ADVANCE SHEET– DECEMBER 11, 2020

President's Letter

The confirmation to the Supreme Court of Justice Amy Comey Barrett has led some commentators, including the present writer, to write about "The End of Juristocracy," the notion held by the Warren Court and its defenders that courts could be appropriately viewed as agencies of social reform. Even the editors of the New York Times have said (Editorial, October 27, 2020) that "a democracy in which the people's will is repeatedly thwarted by a committee of unelected lawyers is no democracy at all." This has not been the view held by most in the legal academy, and by many journalists, for the last seventy years. It was therefore amusing to come across a reflection of the philosopher Sidney Hook written at the high water mark of Warren Court jurisprudence in 1962: "Death and the pendulum of history are sure to place on the bench not merely conservatives, but illiberals." This may be unfair to the recent appointees, but it may be useful to recall and reproduce two other similar warnings.

The first is the 1958 Report of the Conference of State Chief Justices on Federal-State Relations as Affected by Judicial Decisions, the author of which was Judge Frederick W. Brune of our state Court of Appeals, who I served as law clerk in 1963-64.

The second is an article by the then President of the University of Chicago, Edward H. Levi dealing with the Court's adventures with regard to abortion and capital punishment, "The Collective Morality of a Maturing Society," 30 Washington and Lee Law Review 399 (1973).

Readers may judge for themselves whether these warnings were prophetic or perverse.

Our selected famous judicial opinion for this issue is a still topical one, the joint dissenting opinion of Justices Robert Jackson, Felix Frankfurter and Owen Roberts in *Screws v. United States*, 325 U.S. 91, 138 (1946) limiting federal prosecutions for misconduct by state and local law enforcement officers, which echoed concerns expressed in the controlling opinion in that case.

I have been provided by a number of my former classmates with comments on new television series available on Netflix, which I pass on elsewhere in this newsletter, with no warranties, expressed or implied.

George W. Liebmann

For Your Information & Entertainment

Our recent much appreciated Zoom speaker, Paul Dickson (*The Rise of the G.I. Army*) is a co-participant in a podcast with James Holland, author of a much praised book on the invasion of Sicily in World War II, available for those interested at:

https://play.acast.com/s/wehaveways/210.pauldickson

Some Netflix Suggestions, for Shut In Lawyers:

The Queen's Gambit. Starts out grim and foreboding but soon blossoms, from a novel by Walter Tevis.

The Stranger. A horror thriller.

Borgen. West Wing set in Denmark with actors on a par with the American West Wing.

Babylon Berlin. Intriguing police procedural drama set in Weimar Berlin.

Offspring. Australian comedy-drama about a dysfunctional but loving family.

The Bodyguard. British thriller.

The Romanovs. First episode especially recommended.

Bosch. Los Angeles Detective.

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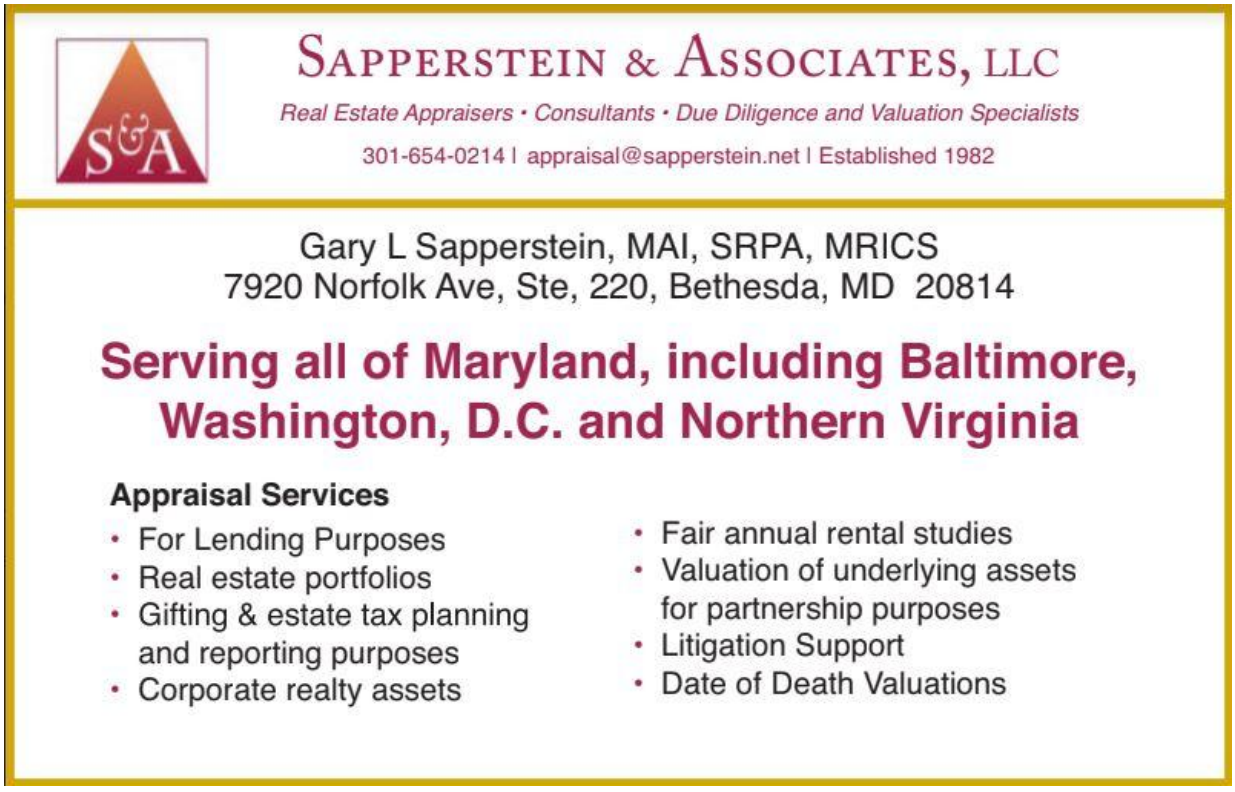

THE CONFERENCE OF CHIEF JUSTICES

REPORT OF THE COMMITTEE ON FEDERAL-STATE RELATIONSHIPS AS AFFECTED BY JUDICIAL DECISIONS

Adopted, August, 1958

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REPORT OF THE COMMITTEE ON FEDERAL-STATE RELATIONSHIPS AS AFFECTED BY JUDICIAL DECISIONS

Foreword

YOUR Committee on Federal-State Relationships as Affected by Judicial Decisions was appointed pursuant to action taken at the 1957 meeting of the Conference, at which, you will recall, there was some discussion of recent decisions of the Supreme Court of the United States and a Resolution expressing concern with regard thereto was adopted by the Conference. This Committee held a meeting in Washington in December, 1957, at which plans for conducting our work were developed. This meeting was attended by Sidney Spector of the Council of State Governments and by Professor Philip B. Kurland, of the University of Chicago Law School.

The Committee believed that it would be desirable to survey this field from the point of view of general trends rather than by attempting to submit detailed analyses of many cases. It was realized however, that an expert survey of recent Su-

preme Court decisions within the area under consideration would be highly desirable in order that we might have the benefit in drafting this report of scholarly research and of competent analysis and appraisal, as well as of objectivity of approach.

Thanks to Professor Kurland and to four of his colleagues of the faculty of the University of Chicago Law School several monographs dealing with subjects within the Committee's field of action have been prepared and have been furnished to all members of the Committee and of the Conference. These monographs and their authors are as follows:

1. "The Supreme Court, The Due Process Clause, and the In Personam Jurisdiction of State Courts" by Professor Kurland;
2. "Limitations on State Power to Deal with Issues of Subversion and Loyalty" by Assistant Professor Cramton;
3. "Congress, the States and Commerce" by Professor Allison Dunham;
4. "The Supreme Court, Federalism, and State Systems of Criminal Justice" by Professor Francis A. Allen; and
5. "The Supreme Court, the Congress and State Jurisdiction Over Labor Relations" by Professor Bernard D. Meltzer.

These gentlemen have devoted much time, study and thought to the preparation of very scholarly, interesting and instructive monographs on the above subjects. We wish to express our deep appreciation to each of them for his very thorough research and analysis of these problems. With the pressure of the work of our respective courts, the members of this Committee could not have undertaken this research work and we could scarcely have hoped, even with ample time, to equal the thorough and excellent reports which they have written on their respective subjects.

It had originally been hoped that all necessary research material would be available to your Committee by the end of

April and that the Committee could study it and then meet for discussion, possibly late in May, and thereafter send at least a draft of the Committee's report to the members of the Conference well in advance of the 1958 meeting; but these hopes have not been realized. The magnitude of the studies and the thoroughness with which they have been made rendered it impossible to complete them until about two months after the original target date and it has been impracticable to hold another meeting of this Committee until the time of the Conference.

Even after this unavoidable delay had developed, there was a plan to have these papers presented at a Seminar to be held at the University of Chicago late in June. Unfortunately, this plan could not be carried through, either. We hope, however, that these papers may be published in the near future with such changes and additions as the several authors may wish to make in them. Some will undoubtedly be desired in order to include decisions of the Supreme Court in some cases which are referred to in these monographs, but in which decisions were rendered after the monographs had been prepared. Each of the monographs as transmitted to us is stated to be in preliminary form and subject to change and as not being for publication. Much as we are indebted to Professor Kurland and his colleagues for their invaluable research aid, your Committee must accept sole responsibility for the views herein stated. Unfortunately, it is impracticable to include all or even a substantial part of their analyses in this report.

Background and Perspective

We think it desirable at the outset of this report to set out some points which may help to put the report in proper perspective, familiar or self-evident as these points may be.

First, though decisions of the Supreme Court of the United

States have a major impact upon federal-state relationships and have had such an impact since the days of Chief Justice Marshall, they are only a part of the whole structure of these relationships. These relations are, of course, founded upon the Constitution of the United States itself. They are materially affected not only by judicial decisions but in very large measure by Acts of Congress adopted under the powers conferred by the Constitution. They are also affected, or may be affected, by the exercise of the treaty power.

Of great practical importance as affecting federal-state relationships are the rulings and actions of federal administrative bodies. These include the independent agency regulatory bodies, such as the Interstate Commerce Commission, the Federal Power Commission, the Securities and Exchange Commission, the Civil Aeronautics Board, the Federal Communications Commission and the National Labor Relations Board. Many important administrative powers are exercised by the several departments of the Executive Branch, notably the Treasury Department and the Department of the Interior. The scope and importance of the administration of the federal tax laws are, of course, familiar to many individuals and businesses because of their direct impact, and require no elaboration.

Second, when we turn to the specific field of the effect of judicial decisions on federal-state relationships we come at once to the question as to where power should lie to give the ultimate interpretation to the Constitution and to the laws made in pursuance thereof under the authority of the United States. By necessity and by almost universal common consent, these ultimate powers are regarded as being vested in the Supreme Court of the United States. Any other allocation of such power would seem to lead to chaos. (See Judge Learned Hand's most interesting Holmes Lectures on "The Bill of

Rights" delivered at the Harvard Law School this year and published by the Harvard University Press.)

Third, there is obviously great interaction between federal legislation and administrative action on the one hand, and decisions of the Supreme Court on the other, because of the power of the Court to interpret and apply Acts of Congress and to determine the validity of administrative action and the permissible scope thereof.

Fourth, whether federalism shall continue to exist, and if so in what form, is primarily a political question rather than a judicial question. On the other hand, it can hardly be denied that judicial decisions, specifically decisions of the Supreme Court, can give tremendous impetus to changes in the allocation of powers and responsibilities as between the federal and the state governments. Likewise, it can hardly be seriously disputed that on many occasions the decisions of the Supreme Court have produced exactly that effect.

Fifth, this Conference has no legal powers whatsoever. If any conclusions or recommendations at which we may arrive are to have any effect, this can only be through the power of persuasion.

Sixth, it is a part of our obligation to seek to uphold respect for law. We do not believe that this goes so far as to impose upon us an obligation of silence when we find ourselves unable to agree with pronouncements of the Supreme Court (even though we are bound by them), or when we see trends in decisions of that Court which we think will lead to unfortunate results. We hope that the expression of our views may have some value. They pertain to matters which directly affect the work of our state courts. In this report we urge the desirability of self-restraint on the part of the Supreme Court in the exercise of the vast powers committed to it. We endeavor not to be guilty ourselves of a lack of due restraint in

expressing our concern and, at times, our criticisms in making the comments and observations which follow.

Problems of Federalism

The difference between matters primarily local and matters primarily national was the guiding principle upon which the framers of our national Constitution acted in outlining the division of powers between the national and state governments.

This guiding principle, central to the American federal system, was recognized when the original Constitution was being drawn and was emphasized by de Tocqueville. Under his summary of the federal Constitution he says:

"The first question which awaited the Americans was so to divide the sovereignty that each of the different states which composed the union should continue to govern itself in all that concerned its internal prosperity, while the entire nation, represented by the Union, should continue to form a compact body and to provide for all general exigencies. The problem was a complex and difficult one. It was as impossible to determine beforehand, with any degree of accuracy, the share of authority that each of the two governments was to enjoy as to foresee all the incidents in the life of a nation."

In the period when the Constitution was in the course of adoption the "Federalist" (No. 45) discussed the division of sovereignty between the Union and the States and said: "The powers delegated by the Constitution to the Federal Government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the internal order and prosperity of the State."

Those thoughts expressed in the "Federalist" of course are those of the general period when both the original Constitution and the Tenth Amendment were proposed and adopted. They long antedated the proposal of the Fourteenth Amendment.

The fundamental need for a system of distribution of powers between national and state governments was impressed sharply upon the framers of our Constitution not only because of their knowledge of the governmental systems of ancient Greece and Rome. They also were familiar with the government of England; they were even more aware of the colonial governments in the original states and the governments of those states after the Revolution. Included in government on this side of the Atlantic was the institution known as the New England town meeting, though it was not in use in all of the states. A town meeting could not be extended successfully to any large unit of population, which, for legislative action, must reply upon representative government.

But it is this spirit of self-government, of *local* self-government, which has been a vital force in shaping our democracy from its very inception.

The views expressed by our late brother, Chief Justice Arthur T. Vanderbilt, on the division of powers between the national and state governments—delivered in his addresses at the University of Nebraska and published under the title "The Doctrine of the Separation of Powers and Its Present Day Significance"—are persuasive. He traced the origins of the doctrine of the separation of powers to four sources: Montesquieu and other political philosophers who preceded him; English constitutional experience; American colonial experience; and the common sense and political wisdom of the Founding Fathers. He concluded his comments on the experiences of the American colonists with the British govern-

ment with this sentence: "As colonists they had enough of a completely centralized government with no distribution of powers and they were intent on seeing to it that they should never suffer such grievances from a government of their own construction."

His comments on the separation of powers and the system of checks and balances and on the concern of the Founding Fathers with the proper distribution of governmental power between the nation and the several states indicates that he treated them as parts of the plan for preserving the nation on the one side and individual freedom on the other—in other words, that the traditional tripartite vertical division of powers between the legislative, the executive and the judicial branches of government was not an end in itself, but was a means towards an end; and that the horizontal distribution or allocation of powers between national and state governments was also a means towards the same end and was a part of the separation of powers which was accomplished by the federal Constitution. It is a form of the separation of powers with which Montesquieu was not concerned; but the horizontal division of powers, whether thought of as a form of separation of powers or not, was very much in the minds of the framers of the Constitution.

Two Major Developments in the Federal System

The outstanding development in federal-state relations since the adoption of the national Constitution has been the expansion of the power of the national government and the consequent contraction of the powers of the state governments. To a large extent this is wholly unavoidable and indeed is a necessity, primarily because of improved transportation and communication of all kinds and because of mass production. On the other hand, our Constitution does envision federalism.

The very name of our nation indicates that it is to be composed of states. The Supreme Court of a bygone day said in *Texas* v. *White*, 7 Wall. 700, 721 (1868): "The Constitution, in all its provisions, looks to an indestructible Union of indestructible-States."

Second only to the increasing dominance of the national government has been the development of the immense power of the Supreme Court in both state and national affairs. It is not merely the final arbiter of the law; it is the maker of policy in many major social and economic fields. It is not subject to the restraints to which a legislative body is subject. There are points at which it is difficult to delineate precisely the line which should circumscribe the judicial function and separate it from that of policy-making. Thus, usually within narrow limits, a court may be called upon in the ordinary course of its duties to make what is actually a policy decision by choosing between two rules, either of which might be deemed applicable to the situation presented in a pending case.

But if and when a court in construing and applying a constitutional provision or a statute becomes a policy maker, it may leave construction behind and exercise functions which are essentially legislative in character, whether they serve in practical effect as a constitutional amendment or as an amendment of a statute. It is here that we feel the greatest concern, and it is here that we think the greatest restraint is called for. There is nothing new in urging judicial self-restraint, though there may be, and we think there is, new need to urge it.

It would be useless to attempt to review all of the decisions of the Supreme Court which have had a profound effect upon the course of our history. It has been said that the Dred Scott decision made the Civil War inevitable. Whether this is really true or not, we need not attempt to determine. Even if it is discounted as a serious overstatement, it remains a dramatic

reminder of the great influence which Supreme Court decisions have had and can have. As to the great effect of decisions of that Court on the economic development of the country, see Mr. Justice Douglas' Address on *Stare Decisis*, 49 Columbia Law Review 735.

Sources of National Power

Most of the powers of the national government were set forth in the original constitution; some have been added since. In the days of Chief Justice Marshall the supremacy clause of the federal Constitution and a broad construction of the powers granted to the national government were fully developed, and as a part of this development the extent of national control over interstate commerce became very firmly established. The trends established in those days have never ceased to operate and in comparatively recent years have operated at times in a startling manner in the extent to which interstate commerce has been held to be involved, as for example in the familiar case involving an elevator operator in a loft building.

From a practical standpoint the increase in federal revenues resulting from the Sixteenth Amendment (the Income Tax Amendment) has been of great importance. National control over state action in many fields has been vastly expanded by the Fourteenth Amendment.

We shall refer to some subjects and types of cases which bear upon federal-state relationships.

The General Welfare Clause

One provision of the federal Constitution which was included in it from the beginning but which, in practical effect, lay dormant for more than a century, is the general welfare clause. In *United States* v. *Butler*, 297 U. S. 1, the original Agricultural Adjustment Act was held invalid. An argu-

ment was advanced in that case that the general welfare clause would sustain the imposition of the tax and that money derived from the tax could be expended for any purposes which would promote the general welfare. The Court viewed this argument with favor as a general proposition, but found it not supportable on the facts of that case. However, it was not long before that clause was relied upon and applied. See *Steward Machine Co.* v. *Davis*, 301 U. S. 548, and *Helvering* v. *Davis*, 301 U. S. 690. In those cases the Social Security Act was upheld and the general welfare clause was relied upon both to support the tax and to support the expenditures of the money raised by the Social Security taxes.

Grants-in-Aid

Closely related to this subject are the so-called grants-in-aid which go back to the Morrill Act of 1862 and the grants thereunder to the so-called land-grant colleges. The extent of grants-in-aid today is very great, but questions relating to the wisdom as distinguished from the legal basis for such grants seem to lie wholly in the political field and are hardly appropriate for discussion in this report. Perhaps we should also observe that since the decision of *Massachusetts* v. *Mellon*, 262 U. S. 447, there seems to be no effective way in which either a state or an individual can challenge the validity of a federal grant-in-aid.

Doctrine of Pre-emption

Many, if not most, of the problems of federalism today arise either in connection with the commerce clause and the vast extent to which its sweep has been carried by the Supreme Court, or they arise under the Fourteenth Amendment. Historically, cases involving the doctrine of pre-emption pertain mostly to the commerce clause. More recently the doctrine has

been applied in other fields, notably in the case of *Commonwealth of Pennsylvania* v. *Nelson,* in which the Smith Act and other federal statutes dealing with communism and loyalty problems were held to have pre-empted the field and to invalidate or suspend the Pennsylvania anti-subversive statute which sought to impose a penalty for conspiracy to overthrow the government of the United States by force or violence. In that particular case it happens that the decision of the Supreme Court of Pennsylvania was affirmed. That fact, however, emphasizes rather than detracts from the wide sweep now given to the doctrine of pre-emption.

Labor Relations Cases

In connection with commerce clause cases, the doctrine of pre-emption, coupled with only partial express regulation by Congress, has produced a state of considerable confusion in the field of labor relations.

One of the most serious problems in this field was pointed up or created (depending upon how one looks at the matter) by the Supreme Court's decision in *Amalgamated Association* v. *Wisconsin Employment Relations Board,* 340 U. S. 383, which overturned a state statute aimed at preventing strikes and lockouts in public utilities. This decision left the states powerless to protect their own citizens against emergencies created by the suspension of essential services, even though, as the dissent pointed out, such emergencies were "economically and practically confined to a [single] state."

In two cases decided on May 28, 1958, in which the majority opinions were written by Mr. Justice Frankfurter and Mr. Justice Burton, respectively, the right of an employee to sue a union in a state court was upheld. In *International Association of Machinists* v. *Gonzales,* a union member was held entitled to maintain a suit against his union for damages for

wrongful expulsion. In *International Union, United Auto, etc. Workers* v. *Russell*, an employee, who was not a union member, was held entitled to maintain a suit for malicious interference with his employment through picketing during a strike against his employer. Pickets prevented Russell from entering the plant.

Regardless of what may be the ultimate solution of jurisdictional problems in this field, it appears that at the present time there is unfortunately a kind of no-man's land in which serious uncertainty exists. This uncertainty is in part undoubtedly due to the failure of Congress to make its wishes entirely clear. Also, somewhat varying views appear to have been adopted by the Supreme Court from time to time.

In connection with this matter, in the case of *Textile Union* v. *Lincoln Mills*, 353 U. S. 448, the majority opinion contains language which we find somewhat disturbing. That case concerns the interpretation of Section 301 of the Labor Management Relations Act of 1947. Paragraph (a) of that Section provides: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." Paragraph (b) of the same Section provides in substance that a labor organization may sue or be sued as an entity without the procedural difficulties which formerly attended suits by or against unincorporated associations consisting of large numbers of persons. Section 301 (a) was held to be more than jurisdictional and was held to authorize federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements and to include within that body of federal law

specific performance of promises to arbitrate grievances under collective bargaining agreements.

What a state court is to do if confronted with a case similar to the *Lincoln Mills* case is by no means clear. It is evident that the substantive law to be applied must be federal law, but the question remains, where is that federal law to be found? It will probably take years for the development or the "fashioning" of the body of federal law which the Supreme Court says the federal courts are authorized to make. Can a state court act at all? If it can act and does act, what remedies should it apply? Should it use those afforded by state law, or is it limited to those which would be available under federal law if the suit were in a federal court? It is perfectly possible that these questions will not have to be answered, since the Supreme Court may adopt the view that the field has been completely pre-empted by the federal law and committed solely to the jurisdiction of the federal courts, so that the state courts can have no part whatsoever in enforcing rights recognized by Section 301 of the Labor Management Relations Act. Such a result does not seem to be required by the language of Section 301 nor yet does the legislative history of that Section appear to warrant such a construction.

Professor Meltzer's monograph has brought out many of the difficulties in this whole field of substantive labor law with regard to the division of power between state and federal governments. As he points out much of this confusion is due to the fact that Congress has not made clear what functions the states may perform and what they may not perform. There are situations in which the particular activity involved is prohibited by federal law, others in which it is protected by federal law, and others in which the federal law is silent. At the present time there seems to be one field in which state action

is clearly permissible. That is where actual violence is involved in a labor dispute.

State Law in Diversity Cases

Not all of the decisions of the Supreme Court in comparatively recent years have limited or tended to limit the power of the states or the effect of state laws. The celebrated case of *Erie R. R.* v. *Tompkins*, 304 U. S. 64, overruled *Swift* v. *Tyson* and established substantive state law, decisional as well as statutory, as controlling in diversity cases in the federal courts. This marked the end of the doctrine of a federal common law in such cases.

In Personam Jurisdiction Over Non-Residents

Also, in cases involving the *in personam* jurisdiction of state courts over non-residents, the Supreme Court has tended to relax rather than tighten restrictions under the due process clause upon state action in this field. *International Shoe Co.* v. *Washington*, 326 U. S. 310, is probably the most significant case in this development. In sustaining the jurisdiction of a Washington court to render a judgment *in personam* against a foreign corporation which carries on some activities within the State of Washington, Chief Justice Stone used the now familiar phrase that there "were sufficient contacts or ties with the State of the forum to make it reasonable and just, according to our traditional conception of fair play and substantial justice, to enforce the obligation which appellant has incurred there." Formalistic doctrines or dogmas have been replaced by a more flexible and realistic approach, and this trend has been carried forward in subsequent cases leading up to and including *McGee* v. *International Life Insurance Co.*, 355 U. S. 220, until halted by *Hanson* v. *Denckla*, 357 U. S. decided June 23, 1958.

Taxation

In the field of taxation the doctrine of intergovernmental immunity has been seriously curtailed partly by judicial decisions and partly by statute. This has not been entirely a one-way street.

In recent years cases involving state taxation have arisen in many fields. Sometimes they have involved questions of burdens upon interstate commerce or the export-import clause, sometimes of jurisdiction to tax as a matter of due process, and sometimes they have arisen on the fringes of governmental immunity, as where a state has sought to tax a contractor doing business with the national government. There have been some shifts in holdings. On the whole, the Supreme Court seems perhaps to have taken a more liberal view in recent years towards the validity of state taxation than it formerly took.

Other Fourteenth Amendment Cases

In many other fields, however, the Fourteenth Amendment has been invoked to cut down state action. This has been noticeably true in cases involving not only the Fourteenth Amendment but also the First Amendment guarantee of freedom of speech or the Fifth Amendment protection against self-incrimination. State anti-subversive acts have been practically eliminated by *Pennsylvania* v. *Nelson* in which the decision was rested on the ground of pre-emption of the field by the federal statutes.

The Sweezy Case—State Legislative Investigations

One manifestation of this restrictive action under the Fourteenth Amendment is to be found in *Sweezy* v. *New Hampshire*, 354 U. S. 234. In that case, the State of New Hampshire had enacted a subversive activity statute which imposed various disabilities on subversive persons and subversive organiza-

tions. In 1953 the legislature adopted a resolution under which it constituted the Attorney General a one-man legislative committee to investigate violations of that Act and to recommend additional legislation. Sweezy, described as a non-Communist Marxist, was summoned to testify at the investigation conducted by the Attorney General, pursuant to this authorization. He testified freely about many matters but refused to answer two types of questions: (1) inquiries concerning the activities of the Progressive Party in the state during the 1948 campaign, and (2) inquiries concerning a lecture Sweezy had delivered in 1954 to a class at the University of New Hampshire. He was adjudged in contempt by a state court for failure to answer these questions. The Supreme Court reversed the conviction, but there is no majority opinion. The opinion of the Chief Justice, in which he was joined by Justices Black, Douglas and Brennan, started out by reaffirming the position taken in *Watkins* v. *United States,* 354 U. S. 178, that legislative investigations can encroach on First Amendment rights. It then attacked the New Hampshire Subversive Activities Act and stated that the definition of subversive persons and subversive organizations was so vague and limitless that they extended to "conduct which is only remotely related to actual subversion and which is done free of any conscious intent to be a part of such activity." Then followed a lengthy discourse on the importance of academic freedom and political expression. This was not, however, the ground upon which these four Justices ultimately relied for their conclusion that the conviction should be reversed. The Chief Justice said in part: "The respective roles of the legislature and the investigator thus revealed are of considerable significance to the issue before us. It is eminently clear that the basic discretion of determining the direction of the legislative inquiry has been turned over to the investigative agency. The Attorney Gen-

eral has been given such a sweeping and uncertain mandate that it is his discretion which picks out the subjects that will be pursued, what witnesses will be summoned and what questions will be asked. In this circumstance, it can not be stated authoritatively that the legislature asked the Attorney General to gather the kind of facts comprised in the subjects upon which petitioner was interrogated."

Four members of the Court, two in a concurring opinion and two in a dissenting opinion, took vigorous issue with the view that the conviction was invalid because of the legislature's failure to provide adequate standards to guide the Attorney General's investigation. Mr. Justice Frankfurter and Mr. Justice Harlan concurred in the reversal of the conviction on the ground that there was no basis for a belief that Sweezy or the Progressive Party threatened the safety of the state and hence that the liberties of the individual should prevail. Mr. Justice Clark, with whom Mr. Justice Burton joined, arrived at the opposite conclusion and took the view that the state's interest in self-preservation justified the intrusion into Sweezy's personal affairs.

In commenting on this case Professor Cramton says: "The most puzzling aspect of the Sweezy case is the reliance by the Chief Justice on delegation of power conceptions. New Hampshire had determined that it wanted the information which Sweezy refused to give; to say that the State has not demonstrated that it wants the information seems so unreal as to be incredible. The State had delegated power to the Attorney General to determine the scope of inquiry within the general subject of subversive activities. Under these circumstances the conclusion of the Chief Justice that the vagueness of the resolution violates the due process clause must be, despite his protestations, a holding that a state legislature cannot delegate such a power."

Public Employment Cases

There are many cases involving public employment and the question of disqualification therefor by reason of Communist party membership or other questions of loyalty. *Slochower* v. *Board of Higher Education*, 350 U. S. 551, is a well known example of cases of this type. Two more recent cases, *Lerner* v. *Casey*, and *Beilan* v. *Board of Public Education*, both in 357 U. S. and decided on June 30, 1958, have upheld disqualifications for employment where such issues were involved, but they did so on the basis of lack of competence or fitness. Lerner was a subway conductor in New York and Beilan was a public school instructor. In each case the decision was by a 5 to 4 majority.

Admission to the Bar

When we come to the recent cases on admission to the bar, we are in a field of unusual sensitivity. We are well aware that any adverse comment which we may make on those decisions lays us open to attack on the grounds that we are complaining of the curtailment of our own powers and that we are merely voicing the equivalent of the ancient protest of the defeated litigant—in this instance the wail of a judge who has been reversed. That is a prospect which we accept in preference to maintaining silence on a matter which we think cannot be ignored without omitting an important element of the subject with which this report is concerned.

Konigsberg v. *State Bar of California*, 353 U. S. 252, seems to us to reach the high water mark so far established by the Supreme Court in overthrowing the action of a state and in denying to a state the power to keep order in its own house.

The majority opinion first hurdled the problem as to whether or not the federal question sought to be raised was properly presented to the state highest court for decision and

was decided by that court. Mr. Justice Frankfurter dissented on the ground that the record left it doubtful whether this jurisdictional requirement for review by the Supreme Court had been met and favored a remand of the case for certification by the state highest court of "whether or not it did in fact pass on a claim properly before it under the Due Process Clause of the Fourteenth Amendment." Mr. Justice Harlan and Mr. Justice Clark shared Mr. Justice Frankfurter's jurisdictional views. They also dissented on the merits in an opinion written by Mr. Justice Harlan, of which more later.

The majority opinion next turned to the merits of Konigsberg's application for admission to the bar. Applicable state statutes required one seeking admission to show that he was a person of good moral character and that he did not advocate the overthrow of the national or state government by force or violence. The Committee of Bar Examiners, after holding several hearings on Konigsberg's application, notified him that his application was denied because he did not show that he met the above qualifications.

The Supreme Court made its own review of the facts.

On the score of good moral character, the majority found that Konigsberg had sufficiently established it, that certain editorials written by him attacking this country's participation in the Korean War, the actions of political leaders, the influence of "big business" on American life, racial discrimination and the Supreme Court's decision in *Dennis* v. *United States*, 341 U. S. 494, would not support any rational inference of bad moral character, and that his refusal to answer questions "almost all" of which were described by the Court as having "concerned his political affiliations, editorials and beliefs" (353 U. S. 269) would not support such an inference either. On the matter of advocating the overthrow of the national or state government by force or violence, the Court held (as it had in

the companion case of *Schware* v. *Board of Bar Examiners of New Mexico*, 353 U. S. 232, decided contemporaneously) that past membership in the Communist party was not enough to show bad moral character. The majority apparently accepted as sufficient Konigsberg's denial of any present advocacy of the overthrow of the government of the United States or of California, which was uncontradicted on the record. He had refused to answer questions relating to his past political affiliations and beliefs, which the Bar Committee might have used to test the truthfulness of his present claims. His refusal to answer was based upon his views as to the effect of the First and Fourteenth Amendments. The Court did not make any ultimate determination of their correctness, but (at 353 U. S. 270) said that "prior decisions by this Court" indicated that his objections to answering the questions (which we shall refer to below) were not frivolous.

The majority asserted that Konigsberg "was not denied admission to the California Bar simply because he refused to answer questions." In a footnote appended to this statement it is said (353 U. S. 259): "Neither the Committee as a whole nor any of its members ever intimated that Konigsberg would be barred just because he refused to answer relevant inquiries or because he was obstructing the Committee. Some members informed him that they did not necessarily accept his position that they were not entitled to inquire into his political associations and opinions and said that his failure to answer would have some bearing on their determination whether he was qualified. But they never suggested that his failure to answer their questions was, by itself, a sufficient independent ground for denial of his application."

Mr. Justice Harlan's dissent took issue with these views—convincingly, we think. He quoted lengthy extracts from the record of Konigsberg's hearings before the subcommittee and

the committee of the State Bar investigating his application. (353 U. S. 284-309.) Konigsberg flatly refused to state whether or not at the time of the hearing he was a member of the Communist Party and refused to answer questions on whether he had ever been a Communist or belonged to various organizations, including the Communist Party. The Bar Committee conceded that he could not be required to answer a question if the answer might tend to incriminate him; but Konigsberg did not stand on the Fifth Amendment and his answer which came nearest to raising that question, as far as we can see, seems to have been based upon a fear of prosecution for perjury for whatever answer he might then give as to membership in the Communist Party. We think, on the basis of the extracts from the record contained in Mr. Justice Harlan's dissenting opinion that the Committee was concerned with its duty under the statute "to certify as to this applicant's good moral character" (p. 295), and that the Committee was concerned with the applicant's "disinclination" to respond to questions proposed by the Committee (p. 301), and that the Committee, in passing on his good moral character, sought to test his veracity (p. 303).

The majority, however, having reached the conclusion above stated, that Konigsberg had not been denied admission to the bar simply because he refused to answer questions, then proceeded to demolish a straw man by saying that there was nothing in the California statutes or decisions, or in the rules of the Bar Committee which had been called to the Court's attention, suggesting that a failure to answer questions "is *ipso facto*, a basis for excluding an applicant from the Bar, irrespective of how overwhelming is his showing of good character or loyalty or how flimsy are the suspicions of the Bar Examiners." Whether Konigsberg's "overwhelming" showing of his own good character would have been shaken if he had an-

swered the relevant questions which he refused to answer, we cannot say. We have long been under the impression that candor is required of members of the bar and, prior to *Konigsberg* we should not have thought that there was any doubt that a candidate for admission to the bar should answer questions as to matters relating to his fitness for admission, and that his failure or refusal to answer such questions would warrant an inference unfavorable to the applicant or a finding that he had failed to meet the burden of proof of his moral fitness.

Let us repeat that Konigsberg did not invoke protection against self-incrimination. He invoked a privilege which he claimed to exist against answering certain questions. These might have served to test his veracity at the Committee hearings held to determine whether or not he was possessed of the good moral character required for admission to the bar.

The majority opinion seems to ignore the issue of veracity sought to be raised by the questions which Konigsberg refused to answer. It is also somewhat confusing with regard to the burden of proof. At one point (pp. 270-271) it says that the Committee was not warranted in drawing from Konigsberg's refusal to answer questions any inference that he was of bad moral character; at another (p. 273) it says that there was no evidence in the record to justify a finding that he had failed to establish his good moral character.

Also at page 273 of 353 U. S., the majority said: "We recognize the importance of leaving States free to select their own bars, but it is equally important that the State not exercise this power in an arbitrary or discriminatory manner nor in such way as to impinge on the freedom of political expression or association. A bar composed of lawyers of good character is a worthy objective but it is unnecessary to sacrifice vital freedoms in order to obtain that goal. It is also important to

society and the bar itself that lawyers be unintimidated—free to think, speak and act as members of an Independent Bar." The majority thus makes two stated concessions—each, of course, subject to limitations—one, that it is important to leave the states free to select their own bars and the other, that "a bar composed of lawyers of good character is a worthy objective."

We think that Mr. Justice Harlan's dissent on the merits, in which Mr. Justice Clark joined, shows the fallacies of the majority position. On the facts which we think were demonstrated by the excerpts from the record included in that dissent, it seems to us that the net result of the case is that a state is unable to protect itself against admitting to its bar an applicant who, by his own refusal to answer certain questions as to what the majority regarded as "political" associations and activities, avoids a test of his veracity through cross-examination on a matter which he has the burden of proving in order to establish his right to admission to the bar. The power left to the states to regulate admission to their bars under *Konigsberg* hardly seems adequate to achieve what the majority chose to describe as a "worthy objective"—"a bar composed of lawyers of good character."

We shall close our discussion of *Konigsberg* by quoting two passages from Mr. Justice Harlan's dissent, in which Mr. Justice Clark joined. In one, he states that "this case involves an area of federal-state relations—the right of States to establish and administer standards for admission to their bars—into which this Court should be especially reluctant and slow to enter." In the other, his concluding comment (p. 312), he says: "[W]hat the Court has really done, I think, is simply to impose on California its own notions of public policy and judgment. For me, today's decision represents an unacceptable intrusion into a matter of State concern."

The *Lerner* and *Beilan* cases above referred to seem to indicate some recession from the intimations, though not from the decisions, in the *Konigsberg* and *Slochower* cases. In *Beilan* the school teacher was told that his refusal to answer questions might result in his dismissal, and his refusal to answer questions pertaining to loyalty matters was held relevant to support a finding that he was incompetent. "Incompetent" seems to have been taken in the sense of unfit.

State Administration of Criminal Law

When we turn to the impact of decisions of the Supreme Court upon the state administration of criminal justice, we find that we have entered a very broad field. In many matters, such as the fair drawing of juries, the exclusion of forced confessions as evidence, and the right to counsel at least in all serious cases, we do not believe that there is any real difference in doctrine between the views held by the Supreme Court of the United States and the views held by the highest courts of the several states. There is, however, a rather considerable difference at times as to how these general principles should be applied and as to whether they have been duly regarded or not. In such matters the Supreme Court not only feels free to review the facts, but considers it to be its duty to make an independent review of the facts. It sometimes seems that the rule which governs most appellate courts in the view of findings of fact by trial courts is given lip service, but is actually given the least possible practical effect. Appellate courts generally will give great weight to the findings of fact by trial courts which had the opportunity to see and hear the witnesses, and they are reluctant to disturb such findings. The Supreme Court at times seems to read the records in criminal cases with a somewhat different point of view. Perhaps no

more striking example of this can readily be found than in *Moore* v. *Michigan*, 335 U. S. 155.

In the *Moore* case the defendant had been charged in 1937 with the crime of first degree murder, to which he pleaded guilty. The murder followed a rape and was marked by extreme brutality. The defendant was a Negro youth, 17 years of age at the time of the offense, and is described as being of limited education (only the 7th grade) and as being of rather low mentality. He confessed the crime to law enforcement officers and he expressed a desire to plead guilty and "get it over with." Before such a plea was permitted to be entered he was interviewed by the trial judge in the privacy of the judge's chambers and he again admitted his guilt, said he did not want counsel and expressed the desire to "get it over with," to be sent to whatever institution he was to be confined in, and to be placed under observation. Following this, the plea of guilty was accepted and there was a hearing to determine the punishment which should be imposed. About 12 years later the defendant sought a new trial principally on the ground that he had been unfairly dealt with because he was not represented by counsel. He had expressly disclaimed any desire for counsel at the time of his trial. Pursuant to the law of Michigan, he had a hearing on this application for a new trial. In most respects his testimony was seriously at variance with the testimony of other witnesses. He was corroborated in one matter by a man who had been a deputy sheriff at the time when the prisoner was arrested and was being questioned. The trial court, however, found in substance that the defendant knew what he was doing when he rejected the appointment of counsel and pleaded guilty, that he was then calm and not intimidated, and, after hearing him testify, that he was completely unworthy of belief. It accordingly denied the application for a new trial. This denial was

affirmed by the Supreme Court of Michigan, largely upon the basis of the findings of fact by the trial court. The Supreme Court of the United States reversed. The latter Court felt that counsel might have been of assistance to the prisoner, in view of his youth, lack of education and low mentality, by requiring the state to prove its case against him (saying the evidence was largely circumstantial), by raising a question as to his sanity, and by presenting factors which might have lessened the severity of the penalty imposed. It was the maximum permitted under the Michigan law—solitary confinement for life at hard labor. The case was decided by the Supreme Court of the United States in 1957. The majority opinion does not seem to have given any consideration whatsoever to the difficulties of proof which the state might encounter after the lapse of many years or the risks to society which might result from the release of a prisoner of this type, if the new prosecution should fail. They are, however, pointed out in the dissent.

Another recent case which seems to us surprising, and the full scope of which we cannot foresee, is *Lambert* v. *California*, 355 U. S., decided December 16, 1957. In that case a majority of the Court reversed a conviction under a Los Angeles ordinance which required a person convicted of a felony, or of a crime which would be felony under the law of California, to register upon taking up residence in Los Angeles. Lambert had been convicted of forgery and had served a long term in a California prison for that offense. She was arrested on suspicion of another crime and her failure to register was then discovered and she was prosecuted, convicted and fined. The majority of the Supreme Court found that she had no notice of the ordinance, that it was not likely to be known, that it was a measure merely for the convenience of the police, that the defendant had no opportunity to comply with it after

learning of it and before being prosecuted, that she did not act willfully in failing to register, that she was not "blameworthy" in failing to do so, and that her conviction involved a denial of due process of law.

This decision was reached only after argument and reargument. Mr. Justice Frankfurter wrote a short dissenting opinion in which Mr. Justice Harlan and Mr. Justice Whittaker joined. He referred to the great number of state and federal statutes which imposed criminal penalities for non-feasance and stated that he felt confident that "the present decision will turn out to be an isolated deviation from the strong current of precedents—a derelict on the waters of the law."

We shall not comment in this report upon the broad sweep which the Supreme Court now gives to habeas corpus proceedings. Matters of this sort seem to fall within the scope of the Committee of this Conference on the Habeas Corpus Bill which has been advocated for some years by this Conference for enactment by the Congress of the United States, and has been supported by the Judicial Conference of the United States, the American Bar Association, the Association of Attorneys General and the Department of Justice.

We cannot, however, completely avoid any reference at all to habeas corpus matters because what is probably the most far reaching decision of recent years on state criminal procedure which has been rendered by the Supreme Court is itself very close to a habeas corpus case. That is the case of *Griffin* v. *Illinois*, 351 U. S. 12, which arose under the Illinois Post Conviction Procedure Act. The substance of the holding in that case may perhaps be briefly and accurately stated in this way: If a transcript of the record, or its equivalent, is essential to an effective appeal, and if a state permits an appeal by those able to pay for the cost of the record or its equivalent, then the state must furnish without expense to an in-

digent defendant either a transcript of the record at his trial, or an equivalent thereof, in order that the indigent defendant may have an equally effective right of appeal. Otherwise, the inference seems clear, the indigent defendant must be released upon habeas corpus or similar proceedings. Probably no one would dispute the proposition that the poor man should not be deprived of the opportunity for a meritorious appeal simply because of his poverty. The practical problems which flow from the decision in *Griffin* v. *Illinois* are, however, almost unlimited and are now only in course of development and possible solution. This was extensively discussed at the 1957 meeting of this Conference of Chief Justices in New York.

We may say at this point that in order to give full effect to the doctrine of *Griffin* v. *Illinois*, we see no basis for distinction between the cost of the record and other expenses to which the defendant will necessarily be put in the prosecution of an appeal. These include filing fees, the cost of printing the brief and of such part of the record as may be necessary, and counsel fees.

The *Griffin* case was very recently given retroactive effect by the Supreme Court in a per curiam opinion in *Eskridge* v. *Washington State Board of Prison Terms and Paroles*, 78 S. Ct. 1061. In that case the defendant, who was convicted in 1935, gave timely notice of an appeal. His application then made for a copy of the transcript of the trial proceedings to be furnished at public expense was denied by the trial judge. A statute provided for so furnishing a transcript if "in his [the trial judge's] opinion justice will thereby be promoted." The trial judge found that justice would not be promoted, in that the defendant had had a fair and impartial trial, and that, in his opinion, no grave or prejudicial errors had occurred in the trial. The defendant then sought a writ of mandate from the

Supreme Court of the state, ordering the trial judge to have the transcript furnished for the prosecution of his appeal. This was denied and his appeal was dismissed. In 1956 he instituted habeas corpus proceedings which, on June 16, 1958, resulted in a reversal of the Washington Court's decision and a remand "for further proceedings not inconsistent with this opinion." It was conceded that the "reporter's transcript" from the trial was still available. In what form it exists does not appear from the Supreme Court's opinion. As in *Griffin*, it was held that an adequate substitute for the transcript might be furnished in lieu of the transcript itself. Justices Harlan and Whittaker dissented briefly on the ground that "on this record the Griffin case decided in 1956 should not be applied to this conviction occurring in 1935." This accords with the view expressed by Mr. Justice Frankfurter in his concurring opinion in *Griffin* that it should not be retroactive. He did not participate in the *Eskridge* case.

Just where *Griffin* v. *Illinois* may lead us is rather hard to say. That it will mean a vast increase in criminal appeals and a huge case load for appellate courts seems almost to go without saying. There are two possible ways in which the meritorious appeals might be taken care of and the non-meritorious appeals eliminated. One would be to apply a screening process to appeals of all kinds, whether taken by the indigent or by persons well able to pay for the cost of appeals. It seems very doubtful that legislatures generally would be willing to curtail the absolute right of appeal in criminal cases which now exists in many jurisdictions. Another possible approach would be to require some showing of merit before permitting an appeal to be taken by an indigent defendant at the expense of the state.

Whether this latter approach which we may call "screening" would be practical or not is, to say the least, very dubi-

ous. First, let us look at a federal statute and Supreme Court decisions thereunder. What is now subsection (a) of Section 1915 of Title 28, U. S. C. A. contains a sentence reading as follows: "An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith." This section or a precursor thereof was involved in *Miller* v. *United States*, 317 U. S. 192, *Johnson* v. *United States*, 352 U. S. 565, and *Farley* v. *United States*, 354 U. S. 521, 523. In the *Miller* case the Supreme Court held that the discretion of the trial court in withholding such a certificate was subject to review on appeal, and that in order that such a review might be made by the Court of Appeals it was necessary that it have before it either the transcript of the record or an adequate substitute therefor, which might consist of the trial judge's notes or of an agreed statement as to the points on which review was sought. Similar holdings were made by per curiam opinions in the *Johnson* and *Farley* cases, in each of which the trial court refused to certify that the appeal was taken in good faith. In each case, though perhaps more clearly in *Johnson*, the trial court seems to have felt that the proposed appeal was frivolous, and hence not in good faith.

The *Eskridge* case, above cited, decided on June 16, 1958, rejected the screening process under the state statute there involved, and appears to require, under the Fourteenth Amendment, that a full appeal be allowed—not simply a review of the screening process, as under the federal statute above cited. The effect of the *Eskridge* case thus seems rather clearly to be that unless all appeals, at least in the same types of cases, are subject to screening, none may be.

It would seem that it may be possible to make a valid classification of appeals which shall be subject to screening and of appeals which shall not. Such a classification might be based upon the gravity of the offense or possibly upon the sentence

imposed. In most, if not all, states, such a classification would doubtless require legislative action.

In the *Griffin* case, it will be recalled, the Supreme Court stated that a substitute for an actual transcript of the record would be acceptable if it were sufficient to present the points upon which the defendant based his appeal. The Supreme Court suggested the possible use of bystanders' bills of exceptions.

It seems probable to us that an actual transcript of the record will be required in most cases. For example, in cases where the basis for appeal is the alleged insufficiency of the evidence, it may be very difficult to eliminate from that part of the record which is to be transcribed portions which seem to have no immediate bearing upon this question. A statement of the facts to be agreed upon by trial counsel for both sides may be still more difficult to achieve even with the aid of the trial judge.

The danger of swamping some state appellate courts under the flood of appeals which may be loosed by *Griffin* and *Eskridge* is not a reassuring prospect. How far *Eskridge* may lead and whether it will be extended beyond its facts remain to be seen.

Conclusions

This long review, though far from exhaustive, shows some of the uncertainties as to the distribution of power which are probably inevitable in a federal system of government. It also shows, on the whole, a continuing and, we think, an accelerating trend towards increasing power of the national government and correspondingly contracted power of the state governments. Much of this is doubtless due to the fact that many matters which were once mainly of local concern are now parts of larger matters which are of national concern. Much

of this stems from the doctrine of a strong, central government and of the plenitude of national power within broad limits of what may be "necessary and proper" in the exercise of the granted powers of the national government which was expounded and established by Chief Justice Marshall and his colleagues, though some of the modern extensions may and do seem to us to go to extremes. Much, however, comes from the extent of the control over the action of the states which the Supreme Court exercises under its views of the Fourteenth Amendment.

We believe that strong state and local governments are essential to the effective functioning of the American system of federal government; that they should not be sacrificed needlessly to leveling, and sometimes deadening, uniformity; and that in the interest of active, citizen participation in self-government—the foundation of our democracy—they should be sustained and strengthened.

As long as this country continues to be a developing country and as long as the conditions under which we live continue to change, there will always be problems of the allocation of power depending upon whether certain matters should be regarded as primarily of national concern or as primarily of local concern. These adjustments can hardly be effected without some friction. How much friction will develop depends in part upon the wisdom of those empowered to alter the boundaries and in part upon the speed with which such changes are effected. Of course, the question of speed really involves the exercise of judgment and the use of wisdom, so that the two things are really the same in substance.

We are now concerned specifically with the effect of judicial decisions upon the relations between the federal government and the state governments. Here we think that the overall tendency of decisions of the Supreme Court over the last

25 years or more has been to press the extension of federal power and to press it rapidly. There have been, of course, and still are, very considerable differences within the Court on these matters, and there has been quite recently a growing recognition of the fact that our government is still a federal government and that the historic line which experience seems to justify between matters primarily of national concern and matters primarily of local concern should not be hastily or lightly obliterated. A number of justices have repeatedly demonstrated their awareness of problems of federalism and their recognition that federalism is still a living part of our system of government.

The extent to which the Supreme Court assumes the function of policy-maker is also of concern to us in the conduct of our judicial business. We realize that in the course of American history the Supreme Court has frequently—one might, indeed, say customarily—exercised policy-making powers going far beyond those involved, say, in making a selection between competing rules of law.

We believe that in the fields with which we are concerned, and as to which we feel entitled to speak, the Supreme Court too often has tended to adopt the role of policy-maker without proper judicial restraint. We feel this is particularly the case in both of the great fields we have discussed—namely, the extent and extension of the federal power, and the supervision of state action by the Supreme Court by virtue of the Fourteenth Amendment. In the light of the immense power of the Supreme Court and its practical non-reviewability in most instances no more important obligation rests upon it, in our view, than that of careful moderation in the exercise of its policy-making role.

We are not alone in our view that the Court, in many cases arising under the Fourteenth Amendment, has assumed what

seem to us primarily legislative powers. (See Judge Learned Hand on the Bill of Rights.) We do not believe that either the framers of the original Constitution or the possibly somewhat less gifted draftsmen of the Fourteenth Amendment ever contemplated that the Supreme Court would, or should, have the almost unlimited policy-making powers which it now exercises. It is strange, indeed, to reflect that under a constitution which provides for a system of checks and balances and of distribution of power between national and state governments one branch of one government—the Supreme Court—should attain the immense, and in many respects, dominant, power which it now wields.

We believe that the great principle of distribution of powers among the various branches of government and between levels of government has vitality today and is the crucial base of our democracy. We further believe that in construing and applying the Constitution and laws made in pursuance thereof, this principle of the division of power based upon whether a matter is primarily of national or of local concern should not be lost sight of or ignored, especially in fields which bear upon the meaning of a constitutional or statutory provision, or the validity of state action presented for review. For, with due allowance for the changed conditions under which it may or must operate, the principle is as worthy of our consideration today as it was of the consideration of the great men who met in 1787 to establish our nation as a nation.

It has long been an American boast that we have a government of laws and not of men. We believe that any study of recent decisions of the Supreme Court will raise at least considerable doubt as to the validity of that boast. We find first that in constitutional cases unanimous decisions are comparative rarities and that multiple opinions, concurring or dissenting, are common occurrences. We find next that divisions in

result on a 5 to 4 basis are quite frequent. We find further that on some occasions a majority of the Court cannot be mustered in support of any one opinion and that the result of a given case may come from the divergent views of individual Justices who happen to unite on one outcome or the other of the case before the Court.

We further find that the Court does not accord finality to its own determinations of constitutional questions, or for that matter of others. We concede that a slavish adherence to *stare decisis* could at times have unfortunate consequences; but it seems strange that under a constitutional doctrine which requires all others to recognize the Supreme Court's rulings on constitutional questions as binding adjudications of the meaning and application of the Constitution, the Court itself has so frequently overturned its own decisions thereon, after the lapse of periods varying from one year to seventy-five, or even ninety-five years. (See the tables appended to Mr. Justice Douglas' address on *Stare Decisis*, 49 Columbia Law Review 735, 756-758.) The Constitution expressly sets up its own procedures for amendment, slow or cumbersome though they may be.

These frequent differences and occasional overrulings of prior decisions in constitutional cases cause us grave concern as to whether individual views of the members of the court as from time to time constituted, or of a majority thereof, as to what is wise or desirable do not unconsciously override a more dispassionate consideration of what is or is not constitutionally warranted. We believe that the latter is the correct approach, and we have no doubt that every member of the Supreme Court intends to adhere to that approach, and believes that he does so. It is our earnest hope which we respectfully express, that that great Court exercise to the full its power of judicial self-restraint by adhering firmly to its tremendous, strictly

judicial powers and by eschewing, so far as possible, the exercise of essentially legislative powers when it is called upon to decide questions involving the validity of state action, whether it deems such action wise or unwise. The value of our system of federalism, and of local self-government in local matters which it embodies, should be kept firmly in mind, as we believe it was by those who framed our Constitution.

At times the Supreme Court manifests, or seems to manifest, an impatience with the slow workings of our federal system. That impatience may extend to an unwillingness to wait for Congress to make clear its intention to exercise the powers conferred upon it under the Constitution, or the extent to which it undertakes to exercise them, and it may extend to the slow processes of amending the Constitution which that instrument provides. The words of Elihu Root on the opposite side of the problem, asserted at a time when demands were current for recall of judges and judicial decisions, bear repeating: "If the people of our country yield to impatience which would destroy the system that alone makes effective these great impersonal rules and preserves our constitutional government, rather than endure the temporary inconvenience of pursuing regulated methods of changing the law, we shall not be reforming. We shall not be making progress, but shall be exhibiting that lack of self-control which enables great bodies of men to abide the slow process of orderly government rather than to break down the barriers of order when they are struck by the impulse of the moment." (Quoted in 31 *Boston University Law Review* 43.)

We believe that what Mr. Root said is sound doctrine to be followed towards the Constitution, the Supreme Court and its interpretation of the Constitution. Surely, it is no less incumbent upon the Supreme Court, on its part, to be equally restrained and to be as sure as is humanly possible that it is ad-

hering to the fundamentals of the Constitution with regard to the distribution of powers and the separation of powers, and with regard to the limitations of judicial power which are implicit in such separation and distribution, and that it is not merely giving effect to what it may deem desirable.

We may expect the question as to what can be accomplished by the report of this committee or by resolutions adopted in conformity with it. Most certainly some will say that nothing expressed here would deter a member or group of members of an independent judiciary from pursuing a planned course. Let us grant that this may be true. The value of a firm statement by us lies in the fact that we speak as members of all the state appellate courts with a background of many years' experience in the determination of thosuands of cases of all kinds. Surely there are those who will respect a declaration of what we believe. And it just could be true that our statement might serve as an encouragement to those members of an independent judiciary who now or in the future may in their conscience adhere to views more consistent with our own.

Respectfully submitted:

Frederick W. Brune, Chief Judge of Maryland, *Chairman*
Albert Conway, Chief Judge of New York
John R. Dethmers, Chief Justice of Michigan
William H. Duckworth, Chief Justice of Georgia
John E. Hickman, Chief Justice of Texas
John E. Martin, Chief Justice of Wisconsin
Martin A. Nelson, Associate Justice of Minnesota
William C. Perry, Chief Justice of Oregon
Taylor H. Stukes, Chief Justice of South Carolina
Raymond S. Wilkins, Chief Justice of Massachusetts

THE COLLECTIVE MORALITY OF A MATURING SOCIETY*

EDWARD H. LEVI†

The recent Supreme Court decisions on capital punishment[1] and abortion[2] pose again problems in the relationship between law and morality. These cases ought not be seen in isolation from the direction of governance in our land. But they focus attention on the Supreme Court's leadership on matters relating to what Chief Justice Warren called "the evolving standard of decency that marks the progress of a maturing society."[3] I have thought it might be useful to see the abortion and capital punishment cases in the light of the debate which has been going on between Lord Devlin and his critics ever since Lord Devlin gave the Second Maccabaean Lecture on Morals and the Criminal Law in 1959.[4]

I

Lord Devlin had a general interest in the relationship between law and morality. As a judge who had to pass sentence in a criminal court, he confessed he would feel handicapped if he thought he were addressing an audience which had no sense of sin, or which thought of crime as something quite different. He wondered whether "in passing sentence upon a female abortionist" it would be right "to treat

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*The John Randolph Tucker Lecture, delivered at Washington and Lee University May 12, 1973.

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[1]Furman v. Georgia, 408 U.S. 238 (1972).

[2]Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973).

[3]Trop v. Dulles, 356 U.S. 86, 101 (1958).

[4]Maccabaean Lecture in Jurisprudence read at the British Academy on March 18, 1959 and printed in the PROCEEDINGS OF THE BRITISH ACADEMY, vol. xlv, under the title *The Enforcement of Morals*.

her simply as if she were an unlicensed midwife."[5] As a judge he had the feeling that a complete separation of crime from sin "would not be good for the moral law and might be disastrous for the criminal."[6] But he asked whether this "sort of feeling" could be "justified as a matter of jurisprudence."[7] He had struggled with the problem of the "vacuum . . . created when a society no longer acknowledges a supreme spiritual authority."[8] "When a state recognizes freedom of worship and of conscience, it sets a problem for jurists which they have not yet succeeded in solving. Now, when the law divides right from wrong, it cannot appeal to any absolute authority outside itself . . . ." A version of this doubt is reflected in the argument that the establishment of religion clause in the American Constitution removes the valid basis for a number of laws concerning morality.

The immediate background of the debate raised the question of the right of the law to interfere in matters of private morality. Two years prior to the lecture the Committee on Homosexual Offences and Prostitution, appointed by the British government and headed by Sir John Wolfenden had made its report.[10] The Committee urged heavier penalties for the street-walking manifestations of prostitution.[11] These were enacted by Parliament in 1959.[12] More controversial was the Committee's conclusion that "homosexual practices in private between consenting adults should no longer be a crime," because "of the importance which society and the law ought to give to individual freedom of choice and action in matters of private morality."[13] The Wolfenden Report stated a general principle: the law's function, in this field, the Committee said, was "to preserve public order and decency, . . . to protect the citizen from what is offensive and injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are especially vulnerable

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[5]P. DEVLIN, THE ENFORCEMENT OF MORALS 4 (1965) [hereinafter cited as DEVLIN].

[6]*Id.* at 4.

[7]*Id.* at 4.

[8]*Id.* at 92.

[9]*Id.* at 86.

[10]"Wolfenden Report," REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION, CMD. NO. 247 (1957) [hereinafter cited as WOLFENDEN REPORT].

[11]NATIONAL INSTITUTE OF MENTAL HEALTH, CENTER FOR STUDIES OF CRIME AND DELINQUENCY, NOT THE LAW'S BUSINESS: AN EXAMINATION OF HOMOSEXUALITY, ABORTION, PROSTITUTION, NARCOTICS AND GAMBLING IN THE UNITED STATES 42 (1972) [hereinafter cited as NOT THE LAW'S BUSINESS].

[12]Street Offences Act, 7 & 8 Eliz. 2, c. 57 (1959); *see also* NOT THE LAW'S BUSINESS 43.

[13]WOLFENDEN REPORT AT ¶ 62.

because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence.

"It is not . . . the function of the law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behavior further than is necessary to carry out the purposes we have outlined . . . . Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business."[14]

Lord Devlin, as a judge of the Queen's Bench, had testified before the Wolfenden Committee in favor of "one of those illogical compromises," as he described it, "that would be rejected out of hand in any system of law that was not English."[15] He would have retained the major offense, but abolished the lesser crime of indecent assault and gross indecency unless the acts were committed on youth. As he later wrote, this seemed to him "to be as much as public opinion would be at all likely to support."[16] In fact the Committee's more radical recommendation was enacted by Parliament but after a delay of seven years.[17]

Lord Devlin was initially impressed with the Wolfenden Report. The Report derived "its force from the teachings of Bentham and Mill,"[18] and "Mill's ideas," Lord Devlin later wrote, "even when absorbed at second-hand, are so clear and definitive that they are likely to make a permanent impression on the least attentive student. That was their effect on me."[19] As a consequence, what he "had in mind to do" in 1957, as he prepared for his jurisprudential lecture, "was to take other examples of private immorality . . . to show how they were affected by the criminal law and to consider what amendments would be necessary to make the law conform with the statement of principles in the Report."[20] He noted early in his lecture that the Wolfenden Principle would end a number of specific crimes: "Euthanasia . . . suicide, attempted suicide and suicide pacts, duelling, abortion, incest between brother and sister, are all acts which can be done in private and without offence to others and need not involve

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[14]*Id.* at ¶ 13.

[15]DEVLIN at vi.

[16]*Id.*

[17]The Sexual Offenses Act 1967, c. 60.

[18]*Id.*

[19]*Id.*

[20]*Id.* at vii.

the corruption or exploitation of others."[21] One gathers that obscenity, some aspects of prostitution, and bigamy, without deception, would have been on the list, also. But the Maccabaean Lecture turned out differently than planned.

As Lord Devlin reports in his later preface,[22] his study in preparation for the Lecture destroyed the simple faith which he had when he began that, jurisprudentially at least, private morality was not the law's concern. The Maccabaean Lecture thus became a statement of a position that while crime could not be equated with sin, because if the whole dead weight of sin were ever to be allowed to fall upon the law, it could not take the strain; nevertheless, "[s]ociety cannot live without morals. Its morals are those standards of conduct which the reasonable man approves."[23] "A man who concedes that morality is necessary to society must support the use of those instruments without which morality cannot be maintained. The two instruments are those of teaching, which is doctrine, and of enforcement which is the law."[24] The law of which Lord Devlin was speaking was the criminal law, for he later wrote that "[o]nly the criminal law can be used to enforce moral standards,"[25] and the method of its enforcement was punishment. In contrast to Mill's position that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others,"[26] Lord Devlin denied there was any absolutely protected area for the individual where law under some circumstances might not intervene on a question of morals. He argued that the inoperativeness of consent by the victim to most crimes in England showed that it was the offense to society and not just the harm to others, which the law punished. He stated that "[t]he error of jurisprudence in the Wolfenden Report was caused by the search for some single principle to explain the division between crime and sin. The Report finds it in the principle that the criminal law exists for the protection of individuals . . . . But the true principle is that the law exists for the protection of society."[27] Lord Devlin then fashioned his attack on Mill and the "no business of law" theory upon the importance of morality for society. An important part of his argument was a conception of the

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[21]*Id.* at 7.
[22]*Id.* at vii.
[23]*Id.* at 24.
[24]*Id.* at 25.
[25]*Id.* at 52.
[26]J.S. Mill, *On Liberty*, 17 (Walter Scott edition).
[27]DEVLIN at 22.

way morality was to be found and enforced in a democratic community, and the consequences for society and for the law itself when the law ignored deep feelings of the community concerning morality.

"What makes a society of any sort is community of ideas, not only political ideas but also ideas about the way its members should behave and govern their lives; these latter ideas are its morals. . . . [T]he structure of every society is made up both of politics and morals. . . . [W]ithout shared ideas on politics, morals and ethics no society can exist. . . . If men and women try to create a society in which there is no fundamental agreement about good and evil, they will fail; if, having based it on common agreement, the agreement goes, the society will disintegrate. . . . A common morality is part of the bondage. The bondage is part of the price of society; and mankind, which needs society, must pay its price. . . . Society is entitled by means of its laws to protect itself from dangers, whether from within or without. Here . . . the political parallel is legitimate. The law of treason is directed against aiding the king's enemies and against sedition from within. . . . But an established morality is as necessary as good government to the welfare of society. Societies disintegrate from within more frequently than they are broken up by external pressures. . . . [T]he loosening of moral bonds is often the first step of disintegration. . . ."[28]

In a subsequent lecture, Lord Devlin explained further the kind of morality necessary. "What is important is not the quality of the creed but the strength of the belief in it. The enemy of society is not error but indifference."[29] Thus "polygamy can be as cohesive as monogamy" and "a society based on free love and a community of children could be just as strong (though according to our ideas it could not be as good) as one based on the family."[30] "Unfortunately bad societies can live on bad morals just as well as good societies on good ones."[31] The danger was that if change were in progress there might be for a long period no common belief. The decline in particular moral beliefs has a "special difficulty" because moral belief for most men is not "based on a number of separate rational judgments . . . . Most men take their morality as a whole and in fact derive it, though this is irrelevant, from some religious doctrine. To destroy the belief in one part of it will probably result in weakening the belief in the

[28] *Id.* at 9-13.
[29] *Id.* at 114.
[30] *Id.*
[31] *Id.* at 94.

whole."[32] He comments that when law changes in response to some shift in sentiment, an unfortunate consequence may be "the impression that moral judgment is being weakened."[33] Lord Devlin could have made the argument that the idea that one thing leads to another should not be new to lawyers. It is after all the doctrine of precedent.

Professor H. L. A. Hart, Lord Devlin's chief critic, responded by characterizing Devlin's view of the structure of morality necessary for society as the "single seamless web" theory.[34] "[N]o evidence is produced," he wrote, "to show that deviation from accepted sexual morality, even by adults in private, is something which, like treason, threatens the existence of society. No reputable historian has maintained this thesis, and there is indeed much evidence against it."[35] As the debate progressed, Professor Hart suggested that to make the moral disintegration case, Lord Devlin would have to find evidence that where moral pluralism is accepted, through the retreat by the law, "divergent moralities must eventually destroy the minimal forms of restraints necessary for social cohesion"[36]—that there would come "increases in violence and dishonesty and a general lapse of those restraints which are essential for any form of social life."[37] Such evidence is obviously hard to come by, in the state of the sciences as they are, and the comment poses the problem of the burden of proof. Even if the evidence were produced, there apparently is a question, when important rights of privacy are involved, whether it would be considered relevant. The point is made explicitly in Professor Hart's discussion of why the distinction is drawn between what is done in public and what is done in private. He wrote, "[i]t may no doubt be objected that too much has been made of this distinction, . . . [f]or 'offence to feelings,' it may be said, is given . . . when those who . . . condemn certain . . . practices . . . learn that others indulge in them in private."[38] But the point was that "a right to be protected from the distress which is inseparable from the bare knowledge that others are acting in ways you think wrong, cannot be acknowledged by anyone who recognizes individual liberty as a value. . . . To punish people for causing this form of distress would

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[32]*Id.* at 115.

[33]*Id.* at 18.

[34]H.L.A. HART, LAW, LIBERTY AND MORALITY 51 (1963) [hereinafter cited as HART].

[35]*Id.* at 50.

[36]Hart, *Social Solidarity and the Enforcement of Morality*, 35 U. CHI. L. REV. 1, 13 (1967).

[37]*Id.*

[38]HART at 45.

be tantamount to punishing them simply because others object to what they do; . . . Protection from shock or offence to feelings caused by some public display is, as most legal systems recognize, another matter."[39] I suppose the question would be whether conduct arising from this distress could be taken into account even if the harm of the distress could not be. Professor Hart here, as on the death penalty, takes a qualified utilitarian position, and the qualification can exclude or shift the burden for evidence and proof.

The morality which Lord Devlin found in a democratic society to fill the vacuum created when a society no longer acknowledges a supreme spiritual authority, was based upon the common belief of the community, which need not be "the true belief." How is the lawmaker to ascertain this moral judgment of society? "English law has evolved and regularly uses a standard which does not depend on the counting of heads. It is that of the reasonable man. He is not to be confused with the rational man. He is not expected to reason about anything, and his judgment may be largely a matter of feeling. It is the viewpoint of the man in the street—or to use an archaism familiar to all lawyers—the man in the Clapham omnibus. He might also be called the right-minded man. For my purpose I would like to call him the man in the jury box, for the moral judgment of society must be something about which twelve men or women drawn at random might after discussion be expected to be unanimous. This was the standard the judges applied in the days before Parliament was as active as it is now and when they laid down rules of public policy."[40] "Immorality then, for the purpose of the law, is what every right-minded person is presumed to consider to be immoral."[41] Whatever this presumption, however, the law-maker was concerned with "morality as it is."[42]

In order to protect the individual, Lord Devlin stated certain "elastic principles"[43] to guide legislators in balancing various interests and values. One of these was that "there must be toleration of the maximum individual freedom that is consistent with the integrity of society."[44] An example of the application of this principle was "the recognition of the right to conscientious objection in war-time."[45]

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[39]*Id.* at 46-47.
[40]DEVLIN at 15.
[41]*Id.*
[42]*Id.* at 94.
[43]*Id.* at 16.
[44]*Id.*
[45]*Id.*

"Nothing should be punished by the law," Lord Devlin wrote—and his words were much criticized[46]—"that does not lie beyond the limits of tolerance. It is not nearly enough to say that a majority dislike a practice; there must be a real feeling of reprobation. Those who are dissatisfied with the present law on homosexuality often say that the opponents of reform are swayed simply by disgust. If that were so it would be wrong, but I do not think one can ignore disgust if it is deeply felt and not manufactured. Its presence is a good indication that the bounds of toleration are being reached. Not everything is to be tolerated. No society can do without intolerance, indignation and disgust; they are the forces behind the moral law."[47] Speaking of homosexuality, he said, "We should ask ourselves . . . whether, looking at it calmly and dispassionately, we regard it as a vice so abominable that its mere presence is an offence. If that is the genuine feeling of the society in which we live, I do not see how society can be denied the right to eradicate it."[48] Beyond the principle of the maximum freedom consistent with the integrity of society, Justice Devlin found three other guides: (1) In any new matter of morals the law should be slow to act because the limits of tolerance may shift.[49] (2) So far as possible privacy should be respected—not as a definite limitation on the law but as "a matter to be taken into account. Since the gravity of the crime is also a proper consideration, a distinction might well be made in the case of homosexuality between the lesser acts of indecency and the full offence," he said, obviously thinking of the proposal he had made, "which on the principles of the Wolfenden Report it would be illogical to do."[50] (3) And "the last and the biggest thing . . . is that the law is concerned with the minimum and not with the maximum," for "every worthy society sets for its members standards which are above those of the law."[51]

For the application of his own position, Lord Devlin states no necessary conclusion as to what the law must be. His plea is for a judgment in each case taking into account the kinds of factors he has mentioned. He does observe that "a murderer who acts only upon the consent, and maybe the request, of his victim is no menace to oth-

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[46]HART at 62-63; Hart, *Social Solidarity and the Enforcement of Morality*, 35 U. CHI. L. REV. 1, 7 (1967); Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 YALE L.J. 986, 1001 (1966).

[47]DEVLIN at 16-17.

[48]*Id.* at 17.

[49]*Id.* at 18.

[50]*Id.* at 19.

[51]*Id.*

ers," but he threatens "one of the great moral principles upon which society is based, that is, the sanctity of human life."[52] He comments that "[a]dultery of the sort that breaks up marriage seems to me to be just as harmful to the social fabric as homosexuality or bigamy. The only ground for putting it outside the criminal law is that a law which made it a crime would be too difficult to enforce; it is too generally regarded as a human weakness not suitably punished by imprisonment."[53] With respect to abortion, he observes that "a great many people nowadays do not understand why abortion is wrong."[54] As a consequence, the law against abortion was sought to be justified largely because of the dangerousness of the act, "and it is dangerous largely because it is illegal and therefore performed only by the unskilled."[55] The law thus has been given "a twist which disassociates it from morality, and, I think, to some extent, from sound sense."[56] In a later lecture he explained that "[i]f the law on abortion causes unnecessary misery, let it be amended, not abolished on the ground that abortion is not the law's business. So with obscenity. . . . In all these cases the appointed law-makers of society have the duty to balance conflicting values . . . ."[57] Speaking of the part which articulate and informed citizens can play in shaping the law, Lord Devlin, in one of his later lectures, pointed out that "In 1948 flogging was abolished . . . ; it is doubtful whether that would have been the result of a majority vote, and it is still uncertain whether the gain will be held. Some years later the same body of opinion was very nearly successful in abolishing capital punishment; I do not believe that in the country as a whole there is a majority against capital punishment."[58] Four years later capital punishment was experimentally abolished in England,[59] and the abolition, with certain exceptions, became final in 1969.[60]

The language which Lord Devlin used in his Maccabaean Lecture and his way for finding out common morality were disturbing to his critics. Professor Wollheim recognized that all Justice Devlin had

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[52]*Id.* at 6.

[53]*Id.* at 22.

[54]*Id.* at 23.

[55]*Id.* at 24.

[56]*Id.*

[57]*Id.* at 117.

[58]*Id.* at 96.

[59]Homicide Act, 5 & 6 Eliz. 2, c. 11 § 5 & 6 (1957).

[60]Murder (Abolition of Death Penalty) Act 1965, c. 71; *see* 793 PARL. DEB., H.C. (5th ser.), 294-98 (1969), 306 PARL. DEB., H.L. (5th ser.) 1317-22 (1969).

done was to provide a justification for distinguishing between crime and sin and that "this justification can be interpreted in a number of different ways, some more, some less liberal."[61] But it might be that with "poor jurisprudence good law is never safe."[62] He was upset by Justice Devlin's jurisprudence. It relied on a conception of society resting "on the strong and ungovernable feelings of the ordinary citizen,"[63] determining what was wrong by "what makes 'the man on the Clapham omnibus' sick."[64] It was opposed to three hundred years of liberalism which held the continuity of a society rested on "the mutual toleration of different moralities."[65] It was once again an example of a man attempting to establish morality on a superior basis ending up with a morality that rests on "feeling in its most primitive reaches."[66]

Professor Hart asked what is the justification for taking a morality which is "a compound of indignation, intolerance and disgust"[67] at concert pitch level and turning it into criminal law with all the misery which the criminal punishment entails? "Whatever other arguments there may be for the enforcement of morality, no one should think even when popular morality is supported by an 'overwhelming majority' or marked by widespread 'intolerance, indignation, and disgust' that loyalty to democratic principles requires him to admit that its imposition on a minority is justified."[68] "What is shocking and wrong," Professor Dworkin wrote several years later, "is not (Lord Devlin's) idea that the community's morality counts, but his idea of what counts as the community's morality."[69] The moral consensus of a community as advanced by a legislator must pass the test of a principled position, based on more than prejudice, personal emotional reactions, rationalizations unsupported by even minimal standards of evidence, or the mere parroting of beliefs on others. If Lord

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[61]Wollheim, *Crime, Sin, and Mr. Justice Devlin,* ENCOUNTER, Nov., 1959, 34, 36.

[62]*Id.*

[63]*Id.*

[64]*Id.* at 39.

[65]*Id.* at 38.

[66]*Id.* at 39.

[67]Hart, 35 U. CHI. L. REV. 1, 7; *see also* Hart, *Immorality and Treason,* 62 THE LISTENER 162 (1959).

[68]HART at 81.

[69]Dworkin, *Lord Devlin and the Enforcement of Morals,* 75 YALE L.J. 986, 1001 (1966).

Devlin "would ask [the legislator] to exclude prejudice, personal aversions, arbitrary stands and the rest as well, he should have said so. . . ."[70]

II

The language and the conception of community response which Lord Devlin used are often reflected in the privacy and sexual morality cases.

Less than two years prior to Lord Devlin's Maccabaean Lecture, the decisions of the United States Supreme Court in *Roth* and *Alberts*[71] were announced, denying the constitutional protection for speech and press to the mailing or keeping for sale of obscene literature. Since one of the key words in the Federal statute involved in one of the cases was "filthy" along with "obscene, lewd and lascivious,"[72] the trial judge had explained that "filthy" pertained "to that sort of treatment of sexual matters . . . that . . . tends to arouse a feeling of disgust and revulsion."[73] The trial judge instructed the jury that "obscene, lewd and lascivious" signify "that form of immorality which has relation to sexual impurity and has a tendency to excite lustful thoughts."[74] He asked the jury to judge the material in terms of its impact upon "the average person in the community,"[75] and upon the basis of whether it offended "the common conscience of the community by present-day standards."[76] Justice Brennan concluded that the charge passed the Court's test that materials regulated as obscenity, taken as a whole, must have a dominant theme which appeals to prurient interests, applying contemporary community standards. A separate concurrence and dissent by Justice Harlan distinguished between the power of the States "which bear direct responsibility for the protection of the local moral fabric,"[77] and the power of the Federal government which is more limited in this field than its "power to restrict seditious speech."[78] The analogy when used by Lord Devlin had troubled his critics.

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[70]*Id.* at 1000 n. 22.
[71]354 U.S. 476 (1957).
[72]18 U.S.C. § 1461.
[73]354 U.S. 476, 508.
[74]*Id.*
[75]*Id.*
[76]*Id.*
[77]*Id.* at 504.
[78]*Id.*

In 1966, this rule of *Roth*, in three obscenity cases,[79] scattered the Justices in all directions. It was developed into a cumulative test for regulatable obscenity, each element of which had to be present: the dominant appeal to prurient interests, the offensiveness to contemporary community standards, the finding that the material was without redeeming social value. But the ban against state power also was weakened by holding that if the material was directed toward a clearly deviant sexual group, the impact on this group in the test could replace the average person. The method of commercial exploitation, the "leer of the sensualist"[80] in advertising, stimulating the reader to accept the material as prurient, was held relevant in determining whether the social importance claim was pretense or real. The latter point was close to a distinction made by John Stuart Mill between interested and disinterested persons. The paid instigator of vice who "stimulated" the "inclinations" had caused trouble for Mill in applying his own theories, since Mill felt that such a person, since paid, could not be disinterested. A better distinction, Lord Devlin had written, in view of Mill's visualization of a number of idealistic people doing things he himself would disapprove of, but doing them earnestly and openly, would be between those who practice what they know to be vice and those who practice what they believe to be virtue.[81] The shift in the Court's theory was enough to send Mr. Ginzburg to jail, even though Justice Harlan and Justice Stewart found the "pandering" element introduced into his case, a matter upon which Mr. Ginzburg had not been tried, and Justice Stewart wrote he knew of no Federal statute which made "commercial exploitation," or "pandering," or "titillation" a criminal offense.[82]

Describing the aftermath of *Roth*, Justice Harlan wrote, "[N]o stable approach to the obscenity problem has been devised by this Court. Two justices believe that the First and Fourteenth Amendments absolutely protect obscene and non-obscene material alike. Another Justice believes that neither the States nor the Federal Government may suppress any material save for 'hard-core pornography'."[83] Justice Harlan felt free to adhere to the principles stated in his opinion in *Roth*, Federal power was limited, but the states need only "apply criteria rationally related to the accepted notion of ob-

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[79]Memoirs v. Massachusetts, 383 U.S. 413 (1966); Ginzburg v. United States, 383 U.S. 463 (1966); Mishkin v. New York, 383 U.S. 502 (1966).

[80]383 U.S. 463, 468.

[81]DEVLIN at 108-09.

[82]383 U.S. 463, 500.

[83]383 U.S. 413, 455.

scenity . . . not wholly out of step with current American standards." This approach lacked precision, but "imprecision is characteristic of mediating constitutional standards."[84]

"The line that divides the criminal law from the moral is not determinable by the application of any clear-cut principle. It is like a line that divides land and sea, a coastline of irregularities and indentations,"[85] wrote Devlin. He later asked: "Is it possible to draw a straight line across the field running from one end to the other, marking out for all time the private domain on one side and the public on the other? . . . This sort of thing . . . is attempted on a grand scale in the Constitution of the United States. The scale was not grand enough for Mill. The Constitution was built to be permanent: Mill's doctrine was designed as perdurable . . . [t]o be kept as a tabernacle in the hearts of men, to which all law, including the law that makes and amends constitutions, should be subject."[86] Elsewhere Devlin had written, "a written constitution is only a fundamental enactment that is difficult to alter."[87] But the paradox, of course, is that it might turn out that the constitution is easier to alter than a statute.

In *Stanley v. Georgia*,[88] in 1969, the Court moved to limit *Roth* in a case where government agents, searching the defendant's bedroom, found in a desk drawer motion picture films regarded as obscene. "Whatever may be the justifications for other statutes regulating obscenity," Justice Marshall wrote, "we do not think they reach into the privacy of one's own home."[89] "Georgia asserts the right to protect the individual's mind from the effects of obscenity. We are not certain that this argument amounts to anything more than the assertion that the State has the right to control the moral content of a person's thoughts."[90] The opinion said it was "well established that the Constitution protects the right to receive information and ideas,"[91] and emphasized the point by reference to cases involving freedom of education and which spoke of "the principles of unrestricted distribution of publications."[92] But in 1971 in two cases[93] the Court continued

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[84]*Id.* at 458.

[85]DEVLIN at 21-22.

[86]*Id.* at 102-03.

[87]*Id.* at 89.

[88]394 U.S. 557 (1969).

[89]*Id.* at 565.

[90]*Id.*

[91]*Id.* at 564.

[92]Winters v. New York, 333 U.S. 507, 510 (1948).

to apply *Roth* to permit Federal prosecution for the use of the mails for the delivery of obscene matter to willing recipients and for the importation of obscene pictures for commercial purposes.

Two years after Lord Devlin's Maccabaean Lecture, in time to be added as ammunition for the second wave of disapproval of his views, the House of Lords in *Shaw v. Director of Public Prosecutions*[94] permitted the judges to recreate the crime of conspiracy to corrupt public morals—one of the counts in the indictment—the nature of the offense being put before the jury in instructions to determine whether the defendant's conduct would morally "lead astray." It being no longer possible, we are told, because of the enactment of the Wolfenden Committee's recommendation on street-walking, for prostitutes to ply their trade by soliciting in the streets, the defendant had published a booklet called a "Ladies Directory" to advertise their services. Viscount Simonds, in his opinion as to the generative power of the common law said, "Let it be supposed that at some future, perhaps, early date, homosexual practices between adults are no longer a crime. Would it not be an offence if even without obscenity such practices were publicly advocated and encouraged by pamphlet and advertisement? Or must we wait until Parliament finds time to deal with such conduct? I say, my Lords, that if the common law is powerless in such an event, then we should no longer do her reverence."[95] Lord Devlin, who was not involved in Shaw's Case, found in it a cardinal enunciation of principles, rejecting the teachings of John Stuart Mill, proclaiming the Courts as keepers of the nation's morals, and settling "for the purposes of the law that morality in England means what twelve men and women think it means."[96] He pointed out that in his analysis the role of the jury had been seen as negative—"a sort of veto" function "upon the enforcement of morals."[97] His use of this doctrine had been disliked very much by his critics as reducing morality to the level of a question of fact. Now in Shaw's Case, the jury was being given a positive function in law enforcement.

For his part, Professor Hart analogized the opinions to the German statutes of the Nazi period.[98] Speaking of both Lord Devlin and the Law Lords in Shaw's Case, Professor Hart commented: "Judges

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[93]United States v. Reidel, 402 U.S. 351 (1971); United States v. 37 Photographs, 402 U.S. 363 (1971).

[94]1962 A.C. 220 (1961).

[95]*Id.* at 268.

[96]DEVLIN at 100.

[97]*Id.* at 91.

[98]HART at 12.

. . . have gone out of their way to express the view that the enforcement of sexual morality is a proper part of the law's business—as much its business, as one judge has argued, as the suppression of treason. It is not clear what has provoked this resurgence of legal moralism: . . ."[99]

The same year as Shaw's Case, in 1961, in *Poe v. Ullman*,[100] the Supreme Court refused to pass on Connecticut's law prohibiting the use of contraceptive devices. Justice Harlan, while he would have held the law as applied unconstitutional—an attempt to regulate "into the very heart of marital privacy,"[101] entered the general debate about law and morality on Devlin's side. Society "has traditionally concerned itself with the moral soundness of its people," he wrote. "[T]o attempt a line between public behavior and that which is purely consensual or solitary would be to withdraw from community concern a range of subjects with which every society in civilized time has found it necessary to deal."[102] Four years later the Connecticut statute was held unconstitutional in *Griswold v. Connecticut*[103] in a case which involved the giving of advice to married persons. Justice Douglas found the statute impinged upon a relationship in a zone of protected privacy "older than the Bill of Rights—older than our political parties, older than our school system."[104] His opinion rested on the peripheral reach of the first amendment and the implications of the fourth and fifth in creating a protected area of "privacy and repose."[105] Justice Harlan wrote a separate concurrence because the Court's opinion seemed to "evince an approach"[106] which restricted the due process clause to rights assured by the letter or penumbra of the Bill of Rights. Justice White also concurred separately; taking a position suggestive of his opinion in the death penalty cases, he found the prohibition a deprivation of liberty without due process, because the legislative goal against all forms of promiscuous sexual relationships was only marginally served by the ban on the use by married persons. Justice Stewart dissented. "I think this is an uncommonly silly law," he wrote. "But we are not asked in this case to say whether

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[99]*Id.* at 6.
[100]367 U.S. 497 (1961).
[101]*Id.* at 553.
[102]*Id.* at 546.
[103]381 U.S. 479 (1965).
[104]*Id.* at 486.
[105]*Id.* at 485.
[106]*Id.* at 499.

we think this law is unwise, or even asinine."[107] "[W]e were told that the Connecticut law does not 'conform to current community standards.' But it is not the function of this Court to decide cases on the basis of community standards."[108] He mentioned that the Connecticut House of Representatives had recently passed a repealing bill, that the "State Senate has apparently not yet acted on the measure, and today is relieved of that responsibility by the Court."[109] He joined with Justice Black to complain that the majority view was a use of the due process clause to enforce the social and economic beliefs of the Court, making, as Justice Black wrote, "of this Court's members a day-to-day constitutional convention."[110] Later in his concurrence in the 1973 abortion case, Justice Stewart reflected: "[T]he Court's opinion in *Griswold* understandably did its best to avoid reliance on the due process clause . . . . Yet the Connecticut law did not violate any provisions of the Bill of Rights, nor any other specific provision of the Constitution."[111] "There is no constitutional right of privacy, as such."[112] *Griswold* was to be viewed as a return to substantive due process "and I now accept it as such."[113]

Justice Douglas' opinion in *Griswold* ended with a tribute to marriage—"an association for as noble a purpose as any involved in our prior decisions."[114] The step which was taken by the Court in 1972 from *Griswold* to *Eisenstadt v. Baird*,[115] however, makes one think more of Justice Brennan's words in *Roth* that "sex" is a "great and mysterious force in human life."[116] In *Eisenstadt*, Justice Brennan spoke for the Court in striking down the Massachusetts criminal statute which prohibited the selling or giving away of contraceptive items to single persons, but allowed married persons to obtain them on prescription. The Court, adding to the law's seamless web, held the statute violated the equal protection clause because "the rights must be the same for the unmarried and the married alike."[117] It was true, Justice Brennan acknowledged, that the right of privacy in

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[107]*Id.* at 527.
[108]*Id.* at 530.
[109]*Id.* at 531 n.8.
[110]*Id.* at 520.
[111]410 U.S. 113, 167 (1973).
[112]*Id.* at 167, n.2.
[113]*Id.* at 168.
[114]381 U.S. 479, 486.
[115]405 U.S. 438 (1972).
[116]354 U.S. 476, 487.
[117]405 U.S. 438, 453.

Griswold inhered in the marital relationship, but "the marital couple is not an independent entity with a mind and heart of its own, but an association of two indivuduals . . . ."[118] "If the right of privacy means anything, it is the right of the individual, married or single . . . ."[119]

III

The abortion cases are positioned in the line of the privacy and personal morality cases. Justice Douglas, in his concurring opinion, in *Doe v. Bolton*[120] and *Roe v. Wade*,[121] described the contours of the right of privacy and the nature of the barrier which it imposed against legislative intervention. He set forth three categories. First was "the autonomous control over the development and expression o[f] one's intellect, interests, tastes and personality."[122] Second, the "freedom of choice in the basic decisions of one's life respecting marriage, divorce, procreation, contraception, and the education and upbringing of children."[123] Third was "the freedom to care for one's health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll or loaf."[124] In Justice Douglas' view, first category rights were protected by the first amendment and were absolute. He referred to his dissent in *Roth*.[125] In the last two categories, which included such cases as *Griswold*, the right although fundamental, was subject to some limitation through legislative action, but only upon a showing of "compelling state interest."[126] "The Constitution," Justice Blackmun acknowledged in his opinion for the Court, "does not explicitly mention any right of privacy."[127] But the Court has recognized certain protected zones having their roots in the Bill of Rights and its penumbra or in the concept of liberty in the fourteenth amendment. The right was broad enough to encompass a woman's decision whether or not to terminate the pregnancy. But the "pregnant woman cannot be isolated in her privacy. She carries an embryo

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[118] *Id.*
[119] *Id.*
[120] 410 U.S. 179 (1973).
[121] 410 U.S. 113 (1973).
[122] 410 U.S. 179, 211 (1973).
[123] *Id.*
[124] *Id.* at 213.
[125] *Id.* at 211.
[126] *Id.*
[127] 410 U.S. 113, 152 (1973).

and later a fetus . . . ."[128] "[A]t some point in time another interest, that of the health of the mother or that of potential human life, becomes significantly involved."[129] The Court did not agree that the state "by adopting one theory of life . . . may override the rights of the pregnant woman that are at stake."[130] Recognition, however, was to be given to the less rigid claim "that as long as at least *potential* life is involved, the State may assert interests beyond the protection of the pregnant woman alone."[131]

Under this analysis, the "compelling" point of the State's interest in the health of the mother, "in the light of present medical knowledge, is at approximately the end of the first trimester,"[132] because until that time the now established medical fact is that "mortality in abortion is less than mortality in normal childbirth."[133] With respect to the State's "legitimate interest in potential life, the 'compelling' point is at viability . . . because the fetus then presumably has the capability of meaningful life outside the mother's womb."[134] The defect in the state criminal anti-abortion laws was their failure to recognize the inability of the state to prohibit or regulate abortions in the first trimester of pregnancy, subject only to the medical judgment of the pregnant woman's attending physician, and in the second trimester beyond what was reasonably related to maternal health. For the third trimester or stage subsequent to viability, the Court said the state, because of its compelling interest in potential life, could, if it chose, "regulate and even proscribe abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."[135] The consequence was that the Texas anti-abortion statute, an older type, was struck down as a unit. It had proscribed all abortions except "an abortion procured or attempted by medical advice for the purpose of saving the life of the mother."[136] The Georgia statute,[137] patterned after the American Law Institute Model Penal Code, had come before the Court in a mutilated form, since the Federal District Court had already eliminated

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[128]*Id.* at 159.

[129]*Id.*

[130]*Id.* at 162.

[131]*Id.* at 150.

[132]*Id.*

[133]*Id.* at 163.

[134]*Id.*

[135]*Id.* at 165.

[136]TEX. PEN. CODE art. 1196.

[137]GA. CODE ANN. §§ 26-1201 - 26-1203 (1968).

three of its key provisions and had radically changed its meaning. In its mutilated form, the statute retained certain requirements. The woman had to certify she was a Georgia resident; two Georgia licensed physicians had to concur in the judgment of the woman's physician; the abortion could be performed only in a licensed hospital; and prior approval had to be given by a majority vote of at least a three member hospital staff committee. All of these requirements were held unconstitutional by the Supreme Court.

Possibly as a result of the Supreme Court's ruling, public opinion as measured in August, 1972 as 46% to 42% opposed to legalizing abortion, up to three months of pregnancy,[138] has now changed to 52% in favor of this kind of abortion.[139]

Just as the Supreme Court abortion cases can be put in the line of the right of privacy cases, so the Supreme Court capital punishment invalidity holding in *Furman v. Georgia*[140] may be seen in the context of prior opinions dealing with the eighth amendment's ban on "cruel and unusual punishments"[141] and in the light of warnings given in prior capital punishment cases by the Court. But the number of "cruel and unusual punishment" cases are few and not close to the issue at hand, and the warnings are strikingly matched by the language of individual Justices, affirming the constitutionality if not the wisdom of the death penalty. Indeed, only one month more than one year before Mr. Justice Harlan for the Court in *McGautha v. California* had written "we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution."[142] One can, of course, make the point that certiorari was narrowly limited in *McGautha* to the issue of standardless jury sentencing in capital cases, and did not include, as Mr. Justice Brennan there noted in a footnote, the question of the eighth amendment's possible restriction of state power.[143] The point is considerably weakened by the reasoning in *Furman*, and by the statement of Justice Black in *McGautha* as to the application of the Bill of Rights to capital punishment.[144] But in any event I believe it can be fairly said that neither the result in the abortion nor in the capital punishment

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[138]Harris Poll, April 19, 1973.

[139]*Id.*

[140]408 U.S. 238 (1972).

[141]U.S. CONST. amend. VIII.

[142]402 U.S. 183, 207 (1971).

[143]*Id.* at 254-55 n.4.

[144]*Id.* at 226.

cases was compelled by prior Court rulings, or by the original meaning of the amendments, and the determination which was made to change the result was discretionary although undoubtedly deeply felt.

Both *Roe v. Wade*,[145] the abortion case, and *Furman v. Georgia*,[146] the capital punishment case, emphasized changing public opinion and changing circumstances. Justice Blackmun in *Roe v. Wade* reviewed the ancient attitudes toward abortion, common law precedents, English and American statutory law, and concluded that until the late 19th century abortion had been viewed with less disfavor than under most American statutes "currently in effect."[147] He stated three reasons had been advanced to explain historically the enactment of criminal anti-abortion laws in the 19th century and to justify their continued existence. The first was that the statutes "were the product of a Victorian social concern to discourage illicit sexual conduct."[148] But "no court or commentator has taken the argument seriously."[149] The second was the hazard of the abortion procedure prior to the development of antisepsis. "Modern medical techniques have altered this situation."[150] The third reason was "the State's interest—some phrase it in terms of duty—in protecting prenatal life. Some of the argument for this justification rests on the theory that a new human life is present from the moment of conception."[151] The Court found it "need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer."[152] Justice Blackmun's opinion took note of a rapid change in formalized professional organization views toward abortion, mostly within the last decade, as indicated by resolutions of the American Medical Association,[153] the American Public Health Association,[154] the 1962 American Law Institute's Model Penal Code,[155] and the difference between that code and

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[145]410 U.S. 113 (1973).
[146]408 U.S. 238 (1972).
[147]410 U.S. 113, 140 (1973).
[148]*Id.* at 148.
[149]*Id.*
[150]*Id.* at 149.
[151]*Id.* at 150.
[152]*Id.* at 159
[153]*Id.* at 141.
[154]*Id.* at 144.
[155]*Id.* at 140.

the 1971 Uniform Abortion Act.[156] Chief Justice Burger in concurring commented that he was somewhat troubled the "Court had taken notice of various scientific and medical data in reaching its conclusions . . . ."[157]

The emphasis on community reaction was more explicit in *Furman* in the Justices' separate writings which cluster around the per curiam announcement. Among the cumulative tests for unconstitutionality advanced by Justice Brennan was the standard of substantial rejection by contemporary society. At one point he stated that "this punishment has been almost totally rejected by contemporary society."[158] Slightly later in his opinion, he concluded "that contemporary society views this punishment with substantial doubt."[159] The rejection by society was to be found not by looking at what society thought, but at what society did, and this was shown by the small sample of eligible criminals upon whom the death penalty was inflicted. "Indeed the likelihood [was] great that the punishment [was] tolerated only because of its disuse."[160] Justice Marshall in his opinion elevated public sentiment to a separate decisive ground. The penalty would be unconstitutional if "morally unacceptable" to the people of the United States.[161] Even though the "punishment is not excessive and serves a valid legislative purpose," he wrote, "it still may be invalid if popular sentiment abhors it."[162] A public opinion poll would not be the means of determining society's reaction. The question would not be "whether its mere mention 'shocks the conscience and sense of justice of the people', but . . . whether people who were fully informed as to the purposes of the penalty and its liabilities would find the penalty shocking, unjust and unacceptable."[163] This did not mean that people "are required to act rationally; they are not. With respect to this judgment, a violation of the Eighth Amendment is totally dependent on the predictable, subjective, emotional reactions of informed citizens."[164] He believed the average citizen, if possessed of the relevant information, would find the death penalty unwise. He admitted, however, that "a problem arises as to whether

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[156]*Id.* at 146.
[157]410 U.S. 179, 208 (1973).
[158]408 U.S. 238, 295.
[159]*Id.* at 300.
[160]*Id.*
[161]*Id.* at 332.
[162]*Id.*
[163]*Id.* at 361.
[164]*Id.* at 362.

[the information] would convince [the average citizen] that the penalty was morally reprehensible."[165] As to this, he responded, "I cannot believe that at this stage in our history, the American people would ever knowingly support purposeless vengeance."[166] His opinion refers widely to a variety of studies made on the effects of capital punishment.[167] Thus, he concluded, "[a]ssuming knowledge of all the facts presently available regarding capital punishment, the average citizen would, in my opinion, find it shocking to his conscience and sense of justice."[168] To these arguments concerning society's reaction, the dissenting Justices pointed to contrary evidence in the retention of the penalty by forty state legislatures, recent acts of Congress, adding the penalty to Federal crimes, the results of state referenda ("In 1970, approximately 64% of the voters in Illinois approved the penalty"), and the behavior of juries.[169] "During the 1960's juries returned in excess of a thousand death sentences, a rate of approximately two per week. . . . [T]hese totals simply do not support petitioners' assertion that 'the death penalty is virtually unanimously repudiated and condemned by the conscience of contemporary society,' "[170] Mr. Justice Powell wrote, adding "[t]he assessment of popular opinion is essentially a legislative, not a judicial, function."[171] The same argument based on the legislative position taken by the several states could have been made, and was made somewhat, in the dissents in the abortion cases.

The position of the jury as the voice of acceptable community standards became central in the death penalty cases. Justice Brennan's cumulative set of principles included that "the State must not arbitrarily inflict a severe punishment."[172] He found the proof for arbitrary infliction in the "trivial number"[173] of cases in which it was used, smacking of "little more than a lottery system."[174] The infrequent imposition for murder and the extraordinarily rare imposition for rape, meant, according to Justice Stewart, that "[t]hese death sentences are cruel and unusual in the same way that being struck

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[165]*Id.* at 363.
[166]*Id.*
[167]*Id.* at 357.
[168]*Id.* at 369.
[169]*Id.* at 385, 412, 439.
[170]*Id.* at 441.
[171]*Id.* at 443.
[172]*Id.* at 274.
[173]*Id.* at 293.
[174]*Id.*

by lightning is cruel and unusual."[175] "[T]here is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not,"[176] Justice White wrote, and the penalty was imposed too infrequently to make a substantial contribution to deterrence. "[O]ur procedures," Justice Brennan explained, "[were] not constructed to guard against the totally capricious selection of criminals for the punishment of death";[177] indeed, the holding of the Court in *McGautha v. California*, one year before, permitted the decision of life or death to be made by juries "wholly unguided by standards."[178] The Court in *McGautha* speaking through Justice Harlan had rejected the idea that governing standards had to be given to the jury to identify "those homicides for which the slayer should die."[179] It was the jury's role to express the conscience of the community. This role was stressed by quoting from Justice Stewart's opinion in *Witherspoon v. Illinois*,[180] a standardless jury sentencing case, where unconstitutional unfairness had been found in the exclusion from a capital jury of all who were opposed to the death penalty or indicated conscientious scruples against it. A jury culled of all with doubts about capital punishment could speak only for a minority and could not, therefore, fulfill its function. The jury was to maintain "a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.' "[181]

Justices Douglas, Brennan and Marshall had dissented in *McGautha* in 1971. Now in 1972, Justice Douglas emphasized, "We are . . . imprisoned in the *McGautha* holding."[182] As a consequence "juries (or judges, as the case may be) have practically untrammeled discretion to let an accused live or insist that he die."[183] The death penalty statutes were "pregnant with discrimination."[184] "[*McGautha*]," Justice Marshall commented, "was an open invitation to discrimination."[185] It is "evident that the burden of capital

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[175]*Id.* at 309.
[176]*Id.* at 313.
[177]*Id.* at 295.
[178]*Id.*
[179]402 U.S. 183, 197.
[180]391 U.S. 510 (1968).
[181]*Id.* at 519 n.15.
[182]408 U.S. 238, 248.
[183]*Id.*
[184]*Id.* at 257.
[185]*Id.* at 365.

punishment falls upon the poor, the ignorant and the underprivileged members of society."[186]

In the death penalty cases, Justice Powell was moved to exclaim: "I can recall no case in which, in the name of deciding constitutional questions, this Court has subordinated national and local democratic processes to such an extent."[187] Seven months later Justice White referred to the abortion cases "as an exercise of raw judicial power"—an "improvident and extravagant exercise of the power of judicial review."[188]

IV

What application can one make to the abortion and capital punishment cases of the doctrines and positions explicated during the course of the Devlin debate, and in what way may these cases add to our understanding of what may be involved if the issues of the debate are thus placed in an American setting? These cases involve issues of morality in a sensitive and emotional way so as to evoke Lord Devlin's warning that "[m]ost men take their morality as a whole . . ."[189] and Professor Hart's acquiescence that "it is of course clear [and one of the oldest insights of political theory] that society could not exist without a morality which mirrored and supplemented the law's proscription of conduct injurious to others."[190] Dean Rostow in the debate pointed out, "All movements of law reform seek to carry out social judgments as to what is fair and just in the conduct of society," that "[m]en often say that one cannot legislate morality. I should say that we legislate hardly anything else."[191] The emotional and traditional values involved in these cases invests them with a special importance. The death penalty issue, as Justice Brennan writes, goes beyond "differences over the practical wisdom of a particular government policy."[192] The abortion issue, Justice Blackmun acknowledged, evokes responses based on "[o]ne's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitude toward life and family and their values, and the moral standards one establishes and seeks to

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[186]*Id.* at 365-66.

[187]*Id.* at 418.

[188]410 U.S. 179, 222 (1973).

[189]DEVLIN at 115.

[190]HART at 51.

[191]Rostow, *The Enforcement of Morals*, 18 CAMB. L.J. 174, 197 (1960).

[192]408 U.S. 238, 296.

observe."[193] The emotional and symbolic nature of the issues may be such (even though it would be hard to find evidence to prove this) as to make relevant Lord Devlin's troublesome position that the law itself requires moral support, and as a consequence it must in return "be prepared to support public morality;"[194] this might mean in an exceptional case, that in response to public outrage some other high purpose of society, higher than the grant of justice in the individual case, would have to be served.

Furman, of course, deals with a form of punishment rather than the specification of a crime. But the consequences of the punishment and its moral character are encompassed by the debate, quite apart from Lord Devlin's insistence that the sentence should be proportioned according to the degree of immorality involved in the criminal act. Lord Devlin had used the debate about capital punishment as an example of the process of lawmaking. Justice Marshall's treatment of the evidence as to the effects of the death penalty can be taken as a testing of the meaning of the elastic principles which Lord Devlin had set forth to protect the individual against harsh state action. Justice Marshall argued that "[d]espite the fact that abolitionists have not proved non-deterrence beyond a reasonable doubt, they have succeeded in showing by clear and convincing evidence that capital punishment is not necessary as a deterrent to crime in our society. This is all that they must do."[195] Professor Hart, cited by both Justice Marshall[196] and the Chief Justice,[197] had carefully put the matter somewhat differently. He had written, "There is no evidence from the statistics that the death penalty is a superior deterrent to imprisonment,"[198] and had suggested that the onus of proof was upon those who would retain the penalty. Chief Justice Burger responded that justifications for shifting the burden "are not descended from established constitutional principles, but are born of the urge to bypass an unresolved factual question."[199] The point emphasizes the extent to which moral principles should foreclose or at least change the findings of facts in the law-making process.

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[193]410 U.S. 113, 116 (1973).

[194]DEVLIN at 59.

[195]408 U.S. 238, 353.

[196]*Id.* at 354 n.124.

[197]*Id.* at 395 n.20.

[198]H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 85 (1968).

[199]408 U.S. 238, 396.

Lord Devlin, in urging that in "any new matter of morals the law should be slow to act,"[200] had given as a reason that if by the next generation the swell of indigation had subsided, then it would be "difficult to alter the law without giving the impression that moral judgment is being weakened."[201] The caution was against the further intrusion of law into private matters, but the proposition about the impression of retreat is a general one. Most of Lord Devlin's illustrations of specific crimes raise the question not of the extension of the law but of its retreat. Despite this impression of moral weakening, Lord Devlin wrote that in a free society, "the criminal law will withdraw its support, if it has ever given it, from a moral belief which is seriously challenged."[202] There are problems with this formulation, and perhaps more so for a society less homogeneous than England—a point which Lord Devlin recognizes.[203] The formulation seems more appropriate for the abortion cases than for capital punishment, since the formulation is centered on the law's intrusion into the private area. But the formulation makes clear that the test of the community's intolerance, indignation and disgust—derived, perhaps from areas of the law like obscenity—is a continuing one which has to be met if the law is to be maintained. The maintenance of such a test based on community reaction no doubt assumes a distinction, which Lord Devlin makes strongly, between criminal law and quasi-criminal regulatory legislation, the *mala in se* and the *mala prohibita*. The "ordinary man," he wrote, "still retains the distinction in his mind; he still thinks of the word 'crime' as disgraceful or morally wrong. But he cannot be expected to go on doing so for ever if the law jumbles morals and sanitary regulations together and teaches him to have no more respect for the Ten Commandments than for the woodworking regulations."[204] Both Justice Brennan and Justice Marshall, in the death penalty cases, sought to express the community's reaction. Justice Brennan made that reaction decisive as one of his cumulative principles. Justice Marshall pursued the reactions along the lines which Lord Devlin had set to a distinction between disapproval and moral reprehensibility. To be sure, the Court did not find the jury's expression of community reaction sufficient support for the death penalty, but then treating the Court as a legislature, there is

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[200]DEVLIN at 18.

[201]*Id.*

[202]*Id.* at 116.

[203]*Id.*

[204]*Id.* at 31.

no reason to think Lord Devlin would have regarded the availability of the jury as settling the policy issue. Treating the Court as a court, there is, of course, a considerable similarity to and also a contrast with Shaw's Case, but it must be said that English law has permitted much less discretion in the court branch for the imposition of the death penalty than we have. One can say then that the capital punishment case at least treats the problem of collective morality in the spirit of the debate, emphasizing the kind of discussion and knowledge, which Lord Devlin stressed increasingly in later lectures, but recognizing the irrational as well. But the difference is that Lord Devlin was writing about a process in which the legislature was dominant, and not one in which the legislative determination of community reaction, along with an additional jury determination in particular cases, was set aside by a general enactment by the highest Court.

There are obvious difficulties when one shifts a debate about law and morality, with an emphasis on private morality and the exclusion of law from that area as not being its business, from the English context to the American constitutional framework. It has sometimes been argued that Lord Devlin was urging that no constitutional or jurisdictional barrier be placed against the law's scrutiny of the realm of private morality.[205] But Lord Devlin recognized that in "a free society checks are usually put upon the government, both the executive and the legislature, so that it is difficult for them to enact and enforce a law that takes away another's freedom unless in the honest judgment of society it is necessary to do so,"[206] and "one sort of check consists in the safeguarding of certain specific freedoms by the articles of a constitution; another consists in trial by jury."[207] Lord Devlin's concern was that there should be no acceptance of perdurable principles which completely removed from the law-makers' debate the weighing of values and the examination of consequences, although his critics would say he was more concerned with the law-makers' debate reflecting community attitudes or prejudices. Lord Devlin's own flexible principles, presumably, would have some effect, if followed, on how values and consequences would be measured. Supreme Court doctrines for interpreting the Constitution, ranging from the interpretation of the first amendment as absolute to the fourteenth amendment's due process as a concept of ordered liberty,

[205]Sartorius, *The Enforcement of Morality*, 81 YALE L.J. 891, 892 (1972).

[206]DEVLIN at 118.

[207]*Id.*

or to an acceptance of substantive due process, would similarly close or open the debate. In general one would not say that the majority Justices in *Wade* or *Furman* appeared foreclosed by some perdurable doctrine from weighing the competing values. The abortion case was not an absolute right of privacy case and, as Justice Rehnquist wrote in dissent, the adoption of the compelling state interest standard "will inevitably require this Court to examine the legislative policies and pass on the wisdom of these policies . . . ."[208] Lord Devlin had suggested the appropriateness of legislative reform of the law of abortion, and one must conclude that this is what the Supreme Court did. Of course it did more. It removed the issues, at least to a considerable extent, from legislative jurisdiction.

Lord Devlin was writing about the law-making process. It was a process in which judges and legislators, but mostly legislators, took part. In matters of morality, the law-maker's function, as Lord Devlin saw it, was to enforce those ideas about right or wrong which are already accepted by the society for which he was legislating and which were necessary to preserve its integrity. But both the judge and the legislator had a certain freedom. Neither was completely tethered. They could push the law in the direction they thought it ought to go, but if they went too far they would risk seeing it undone by their successors.[209] It was a dynamic process. The legislator had more freedom than the judge. It was not a question of "counting heads or synthesizing answers to moral questions given in a Gallup poll."[210] And it was a process in which "well-informed and articulate men" could play a part "in the shaping of law quite disproportionate to their numbers."[211] They could do so through persuasion and, by marshalling public opinion, change the climate of attitude, influence the views of law-makers. In doing so they were reflecting and changing the collective morality which was the substitute in a democratic society for any other authority outside of the law. The collective morality found its voice in the law-making process, and not by being removed from it or imposed upon it; this was the reason that the concept "not the law's business" seemed to Devlin a threat to this process.

It is, of course, in some ways a conservative view, although a democratic one. In the debate Professor Dworkin commented that at

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[208]410 U.S. 113, 174 (1973).

[209]DEVLIN at 95.

[210]*Id.* at 94.

[211]*Id.* at 96.

times Lord Devlin might seem to be arguing that "the state has a role to play as moral tutor and the criminal law is its proper tutorial technique."[212] Professor Dworkin characterized such a position as eccentric, unworthy of the concern to reply of distinguished philosophers and lawyers, and not in fact Lord Devlin's view.[213] Lord Devlin, himself, explicitly ruled out this position. There were two grounds on which the State might claim to legislate on matters of morals, he wrote. One was the Platonic ideal that the "State exists to promote virtue among its citizens."[214] But this was not acceptable to Anglo-American thought. "It invests the State with power of determination between good and evil, destroys freedom of conscience and is the paved road to tyranny. It is against this concept of the State's power that Mill's words are chiefly directed."[215] The alternative ground was that "society may legislate to preserve itself." Under this theory the law-maker's mandate is to "preserve the essentials of his society, not to reconstruct them according to his own ideas."[216] The difficulty with attempting to reconstruct or to lead society was that it took one back to the Platonic position. In view of the fact that law-makers do attempt to push the law along in the direction they think it should go, there is a difficulty here, which Lord Devlin's analysis does not solve. But perhaps the process to which he is pointing solves the problem for him.

This turning to society for its own determination on the basis of the opinion of the ordinary citizen as to collective morality is initially upsetting, Lord Devlin recognized, to many philosophers, academic lawyers, and those who have had the benefit of a higher education and feel themselves better equipped to solve the nation's problems. Still "it is a commonplace that in our sort of society matters of great moment are settled in accordance with the opinion of the ordinary citizen who acts no more and no less rationally in matters of policy than in matters of morals."[217] The reaction illustrates "the vacuum that is created when a society no longer acknowledges a supreme spiritual authority. . . . Today a man's own conscience is for him the final arbiter: but what for society?"[218]

"Those who believe in God," Lord Devlin replies, "and that He

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[212]Dworkin, 75 YALE L.J. 986, 988.

[213]*Id.*

[214]DEVLIN at 89.

[215]*Id.*

[216]*Id.*

[217]*Id.* at 91.

[218]*Id.* at 92.

made man in His image will believe also that He gave to each in equal measure the knowledge of good and evil, placing it not in the intellect wherein His grant to some was more bountiful than to others, but in the heart and understanding . . . ." "Those who do not believe in God must ask themselves what they mean when they say they believe in democracy. Not that all men are born with equal brains—we cannot believe that; but that they have at their command—and that in this they are all born in the same degree—the faculty of telling right from wrong. This is the whole meaning of democracy, for if in this endowment men were not equal, it would be pernicious that in the government of any society they should have equal rights."[219]

The statement by Lord Devlin evokes recollections of the fable told to Socrates by Protagoras that Prometheus stole the practical arts and distributed them among mankind in unequal proportions, but Zeus sent Hermes to mankind, bearing reverence and justice, to be distributed equally to all, "for cities cannot exist if a few only share in justice and reverence."[220] The issue in the dialogue is whether virtue can be taught, and the position of Protagoras, not unlike Devlin's, is that society in many ways, including the law, teaches its existing view of virtue through rewards and punishment, example and admonition to citizens who share in the evenly distributed capacity to learn. The criticism of Protagoras, as of all sophists, is that they were content to reflect the ways things were. The training to be given was training to get along and be a leader within a process. It was not a training which told what virtue was or ought to be. And so Socrates concludes the dialogue with the assertion "I should like to carry on the discussion until we finally ascertain what virtue is."[221] Lord Devlin has emphasized and defended a process of law-making, and one must ask whether this process itself can lead to a better understanding and implementation of what should be the collective morality of a maturing society.

The process described by Lord Devlin was not the process of the capital punishment or abortion cases. While he recognized that judges could be law-makers, his was essentially a legislative process, kept open for further revision, and involving a much greater public commitment to the results which were reached. I think Lord Devlin was wrong not to have emphasized more strongly, although he increasingly did so in his later lectures, the movement which was possi-

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[219]*Id.* at 100.

[220]Plato, *Protagoras* 20 (Gregory Vlastos ed. 1956).

[221]*Id.* at 69.

ble in this process, the change of views which it induced, and the educational aspects of this form of participation. One might say, of course, that under our system there is a similarly delegated participation to the Justices of the Supreme Court. But the element of removal of elements from legislative discussion cannot be denied. One can defend our version of not the law's business as reflecting determinations of morality, previously agreed upon, as in the Bill of Rights, and to be protected against the vagaries of popular movements. One can recognize a cost in this, for the Bill of Rights then ceases to be a matter for which legislators clearly feel a responsibility, and yet urge that this added protection and kind of leadership is essential in a country as diverse and complex as ours. If one argues this way, the responsibility of the Court not to destroy the legislative process, or the citizen's feeling of participation in the determination of public matters, particularly when the law is to be changed, is very great. The law was changed in the capital punishment and abortion cases.

James Bradly Thayer, speaking before the Congress on Jurisprudence and Law Reform at the 1893 World's Fair in Chicago, recounted one of the costs of this method of changing the law. "No doubt our doctrine of constitutional law," he said, "has a tendency to drive out questions of justice and right and to fill the minds of legislators with thoughts of mere legality, of what the constitution allows. And moreover, even in the matter of legality, they have felt little responsibility; if we are wrong, they say, the courts will correct it. Meantime they and the people whom they represent, not being thrown back on themselves, on the responsible exercise of their own prudence, moral sense, and honor, lose much of what is best in the political experience of any nation; and they are belittled, as well as demoralized. . . . Under no system can the power of courts go far to save a people from ruin; our chief protection lies elsewhere. If this be true, it is of the greatest importance to put the matter in its true light."[222] In the aftermath of the abortion and capital punishment cases one may reflect on whether this is not a somewhat accurate statement of what is going on.

One can add there is a special oddity when national legislation is enacted by the Supreme Court as constitutional doctrine without prior national legislative effort. The Supreme Court in the capital punishment case and to some extent in the abortion cases rested its views on a changing public morality. This was a national view, not

[222]J. THAYER, THE ORIGIN AND SCOPE OF THE AMERICAN DOCTRINE OF CONSTITUTIONAL LAW, LEGAL ESSAYS 38-39 (1908).

based upon the circumstance, public opinion or legislation of a particular state. It was a view based on a concept of ordered liberty or on national values or on the Bill of Rights amendments brought to national level by the fourteenth amendment.[223] The fourteenth amendment also provides for national Congressional power for its enforcement. The power has been recognized and sometimes used. It has sometimes been used or suggested for use after the Supreme Court has acted, and the argument then is whether Congress in this way can remove constitutional protections or barriers which the Court has placed. A more active Congress, which played its role, would not wait for the anomaly of a national Court imposing national legislative guidelines before there has been the kind of national policy debate which only national legislation can evoke. It has sometimes been suggested that section 5 of the fourteenth amendment does not give a true policy-making power to the national Congress, because the power can be exercised only on the basis of correcting state statutes or practices which violate the amendment.[224] But this is the basis for the Court's role also in the capital punishment and abortion cases.

We may, of course, not trust ourselves, and the course of legislation gives good reason for this distrust. It is a self-fulfilling prophecy as Thayer suggests. The concept of "not the law's business," or limits to the law, or the maximum recognition of personal integrity consistent with the integrity of society, is an important doctrine. If, as is the case, it must be used sometimes within our constitutional framework to foreclose consideration, there is also a wide area in which it should be used in a legislative setting to emphasize the human values to be considered. The doctrine will be no less perdurable if used in this way. To enable this to happen, judicial care is necessary. Otherwise we do not make use of the process which not only reflects but helps create a collective morality, and we are on our way to an impairment of that morality and a widening gap between the people and the law.

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[223]U.S. CONST. amend. XIV.

[224]*See* Katzenbach v. Morgan, 384 U.S. 641, 666 (1966); Oregon v. Mitchell, 400 U.S. 112, 128-29 (1970); Goldberg and Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1814 (1970); *The Nixon Busing Bills and Congressional Power*, 81 YALE L.J. 1542 at 1562 et seq. (1972).

SCREWS ET AL. *v.* UNITED STATES.

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

No. 42. Argued October 20, 1944.—Decided May 7, 1945.

1. Upon review of a judgment affirming the conviction, for violation of § 20 of the Criminal Code and conspiracy thereunto, of local law-enforcement officers who arrested a negro citizen for a state offense and wrongfully beat him to death, the judgment is reversed with directions for a new trial. Pp. 92–94, 113.

Opinion of DOUGLAS, J., in which the CHIEF JUSTICE, MR. JUSTICE BLACK and MR. JUSTICE REED concur:

2. Section 20 of the Criminal Code, so far as it penalizes acts which "willfully" deprive a person of any right secured to him by the due process clause of the Fourteenth Amendment, is to be construed as requiring a specific intent to deprive of a right which has been made specific by the express terms of the Constitution or laws of the United States or by decisions interpreting them; and, as so construed, the section is not unconstitutional as lacking an ascertainable standard of guilt. P. 101.
3. The trial court erred in not instructing the jury that, in order to convict, they must find that the defendants had the purpose to deprive the prisoner of a constitutional right. In determining whether that requisite bad purpose was present the jury would be entitled to consider all the attendant circumstances—the malice of the defendants, the weapons used in the assault, the character and duration of the assault, the provocation, if any, and the like. P. 106.
4. Although no exception was taken to the trial court's charge, the error was so fundamental—failure to submit to the jury the essential elements of the only offense on which the conviction could rest—that this Court takes note of it *sua sponte*. P. 107.
5. In making the arrest and in assaulting the prisoner, the defendants acted "under color of law," within the meaning of § 20 of the Criminal Code. P. 107.

Defendants were officers of the law who had made an arrest, and it was their duty under the law of the State to make the arrest

effective. By their own admissions, they made the assault in order to protect themselves and to keep the prisoner from escaping.

140 F. 2d 662, reversed.

CERTIORARI, 322 U. S. 718, to review a judgment affirming convictions for violation of § 20 of the Criminal Code and conspiracy.

Mr. James F. Kemp, with whom *Messrs. Clint W. Hager* and *Robert B. Short* were on the brief, for petitioners.

Solicitor General Fahy, with whom *Assistant Attorney General Tom C. Clark, Messrs. Robert S. Erdahl* and *Irving S. Shapiro* were on the brief, for the United States.

Messrs. William H. Hastie, Thurgood Marshall and *Leon A. Ransom* filed a brief on behalf of the National Association for the Advancement of Colored People, as *amicus curiae,* urging affirmance.

MR. JUSTICE ROBERTS, MR. JUSTICE FRANKFURTER and MR. JUSTICE JACKSON, dissenting.

Three law enforcement officers of Georgia, a county sheriff, a special deputy and a city policeman, arrested a young Negro charged with a local crime, that of stealing a tire. While he was in their custody and handcuffed, they so severely beat the lad that he died. This brutal misconduct rendered these lawless law officers guilty of manslaughter, if not of murder, under Georgia law. Instead of leaving this misdeed to vindication by Georgia law, the United States deflected Georgia's responsibility by instituting a federal prosecution. But this was a criminal homicide only under Georgia law. The United States could not prosecute the petitioners for taking life. In-

stead a prosecution was brought, and the conviction now under review was obtained, under § 20 of the Criminal Code, 18 U. S. C. § 52. Section 20, originating in § 2 of the Civil Rights Act of April 9, 1866, 14 Stat. 27, was put on the statute books on May 31, 1870, but for all practical purposes it has remained a dead letter all these years. This section provides that "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects . . . any inhabitant of any State . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States . . . shall be fined not more than one thousand dollars, or imprisoned not more than one year, or both." Under § 37 of the Criminal Code, 18 U. S. C. § 88, a conspiracy to commit any federal offense is punishable by imprisonment for two years. The theory of this prosecution is that one charged with crime is entitled to due process of law and that that includes the right to an orderly trial of which the petitioners deprived the Negro.

Of course the petitioners are punishable. The only issue is whether Georgia alone has the power and duty to punish, or whether this patently local crime can be made the basis of a federal prosecution. The practical question is whether the States should be relieved from responsibility to bring their law officers to book for homicide, by allowing prosecutions in the federal courts for a relatively minor offense carrying a short sentence. The legal question is whether, for the purpose of accomplishing this relaxation of State responsibility, hitherto settled principles for the protection of civil liberties shall be bent and tortured.

I

By the Thirteenth Amendment slavery was abolished. In order to secure equality of treatment for the emancipated, the Fourteenth Amendment was adopted at the

same time. To be sure, the latter Amendment has not been confined to instances of discrimination because of race or color. Undoubtedly, however, the necessary protection of the new freedmen was the most powerful impulse behind the Fourteenth Amendment. The vital part of that Amendment, § 1, reads as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

By itself, this Amendment is merely an instrument for striking down action by the States in defiance of it. It does not create rights and obligations actively enforceable by federal law. However, like all rights secured by the Constitution of the United States, those created by the Fourteenth Amendment could be enforced by appropriate federal legislation. The general power of Congress to pass measures effectuating the Constitution is given by Art. I, § 8, cl. 18—the Necessary-and-Proper Clause. In order to indicate the importance of enforcing the guarantees of Amendment XIV, its fifth section specifically provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

Accordingly, Congress passed various measures for its enforcement. It is familiar history that much of this legislation was born of that vengeful spirit which to no small degree envenomed the Reconstruction era. Legislative respect for constitutional limitations was not at its height and Congress passed laws clearly unconstitutional. See *Civil Rights Cases,* 109 U. S. 3. One of the laws of this period was the Act of May 31, 1870, 16 Stat. 140. In its

present form, as § 20, it is now here for the first time on full consideration as to its meaning and its constitutionality, unembarrassed by preoccupation both on the part of counsel and Court with the more compelling issue of the power of Congress to control State procedure for the election of federal officers. If § 20 were read as other legislation is read, by giving it the meaning which its language in its proper setting naturally and spontaneously yields, it is difficult to believe that there would be real doubt about the proper construction. The unstrained significance of the words chosen by Congress, the disclosed purpose for which they were chosen and to which they were limited, the always relevant implications of our federal system especially in the distribution of power and responsibility for the enforcement of the criminal law as between the States and the National Government, all converge to make plain what conduct Congress outlawed by the Act of 1870 and what impliedly it did not.

The Fourteenth Amendment prohibited a State from so acting as to deprive persons of new federal rights defined by it. Section 5 of the Amendment specifically authorized enabling legislation to enforce that prohibition. Since a State can act only through its officers, Congress provided for the prosecution of any officer who deprives others of their guaranteed rights and denied such an officer the right to defend by claiming the authority of the State for his action. In short, Congress said that no State can empower an officer to commit acts which the Constitution forbade the State from authorizing, whether such unauthorized command be given for the State by its legislative or judicial voice, or by a custom contradicting the written law. See *Nashville, C. & St. L. R. Co.* v. *Browning,* 310 U. S. 362, 369. The present prosecution is not based on an officer's claim that that for which the United States seeks his punishment was commanded or authorized by the law of his State. On the contrary,

the present prosecution is based on the theory that Congress made it a federal offense for a State officer to violate the explicit law of his State. We are asked to construe legislation which was intended to effectuate prohibitions against States for defiance of the Constitution, to be equally applicable where a State duly obeys the Constitution, but an officer flouts State law and is unquestionably subject to punishment by the State for his disobedience.

So to read § 20 disregards not merely the normal function of language to express ideas appropriately. It fails not merely to leave to the States the province of local crime enforcement, that the proper balance of political forces in our federalism requires. It does both, heedless of the Congressional purpose, clearly evinced even during the feverish Reconstruction days, to leave undisturbed the power and the duty of the States to enforce their criminal law by restricting federal authority to the punishment only of those persons who violate federal rights under claim of State authority and not by exerting federal authority against offenders of State authority. Such a distortion of federal power devised against recalcitrant State authority never entered the minds of the proponents of the legislation.

Indeed, we have the weightiest evidence to indicate that they rejected that which now, after seventy-five years, the Government urges. Section 20 of the Criminal Code derived from § 2 of the Civil Rights Act of 1866, 14 Stat. 27. During the debate on that section, Senator Trumbull, the Chairman of the Senate Judiciary Committee, answered fears concerning the loose inclusiveness of the phrase "color of law." In particular, opponents of the Act were troubled lest it would make criminals of State judges and officials for carrying out their legal duties. Senator Trumbull agreed that they would be guilty if they consciously helped to enforce discriminatory State

legislation. Federal law, replied Senator Trumbull, was directed against those, and only against those, who were not punishable by State law precisely because they acted in obedience to unconstitutional State law and by State law justified their action. Said Senator Trumbull, "If an offense is committed against a colored person simply because he is colored, in a State where the law affords him the same protection as if he were white, this act neither has nor was intended to have anything to do with his case, because he has adequate remedies in the State courts; but if he is discriminated against under color of State laws because he is colored, then it becomes necessary to interfere for his protection." Cong. Globe, 39th Cong., 1st Sess., p. 1758. And this language applies equally to § 17 of the Act of May 31, 1870, 16 Stat. 140, 144 (now § 20 of the Criminal Code), which reenacted the Civil Rights Act.

That this legislation was confined to attempted deprivations of federal rights by State law and was not extended to breaches of State law by its officials, is likewise confirmed by observations of Senator Sherman, another leading Reconstruction statesman. When asked about the applicability of the 1870 Act to a Negro's right to vote when State law provided for that right, Senator Sherman replied, "That is not the case with which we are dealing. I intend to propose an amendment to present a question of that kind. This bill only proposes to deal with offenses committed by officers or persons under color of existing State law, under color of existing State constitutions. No man could be convicted under this bill reported by the Judiciary Committee unless the denial of the right to vote was done under color or pretense of State regulation. The whole bill shows that. My honorable friend from California has not read this bill with his usual care if he does not see that that runs through the whole of the provisions of the first and second sections of the bill, which

simply punish officers as well as persons for discrimination under color of State laws or constitutions; and so it provides all the way through." Cong. Globe, 41st Cong., 2d Sess., p. 3663. The debates in Congress are barren of any indication that the supporters of the legislation now before us had the remotest notion of authorizing the National Government to prosecute State officers for conduct which their State had made a State offense where the settled custom of the State did not run counter to formulated law.

Were it otherwise it would indeed be surprising. It was natural to give the shelter of the Constitution to those basic human rights for the vindication of which the successful conduct of the Civil War was the end of a long process. And the extension of federal authority so as to guard against evasion by any State of these newly created federal rights was an obvious corollary. But to attribute to Congress the making overnight of a revolutionary change in the balance of the political relations between the National Government and the States without reason, is a very different thing. And to have provided for the National Government to take over the administration of criminal justice from the States to the extent of making every lawless act of the policeman on the beat or in the station house, whether by way of third degree or the illegal ransacking for evidence in a man's house (see *Gouled* v. *United States,* 255 U. S. 298; *Byars* v. *United States,* 273 U. S. 28; *Brown* v. *Mississippi,* 297 U. S. 278; *Chambers* v. *Florida,* 309 U. S. 227), a federal offense, would have constituted a revolutionary break with the past overnight. The desire for such a dislocation in our federal system plainly was not contemplated by the Lyman Trumbulls and the John Shermans, and not even by the Thaddeus Stevenses.

Regard for maintaining the delicate balance "between the judicial tribunals of the Union and of the States" in

the enforcement of the criminal law has informed this Court, as it has influenced Congress, "in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution." *Ex parte Royall,* 117 U. S. 241, 251. Observance of this basic principle under our system of Government has led this Court to abstain, even under more tempting circumstances than those now here, from needless extension of federal criminal authority into matters that normally are of State concern and for which the States had best be charged with responsibility.

We have reference to § 33 of the Judicial Code, as amended, 28 U. S. C. § 76. That provision gives the right of removal to a federal court of any criminal prosecution begun in a State court against a revenue officer of the United States "on account of any act done under color of his office or of any such [revenue] law." Where a State prosecution for manslaughter is resisted by the claim that what was done was justifiably done by a United States officer one would suppose that this Court would be alert to construe very broadly "under color of his office or of any such law" in order to avoid the hazards of trial, whether through conscious or unconscious discrimination or hostility, of a United States officer accused of homicide and to assure him a trial in a presumably more impartial federal court. But this Court long ago indicated that misuse of federal authority does not come within the statute's protection. *Tennessee* v. *Davis,* 100 U. S. 257, 261–262. More recently, this Court in a series of cases unanimously insisted that a petition for removal must show with particularity that the offense for which the State is prosecuting resulted from a discharge of federal duty. "It must appear that the prosecution of him, for whatever offense, has arisen out of the acts done by him under color of federal authority and in enforcement of federal law, and

he must by direct averment exclude the possibility that it was based on acts or conduct of his not justified by his federal duty. . . . The defense he is to make is that of his immunity from punishment by the State, because what he did was justified by his duty under the federal law, and because he did nothing else on which the prosecution could be based." *Maryland* v. *Soper* (No. 1), 270 U. S. 9, 33. And see *Maryland* v. *Soper* (No. 2), 270 U. S. 36; *Maryland* v. *Soper* (No. 3), 270 U. S. 44; *Colorado* v. *Symes,* 286 U. S. 510. To the suggestion that such a limited construction of the removal statute enacted for the protection of the United States officers would restrict its effectiveness, the answer was that if Congress chose to afford even greater protection and to withdraw from the States the right and duty to enforce their criminal law in their own courts, it should express its desire more specifically. *Maryland* v. *Soper* (No. 2), 270 U. S. 36, 42, 44. That answer should be binding in the situation now before us.

The reasons which led this Court to give such a restricted scope to the removal statute are even more compelling as to § 20. The matter concerns policies inherent in our federal system and the undesirable consequences of federal prosecution for crimes which are obviously and predominantly State crimes no matter how much sophisticated argumentation may give them the appearance of federal crimes. Congress has not expressed a contrary purpose, either by the language of its legislation or by anything appearing in the environment out of which its language came. The practice of government for seventy-five years likewise speaks against it. Nor is there a body of judicial opinion which bids us find in the unbridled excess of a State officer, constituting a crime under his State law, action taken "under color of law" which federal law forbids.

Only two reported cases considered § 20 before *United States* v. *Classic,* 313 U. S. 299. In *United States* v. *Bun-*

tin, 10 F. 730, a teacher, in reliance on a State statute, refused admittance to a colored child, while in *United States* v. *Stone,* 188 F. 836, election supervisors who acted under a Maryland election law were held to act "under color of law." In neither case was there a patent violation of State law but rather an attempt at justification under State law. *United States* v. *Classic, supra,* is the only decision that looks the other way. In that case primary election officials were held to have acted "under color of law" even though the acts complained of as a federal offense were likewise condemned by Louisiana law. The truth of the matter is that the focus of attention in the *Classic* case was not our present problem, but was the relation of primaries to the protection of the electoral process under the United States Constitution. The views in the *Classic* case thus reached ought not to stand in the way of a decision on the merits of a question which has now for the first time been fully explored and its implications for the workings of our federal system have been adequately revealed.

It was assumed quite needlessly in the *Classic* case that the scope of § 20 was coextensive with the Fourteenth Amendment. Because the weight of the case was elsewhere, we did not pursue the difference between the power granted to Congress by that Amendment to bar "any State" from depriving persons of the newly created constitutional rights and the limited extent to which Congress exercised that power, in what is now § 20, by making it an offense for one acting "under color of any law" to deprive another of such constitutional rights. It may well be that Congress could, within the bounds of the Fourteenth Amendment, treat action taken by a State official even though in defiance of State law and not condoned by ultimate State authority as the action of "a State." It has never been satisfactorily explained how a State can be said to deprive a person of liberty or property without

due process of law when the foundation of the claim is that a minor official has disobeyed the authentic command of his State. See *Raymond* v. *Chicago Traction Co.*, 207 U. S. 20, 40, 41. Although action taken under such circumstances has been deemed to be deprivation by a "State" of rights guaranteed by the Fourteenth Amendment for purposes of federal jurisdiction, the doctrine has had a fluctuating and dubious history. Compare *Barney* v. *City of New York,* 193 U. S. 430, with *Raymond* v. *Chicago Traction Co., supra; Memphis* v. *Cumberland Telephone Co.,* 218 U. S. 624, with *Home Tel. & Tel. Co.* v. *Los Angeles,* 227 U. S. 278. *Barney* v. *City of New York, supra,* which ruled otherwise, although questioned, has never been overruled. See, for instance, *Iowa-Des Moines Bank* v. *Bennett,* 284 U. S. 239, 246–247, and *Snowden* v. *Hughes,* 321 U. S. 1, 13.[1]

But assuming unreservedly that conduct such as that now before us, perpetrated by State officers in flagrant defiance of State law, may be attributed to the State under the Fourteenth Amendment, this does not make it action under "color of any law." Section 20 is much narrower than the power of Congress. Even though Congress might have swept within the federal criminal law any action that could be deemed within the vast reach of the Fourteenth Amendment, Congress did not do so. The presuppositions of our federal system, the pronouncements of the statesmen who shaped this legislation, and the normal meaning of language powerfully counsel against attributing to Congress intrusion into the sphere of criminal law tradition-

[1] *Iowa-Des Moines Bank* v. *Bennett, supra,* illustrates the situation where there can be no doubt that the action complained of was the action of a State. That case came here from a State court as the ultimate voice of State law authenticating the alleged illegal action as the law of the State. Cases of which *Lane* v. *Wilson,* 307 U. S. 268, is an illustration are also to be differentiated. In that case election officials discriminated illegally against Negroes not in defiance of a State statute but under its authority.

ally and naturally reserved for the States alone. When due account is taken of the considerations that have heretofore controlled the political and legal relations between the States and the National Government, there is not the slightest warrant in the reason of things for torturing language plainly designed for nullifying a claim of acting under a State law that conflicts with the Constitution so as to apply to situations where State law is in conformity with the Constitution and local misconduct is in undisputed violation of that State law. In the absence of clear direction by Congress we should leave to the States the enforcement of their criminal law, and not relieve States of the responsibility for vindicating wrongdoing that is essentially local or weaken the habits of local law enforcement by tempting reliance on federal authority for an occasional unpleasant task of local enforcement.

II

In our view then, the Government's attempt to bring an unjustifiable homicide by local Georgia peace officers within the defined limits of the federal Criminal Code cannot clear the first hurdle of the legal requirement that that which these officers are charged with doing must be done under color of Georgia law.

Since the majority of the Court do not share this conviction that the action of the Georgia peace officers was not perpetrated under color of law, we, too, must consider the constitutionality of § 20. All but two members of the Court apparently agree that insofar as § 20 purports to subject men to punishment for crime it fails to define what conduct is made criminal. As misuse of the criminal machinery is one of the most potent and familiar instruments of arbitrary government, proper regard for the rational requirement of definiteness in criminal statutes is basic to civil liberties. As such it is included in the constitutional guaranty of due process of law. But four

members of the Court are of the opinion that this plain constitutional principle of definiteness in criminal statutes may be replaced by an elaborate scheme of constitutional exegesis whereby that which Congress has not defined the courts can define from time to time, with varying and conflicting definiteness in the decisions, and that, in any event, an undefined range of conduct may become sufficiently definite if only such undefined conduct is committed "willfully."

In subjecting to punishment "deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States," § 20 on its face makes criminal deprivation of the whole range of undefined appeals to the Constitution. Such is the true scope of the forbidden conduct. Its domain is unbounded and therefore too indefinite. Criminal statutes must have more or less specific contours. This has none.

To suggest that the "right" deprivation of which is made criminal by § 20 "has been made specific either by the express terms of the Constitution or by decisions interpreting it" hardly adds definiteness beyond that of the statute's own terms. What provision is to be deemed "specific" "by the express terms of the Constitution" and what not "specific"? If the First Amendment safeguarding free speech be a "specific" provision, what about the Fourth? "All unreasonable searches and seizures are absolutely forbidden by the Fourth Amendment." *Nathanson* v. *United States*, 290 U. S. 41, 46. Surely each is among the "rights, privileges, or immunities secured or protected by the Constitution," deprivation of which is a crime under § 20. In any event, what are the criteria by which to determine what express provisions of the Constitution are "specific" and what provisions are not "specific"? And if the terms of § 20 in and of themselves are lacking in sufficient definiteness for a criminal statute, restriction within the framework of "decisions interpret-

ing" the Constitution cannot show the necessary definiteness. The illustrations given in the Court's opinion underline the inescapable vagueness due to the doubts and fluctuating character of decisions interpreting the Constitution.

This intrinsic vagueness of the terms of § 20 surely cannot be removed by making the statute applicable only where the defendant has the "requisite bad purpose." Does that not amount to saying that the black heart of the defendant enables him to know what are the constitutional rights deprivation of which the statute forbids, although we as judges are not able to define their classes or their limits, or, at least, are not prepared to state what they are unless it be to say that § 20 protects whatever rights the Constitution protects?

Under the construction proposed for § 20, in order for a jury to convict, it would be necessary "to find that petitioners had the purpose to deprive the prisoner of a constitutional right, e. g. the right to be tried by a court rather than by ordeal." There is no question that Congress could provide for a penalty against deprivation by State officials "acting under color of any law" of "the right to be tried by a court rather than by ordeal." But we cannot restrict the problem raised by § 20 to the validity of penalizing a deprivation of this specific constitutional right. We are dealing with the reach of the statute, for Congress has not particularized as the Court now particularizes. Such transforming interpolation is not interpretation. And that is recognized by the sentence just quoted, namely, that the jury in order to convict under § 20 must find that an accused "had the purpose to deprive" another "of a constitutional right," giving *this* specific constitutional right as "e. g.," by way of illustration. Hence a judge would have to define to the jury what the constitutional rights are deprivation of which is prohibited by § 20. If that is a legal question as to which

the jury must take instruction from the court, at least the trial court must be possessed of the means of knowing with sufficient definiteness the range of "rights" that are "constitutional." The court can hardly be helped out in determining that legal question by leaving it to the jury to decide whether the act was "willfully" committed.

It is not conceivable that this Court would find that a statute cast in the following terms would satisfy the constitutional requirement for definiteness:

"Whoever WILLFULLY commits any act which the Supreme Court of the United States shall find to be a deprivation of any right, privilege, or immunity secured or protected by the Constitution shall be imprisoned not more than, etc."

If such a statute would fall for uncertainty, wherein does § 20 as construed by the Court differ and how can it survive?

It was settled early in our history that prosecutions in the federal courts could not be founded on any undefined body of so-called common law. *United States* v. *Hudson,* 7 Cranch 32; *United States* v. *Gooding,* 12 Wheat. 460. Federal prosecutions must be founded on delineation by Congress of what is made criminal. To base federal prosecutions on the shifting and indeterminate decisions of courts is to sanction prosecutions for crimes based on definitions made by courts. This is tantamount to creating a new body of federal criminal common law.

It cannot be too often emphasized that as basic a difference as any between our notions of law and those of legal systems not founded on Anglo-American conceptions of liberty is that crimes must be defined by the legislature. The legislature does not meet this requirement by issuing a blank check to courts for their retrospective finding that some act done in the past comes within the contingencies and conflicts that inhere in ascertaining the content of the Fourteenth Amendment by "the gradual process of

judicial inclusion and exclusion." *Davidson* v. *New Orleans,* 96 U. S. 97, 104. Therefore, to subject to criminal punishment conduct that the court may eventually find to have been within the scope or the limitations of a legal doctrine underlying a decision is to satisfy the vital requirement for definiteness through an appearance of definiteness in the process of constitutional adjudication which every student of law knows not to comport with actuality. What the Constitution requires is a definiteness defined by the legislature, not one argumentatively spelled out through the judicial process which, precisely because it is a process, can not avoid incompleteness. A definiteness which requires so much subtlety to expound is hardly definite.

It is as novel as it is an inadmissible principle that a criminal statute of indefinite scope can be rendered definite by requiring that a person "willfully" commit what Congress has not defined but which, if Congress had defined, could constitutionally be outlawed. Of course Congress can prohibit the deprivation of enumerated constitutional rights. But if Congress makes it a crime to deprive another of any right protected by the Constitution—and that is what § 20 does—this Court cannot escape facing decisions as to what constitutional rights are covered by § 20 by saying that in any event, whatever they are, they must be taken away "willfully." It has not been explained how all the considerations of unconstitutional vagueness which are laid bare in the early part of the Court's opinion evaporate by suggesting that what is otherwise too vaguely defined must be "willfully" committed.

In the early law an undesired event attributable to a particular person was punished regardless of the state of mind of the actor. The rational development of criminal liability added a mental requirement for criminal culpability, except in a limited class of cases not here relevant. (See *United States* v. *Balint,* 258 U. S. 250.) That req-

uisite mental ingredient is expressed in various forms in criminal statutes, of which the word "willfully" is one of the most common. When a criminal statute prohibits something from being "willfully" done, "willfully" never defines the physical conduct or the result the bringing of which to pass is proscribed. "Willfully" merely adds a certain state of mind as a prerequisite to criminal responsibility for the otherwise proscribed act. If a statute does not satisfy the due-process requirement of giving decent advance notice of what it is which, if happening, will be visited with punishment, so that men may presumably have an opportunity to avoid the happening (see *International Harvester Co.* v. *Kentucky,* 234 U. S. 216; *Collins* v. *Kentucky,* 234 U. S. 634; *United States* v. *Cohen Grocery Co.,* 255 U. S. 81; *Cline* v. *Frink Dairy Co.,* 274 U. S. 445), then "willfully" bringing to pass such an undefined and too uncertain event cannot make it sufficiently definite and ascertainable. "Willfully" doing something that is forbidden, when that something is not sufficiently defined according to the general conceptions of requisite certainty in our criminal law, is not rendered sufficiently definite by that unknowable having been done "willfully." It is true also of a statute that it cannot lift itself up by its bootstraps.

Certainly these considerations of vagueness imply unconstitutionality of the Act at least until 1909. For it was not until 1909 that the word "willfully" was introduced. But the legislative history of that addition affords no evidence whatever that anybody thought that "willfully" was added to save the statute from unconstitutionality. The Joint Committee of Congress on the Revision of Laws (which sponsored what became the Criminal Code) gives no such indication, for it did not propose "willfully"; the reports in neither House of Congress shed any light on the subject, for the bill in neither House proposed that "willfully" be added; no speech by anyone in charge of the

bill in either House sheds any light on the subject; the report of the Conference Committee, from which "willfully" for the first time emerges, gives no explanation whatever; and the only reference we have is that to which the Court's opinion refers (43 Cong. Rec., p. 3599). And that is an unilluminating remark by Senator Daniel of Virginia, who had no responsibility for the measure and who made the remark in the course of an exchange with Senator Heyburn of Idaho, who *was* in charge of the measure and who complained of an alleged attitude on the part of Southern members to filibuster against the bill because of the retention of Reconstruction legislation.

All this bears not merely on the significance of "willfully" in a presumably otherwise unconstitutionally vague statute. It also bears on the fact that, for the purpose of constitutionality, we are dealing not with an old statute that goes back to the Reconstruction days, but only to 1909.

Nor can support be found in the opinions of this Court for the proposition that "willfully" can make definite prohibitions otherwise indefinite.

In *Omaechevarria* v. *Idaho,* 246 U. S. 343, the Court sustained an Idaho statute prohibiting any person having charge of sheep from allowing them to graze "upon any range usually occupied by any cattle grower." The statute was attacked under the Due Process Clause in that it failed to provide for the ascertainment of the boundaries of a "range" or for determining what length of time is necessary to constitute a prior occupation a "usual" one within the meaning of the Act. This attack upon the Idaho statute was rejected and for the following reasons:

"Men familiar with range conditions and desirous of observing the law will have little difficulty in determining what is prohibited by it. Similar expressions are common in the criminal statutes of other [grazing] States. This

statute presents no greater uncertainty or difficulty, in application to necessarily varying facts, than has been repeatedly sanctioned by this court." 246 U. S. at 348.

Certainly there is no comparison between a statute employing the concept of a western range and a statute outlawing the whole range of constitutional rights, unascertained if not unascertainable.

To be sure, the opinion of Mr. Justice Brandeis also brought to its support § 6314 of Revised Codes of Idaho which provided that "In every crime or public offense there must exist a union, or joint operation, of act and intent, or criminal negligence." But this is merely an Idaho phrasing of the conventional saw in text books and decisions dealing with criminal law that there must be a *mens rea* for every offense. In other words, a guilty state of mind is usually required before one can be punished for an outlawed act. But the definition of the outlawed act is not derived from the state of mind with which it must be committed. All that Mr. Justice Brandeis meant by "indefiniteness" in the context of this statute was the claim that the statute did not give enough notice as to the act which was outlawed. But notice was given by the common knowledge of what a "range" was, and for good measure he suggested that under the Act a man would have to know that he was grazing sheep where he had no business to graze them. There is no analogy between the face of this Idaho statute and the face of our statute. The essential difference is that in the Idaho statute the outlawed act was defined; in § 20 it is undefined.

In *Hygrade Provision Co.* v. *Sherman,* 266 U. S. 497, New York punished the misrepresentation of meat as "kosher" or as satisfying "orthodox Hebrew religious requirements." Here, too, the objection of indefiniteness was rejected by this Court. The objection bordered on the frivolous. In this case, too, the opinion of the Court, as is the way of opinions, softened the blow by saying that

there was no danger of anyone being convicted for not knowing what he was doing, for it required him to have consciousness that he was offering meat as "kosher" meat when he knew very well that it was not.

Thus in both these cases this Court was saying that the criminal statutes under scrutiny, although very specific, did not expose any innocent person to the hazards of unfair conviction, because not merely did the legislation outlaw specifically defined conduct, but guilty knowledge of such defined criminality was also required. It thereby took the legislation outside the scope of *United States* v. *Balint,* 258 U. S. 250, in which the Court sustained the prosecution of one wholly innocent of knowledge of the act, commission of which the statute explicitly forbade.

This case does not involve denying adequate *power* to Congress. There is no difficulty in passing effective legislation for the protection of civil rights against improper State action. What we are concerned with here is something basic in a democratic society, namely, the avoidance of the injustice of prohibiting conduct in terms so vague as to make the understanding of what is proscribed a guess-work too difficult for confident judgment even for the judges of the highest Court in the land.

III

By holding, in this case, that State officials who violate State law nevertheless act "under color of" State law, and by establishing as federal crimes violations of the vast, undisclosed range of the Fourteenth Amendment, this Court now creates new delicate and complicated problems for the enforcement of the criminal law. The answers given to these problems, in view of the tremendous scope of potential offenses against the Fourteenth Amendment, are bound to produce a confusion detrimental to the administration of criminal justice.

The Government recognizes that "this is the first case brought before this Court in which § 20 has been applied

to deprivations of rights secured by the Fourteenth Amendment." It is not denied that the Government's contention would make a potential offender against this act of any State official who as a judge admitted a confession of crime, or who as judge of a State court of last resort sustained admission of a confession, which we should later hold constitutionally inadmissible, or who as a public service commissioner issued a regulatory order which we should later hold denied due process or who as a municipal officer stopped any conduct we later should hold to be constitutionally protected. The Due Process Clause of the Fourteenth Amendment has a content the scope of which this Court determines only as cases come here from time to time and then not without close division and reversals of position. Such a dubious construction of a criminal statute should not be made unless language compels.

That such a pliable instrument of prosecution is to be feared appears to be recognized by the Government. It urges three safeguards against abuse of the broad powers of prosecution for which it contends. (1) Congress, it says, will supervise the Department's policies and curb excesses by withdrawal of funds. It surely is casting an impossible burden upon Congress to expect it to police the propriety of prosecutions by the Department of Justice. Nor would such detailed oversight by Congress make for the effective administration of the criminal law. (2) The Government further urges that, since prosecutions must be brought in the district where the crime was committed, the judge and jurors of that locality can be depended upon to protect against federal interference with State law enforcement. Such a suggestion would, for practical purposes, transfer the functions of this Court, which adjudicates questions concerning the proper relationship between the federal and State governments, to jurors whose function is to resolve factual questions. Moreover,

if federal and State prosecutions are subject to the same influences, it is difficult to see what need there is for taking the prosecution out of the hands of the State. After all, Georgia citizens sitting as a federal grand jury indicted and other Georgia citizens sitting as a federal trial jury convicted Screws and his associates; and it was a Georgia judge who charged more strongly against them than this Court thinks he should have.

Finally, the Department of Justice gives us this assurance of its moderation:

"(3) The Department of Justice has established a policy of strict self-limitation with regard to prosecutions under the civil rights acts. When violations of such statutes are reported, the Department requires that efforts be made to encourage state officials to take appropriate action under state law. To assure consistent observance of this policy in the enforcement of the civil rights statutes, all United States Attorneys have been instructed to submit cases to the Department for approval before prosecutions or investigations are instituted. The number of prosecutions which have been brought under the civil rights statutes is small. No statistics are available with respect to the number of prosecutions prior to 1939, when a special Civil Rights Section was established in the Department of Justice. Only two cases during this period have been reported: *United States* v. *Buntin,* 10 Fed. 730 (C. C. S. D. Ohio), and *United States* v. *Stone,* 188 Fed. 836 (D. Md.). Since 1939, the number of complaints received annually by the Civil Rights Section has ranged from 8,000 to 14,000, but in no year have prosecutions under both Sections 20 and 19, its companion statute, exceeded 76. In the fiscal year 1943, for example, 31 full investigations of alleged violations of Section 20 were conducted, and three cases were brought to trial. In the following fiscal year there were 55 such investigations, and prosecutions were instituted in 12 cases.

"Complaints of violations are often submitted to the Department by local law enforcement officials who for one reason or another may feel themselves powerless to take action under state law. It is primarily in this area, namely, where the official position of the wrongdoers has apparently rendered the State unable or unwilling to institute proceedings, that the statute has come into operation. Thus, in the case at bar, the Solicitor General of the Albany Circuit in the State of Georgia, which included Baker County, testified (R. 42): 'There has been no complaint filed with me in connection with the death of Bobby Hall against Sheriff Screws, Jones, and Kelley. As to whom I depend for investigation of matters that come into my Court, I am an attorney, I am not a detective and I depend on evidence that is available after I come to Court or get into the case . . . The sheriffs and other peace officers of the community generally get the evidence and I act as the attorney for the state. I rely on my sheriffs and policemen and peace officers and private citizens also who prosecute each other to investigate the charges that are lodged in court.' "

But such a "policy of strict self-limitation" is not accompanied by assurance of permanent tenure and immortality of those who make it the policy. Evil men are rarely given power; they take it over from better men to whom it had been entrusted. There can be no doubt that this shapeless and all-embracing statute can serve as a dangerous instrument of political intimidation and coercion in the hands of those so inclined.

We are told local authorities cannot be relied upon for courageous and prompt action, that often they have personal or political reasons for refusing to prosecute. If it be significantly true that crimes against local law cannot be locally prosecuted, it is an ominous sign indeed. In any event, the cure is a reinvigoration of State responsibility. It is not an undue incursion of remote federal

authority into local duties with consequent debilitation of local responsibility.

The complicated and subtle problems for law enforcement raised by the Court's decision emphasize the conclusion that § 20 was never designed for the use to which it has now been fashioned. The Government admits that it is appropriate to leave the punishment of such crimes as this to local authorities. Regard for this wisdom in federal-State relations was not left by Congress to executive discretion. It is, we are convinced, embodied in the statute itself.

LEGAL SPECTATOR & MORE

Jacob A. Stein

THE COURTHOUSE

This is that theater the muse loves best.
All dramas ever dreamed are acted here.
The roles are done in earnest, none in jest.
Hero and dupe and villain all appear.

Here falsehood skulks behind an honest mask.
And witless truth lets fall a saving word,
As the blind goddess tends her patient task
And in the hush the shears of fate are heard.

Here the slow-shod avengers keep their date;
Here innocence uncoils her snow-white bloom;
From here the untrapped swindle walks elate,
And stolid murder goes to meet his doom.

O stage more stark than ever Shakespeare knew.
What Peacock playhouse will contend with you?

Faded and yellowed with age, this poem, by Justice Wendell Phillips Stafford, has had a place on my office wall for many years. How or when I came by it, I cannot recall. Until recently I knew nothing about its author. The other day an old bencher mentioned Stafford's name and it triggered some research.

Justice Stafford, I've learned, was a Vermonter born in 1861. He practiced law in Vermont and also served as a Vermont judge. In 1904 President Theodore Roosevelt called Stafford to Washington and appointed him to the Supreme Court of the District of Columbia. What long forgotten political intrigues must have brought this all about.

Stafford served some 27 years as a local trial judge. He threw his considerable energy behind prison reform and other worthwhile projects. In time he established an outstanding reputation as a judge. He resigned in 1931 midst great praise for his contribution to the court and to his adopted city. He died in 1953 at age 91.

Justice Stafford's court, although a federal district court, was the local court of general jurisdiction because of the District's odd legal status. Thus Stafford was the daily spectator where all dramas ever dreamed were acted. What did the lawyers who appeared before Stafford think of this man who wrote poetry about the courthouse?

I spoke with three lawyers who did appear in Stafford's court. George Monk and Ed Campbell recall Justice Stafford as a no-nonsense judge who ran a strict court. They recall a mustachioed

man, of erect posture, dignified and reserved. Campbell reminded me that justices became judges when the Supreme Court of the District of Columbia became the United States District Court.

Godfrey Munter recalls the judge as a somewhat irascible man with little patience for lawyers who drifted from the point or who were on the wrong side of the case.

The justice's published writings can be found embalmed in time's aroma in the law division of the Library of Congress. These consist of several books of poetry, an equity textbook, and a book of collected speeches. The speeches contain some worthwhile reflections on law and lawyers. They reveal a fully educated man who gave considerable thought to the practice of law. The naturally gifted lawyer for him was the lawyer with the power to perceive the true relations of things, a commonsense quality. "And who will not admit that common sense is always a gift of nature? If you know of any college that can confer an honest degree in common sense, let me know—I want to send my boy there."

Several lines of thought about the practice in Justice Stafford's day reveal themselves in the poetry and the speeches. His cases involved people and the tricks of human nature rather than large corporate or governmental interests. The cases related to life's passions and compassion and to the vices in conflict with whatever is worthwhile in human nature.

The lawyers who appeared before Stafford were specialists in the unraveling of secret human motivations. They eschewed the assembling of documentary evidence, the taking of discovery depositions, and the filing of Rule 11 motions. These were lawyers whose ambition it was to score a victory in a murder case, as Abraham Lincoln did with the use of the almanac and the phases of the moon.

How would Stafford view the changes 60 years have brought to the practice of law? No doubt the increasingly impersonal nature of the practice would not be to his taste. A number of the changes were summarized by Thurman Arnold in his autobiography, *Fair Fights and Foul.* The practice of law, he wrote, was far more personal years ago. Big-firm law practice nowadays is an anonymous practice. The names of the senior partners do not appear in the firm name. The law offices resemble large corporate headquarters.

The chief asset of the large big-city firm is the appearance it gives of institutional power rather than the personal reputations of its individual lawyers. There is no indispensable man or woman that the client seeks. As a partner gets a more lucrative opportunity, the partner persuades a less important client that some other member of the firm is just as qualified—or even more qualified—than he or she is. The legal talents are fungible. Any partner is presumed to be just as good as any other.

Stafford's poem came to mind again as I read an advertisement for the Courtroom Television Network. The ad announces that real live TV trials are on the way, "whether it's the L.A. cops or John Gotti on trial, or whether the issue is toxic torts or surrogate motherhood. TV brings the courtroom drama right into the home."

Justice Stafford, I feel certain, would have been repelled by the Courtroom Television Network. Litigants, as he saw them, were caught in a web of tragedy that often left permanent scars. Serve up these hapless victims as TV entertainment? Never.

Jacob Stein took part in the Bar Library Lecture Series on January 21, 2009 with a presentation on "Perjury, False Statements & Obstruction of Justice." Generous with his time, Mr. Stein was generous in other ways as well as indicated by the language in the preface to the third volume of *Legal Spectator* from which the following was taken. Mr. Stein wrote "This book is not copyrighted. Its contents may be reproduced without the express permission of, but with acknowledgement to, the author. Take what you want and as much as you want." The works featured in the *Legal Spectator*, originally appeared in the *Washington Lawyer*, the *American Scholar*, the *Times Literary Supplement*, the *Wilson Quarterly*, and the ABA Litigation Section's publication. I want to thank Bar Library Board of Director Henry R. Lord for his time and efforts in reviewing the writings of Mr. Stein for inclusion in the *Advance Sheet*.