CONSTITUTIONAL LAW

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The purpose of the following article is to illustrate something of the nature of the work of the Court of Appeals for the Fifth Circuit in dealing with constitutional issues during the survey period, and to comment upon those cases that, because of their novelty or possible long-range effect, seem likely to be of more than ordinary importance. Of course the important case to a lawyer is the precedent most nearly like the case he is working on at the moment, so estimates of importance can never be universally correct. Also, the field of constitutional law is a rapidly changing one, with gait and direction of movement increasingly uncertain. Thus the selection of cases for comment can be undertaken only with slight confidence and modest hope.

The initial and broad classification of cases as non-criminal or criminal is based upon the nature of the constitutional question presented, regardless of the way in which the question arose. Thus, freedom of press cases are treated as non-criminal even if the question is presented in the context of a criminal prosecution, and a case turning upon a protection designed for one accused of crime is classified as criminal even if it arises in, *e.g.*, the habeas corpus (civil action) context.

FIRST AMENDMENT

The scope of the first amendment's protection of defamatory publications was further delineated by the court in *Firestone v. Time, Inc.*[1] Plaintiff, who had also been the plaintiff in a divorce action, based her complaint on the publication in *Life* magazine of a statement suggesting that, by bribery, she had induced an employee of the private detective, hired by her husband, in order to persuade him to work for her. The magazine article was on the general subject of electronic eavesdropping, which the court found was undoubtedly "a matter of general public concern." The publisher's constitutional privilege was therefore, under the ruling of *Rosenbloom v. Metromedia*[2] to be tested by the standard laid down in *New York Times Co. v. Sullivan*,[3] that is, plaintiff could not recover without proving that the publisher knew the statement was false or made it with reckless disregard of its truth or falsity. The case

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1. 460 F.2d 712 (5th Cir. 1972).
2. 403 U.S. 29 (1971).
3. 376 U.S. 254 (1964).

seems to apply soundly the rule of *Metromedia* that the protection extends further than just that accorded to publications that concern public officials in the conduct of their official business.

The *Firestone* case is an interesting example of the importance of the way in which the court approaches a legal issue. The court viewed the question as being whether the subject of the article—electronic eavesdropping—was one of general public concern. Finding that it was, the *Metromedia* test was confidently applied. In contrast, the Supreme Court of Florida, in a similar action involving the same parties, found that when the *Metromedia* test is invoked as a defense on the basis of the prominence of the persons involved, there must be a "*logical relationship* between the reported activities of the prominent person, or between the subject matter of the conduct, occasion or event reported or recorded, and the real concern of the public."[4] The state court action was based on an article in *Time* magazine stating erroneously that one ground for the divorce was adultery. Although the Florida Supreme Court found that the plaintiff and her husband, who was an heir to an immense fortune, were socially prominent people with well-known marital difficulties and that their divorce action was "a veritable *cause celebre* in social circles across the country," there was no real public concern in their divorce such as would warrant invoking the *Metromedia* rule. In reconciling the cases, as the Florida court sought to do, one has to say that electronic eavesdropping is a matter of public concern, while a divorce action—even of prominent people, and following a 17-month trial that was widely reported in the daily press—is not. It is not at all certain that there is a distinction between these cases that clearly helps define and locate the area that the first amendment protects.

A second important aspect of the Fifth Circuit court's treatment of the first amendment question in *Firestone* is the proper role of an appellate court in evaluating the evidence; and on this issue Judge Ainsworth, writing the opinion of the court, did not satisfy either Judge Bell or Judge Godbold, although both of them concurred in the result. The difference in opinions may be basically semantic rather than functional, since Judge Ainsworth obviously used the term "de novo" to refer to the appellate court's careful review of the facts in the record, and not to a trial anew. But surely Judge Bell is right in deploring the indiscriminate use of the term. A proliferation of definitions must inevitably lead to lack of precision in communication.

4. Firestone v. Time, Inc., 271 So.2d 745, 751 (Fla. 1972).

In *Cassano v. WDSU-TV, Inc.*,[5] the *Sullivan* and *Metromedia* principles were applied to telecasts concerning the qualifications of a candidate for political office, and possibly reflecting upon plaintiff, who was an attorney and was not a candidate. The sting of the telecasts was in regard to possible underworld connections, but the subject was the qualifications of a candidate, an area of public interest of high importance and thus entitled to broad protection even when the statements are not true.

In *Mistrot v. True Detective Publishing Corp.*,[6] the court found that a double murder was as much within the area of public and general concern as the police campaign against pornography that furnished the justification in *Metromedia*.

The first amendment obviously does not afford absolute privilege to a publisher to communicate anything he wishes, wherever and whenever he chooses. Thus a state can constitutionally enjoin an outdoor motion picture theatre so operated as to stop highway traffic.[7]

The court enthusiastically struck down a municipality's grant to an administrative official of its right to determine the basis upon which the city's auditorium would be rented when, using "family entertainment" as his standard, he denied the auditorium to a promoter who sought to rent it for a showing of the musical "Hair."[8] The municipal auditorium was said to be probably even more of a public place for first amendment purposes than was a city street. Also, the lack of any real standard gave a city employee uncontrolled discretion to decide what would be exhibited there, thus creating a situation of prior restraint with great potential for denying equal protection. The court twice referred to the situation as "constitutionally intolerable" in concluding that the auditorium manager's dictate could not "withstand the mildest breeze emanating from the Constitution."[9]

Without citing judicial precedent on the constitutional question, the court held the Railroad Retirement Board had correctly denied an application for an annuity by an elected city alderman,[10] and that he was not put to an unconstitutional choice between serving as alderman or receiving an annuity to which he would otherwise be entitled. In effect, the individual was held to have waived rights that are cognate to those specified in the first amendment.

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5. 464 F.2d 3 (5th Cir. 1972).
6. 467 F.2d 122 (5th Cir. 1972).
7. 80 Drive-In, Inc. v. Baxley, 468 F.2d 611 (5th Cir. 1972).
8. Southeastern Promotions, Ltd. v. City of West Palm Beach, 457 F.2d 1016 (5th Cir. 1972).
9. *Id.* at 1017.
10. Davenport v. Railroad Retirement Bd., 453 F.2d 185 (5th Cir. 1972).

First amendment rights were found to be violated by a court order forbidding the publication of testimony given in open court, but the vindication of those rights was incompletely enforced.[11] The trial court had issued the unconstitutional order in connection with an abstention hearing. The court's purpose was to protect the sixth amendment fair trial rights of a prospective defendant in an anticipated future criminal prosecution. Two newspaper reporters with full knowledge of the trial court's order, nevertheless, published the details of the testimony. They were found guilty of criminal contempt and fined $300. A lucid and helpful opinion by Chief Judge Brown puts the free press-fair trial dilemma in historical, legal, and logical perspective, and concludes that the trial court acted unconstitutionally in forbidding publication of testimony given in open court.

The invalidity of the trial court's order, however, does not mean that those who violate it may not be punished for contempt. The court of appeals sought to explain why a court can command obedience to its unconstitutional order while an unconstitutional legislative enactment or executive order may be violated with impunity. Law enforcement by the executive can continue even though the policeman's unconstitutional order is ignored, and the legislative function of passing laws can continue though invalid statutes are violated, but the judiciary's unique role of making determinations in the form of orders would require it to take further action when its orders, valid or not, are violated. Thus its ability to function would be impaired. Although the result reached here is in line with a distinction approved by the Supreme Court,[12] the reasoning is not entirely convincing. The impact of this rule upon first amendment freedoms is uncertain, but the danger is real. It is not supposed that this district judge will issue such an unconstitutional order in the future, but if he or other judges do so, the press must obey, being remitted to the burden of then initiating an action to have an appellate court set aside the order. In the meantime, there is censorship in the classic prior restraint form. The court here found that none of the qualifications of the doctrine[13] applied, and while admitting that only a matter of hours distinguishes "news" from "history," the court said that newsmen "may sometimes have to wait." The inevitable delay thus caused by an unconstitutional order, in addition to the trouble and expense of litigating,

11. United States v. Dickinson, 465 F.2d 496 (5th Cir. 1972).

12. Walker v. City of Birmingham, 388 U.S. 307 (1967); Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969).

13. Jurisdiction by the court over person and subject matter, availability of adequate and orderly review, and lack of irretrievable loss of constitutional rights. 465 F.2d at 511.

may well lead a publisher to comply with the order and let the news go unreported. The price thus paid may be heavy. Although this case was remanded to the trial court for consideration of the appropriateness of the contempt judgment and of the punishment for it, the trial court has the option of permitting both to stand.

In *United States v. Featherstone*,[14] the court sustained a conviction for teaching the use of weapons in furtherance of a civil disorder[15] as against the contention that the statutory language "knowing or having reason to know" was unconstitutionally vague. The court construed the statute as requiring an intent that the activity be employed to further a civil disorder and held the language was thus sufficiently specific to advise an ordinary man as to what would constitute a violation. The court also held that the evidence as to a trained group ready to strike was sufficient to show the clear and present danger the first amendment requires for the punishment of teaching. As to the latter point, the court relied solely upon *Dennis v. United States*,[16] although it may be argued that the later test of "imminent lawless action" as set forth in *Brandenburg v. Ohio*[17] is more restrictive of Congressional power than the "clear and present danger" test of *Dennis*.

The religion aspect of the first amendment arose much less frequently than the communication aspect. A district court's order enjoining the Governor of Alabama from enforcing a statute requiring Bible-reading in public schools[18] was upheld, and the claim that the statute was not unconstitutional on its face was so insubstantial that the district court need not empanel a three-judge court.[19]

JURY TRIAL

The constitutional issue in *Cooley v. Strickland Transportation Co.*[20] was whether a federal district court rule setting the number of jurors at six in all civil actions violated the sixth amendment's guarantee of "the right of trial by jury" in common law action. In this diversity tort action all parties objected to a jury having only six members, but the court of appeals found the local rule valid, largely on the basis of the holding of the Supreme Court[21] that the "jury" guaranty in the sixth amendment

14. 461 F.2d 1119 (5th Cir. 1972).
15. 18 U.S.C. § 231(a)(1) (1970).
16. 341 U.S. 494 (1951).
17. 395 U.S. 444 (1969).
18. Alabama Civil Liberties Union v. Wallace, 331 F. Supp. 966 (M.D. Ala. 1971).
19. Alabama Civil Liberties Union v. Wallace, 456 F.2d 1069 (5th Cir. 1972).
20. 459 F.2d 779 (5th Cir. 1972).
21. Williams v. Florida, 399 U.S. 78 (1970).

for criminal trials was satisfied by a jury consisting of six members, and thus the term was not limited to mean only the jury that at common law traditionally consisted of twelve persons. Of course, the Constitution does not anywhere specify jury size. The court followed the reasoning of the Supreme Court to the extent that it was applicable, but more basically found that to permit a six-member jury in criminal cases while requiring a twelve-member jury in civil causes "would be anomalous to the point of irrationality. . . ."[22]

Due Process

The court held that Mississippi's replevin statute fell under the principles of recent United States Supreme Court decisions[23] holding that due process is denied when state statutes authorize seizure of the debtor's property from his possession without prior notice and hearing.[24]

Despite the somewhat restrictive impact of *Board of Regents v. Roth*[25] to the effect that a college professor without a contract or tenure does not have a right of property entitled to due process protection, the court recognized that due process may be denied if the state's agency applies an otherwise valid policy in retaliation for the professor's exercise of first amendment rights.[26] This issue was not before the Supreme Court in *Roth*. In the instant case the court did not take the charge as proven, but there is clear recognition of a limitation of the basis upon which the state may discharge even an employee who has no property right to future employment.

Issues of both substantive due process and procedural due process confronted the court in *McDowell v. Texas*,[27] which held that a state employee was not denied either of these protections, even on the assumption that plaintiff had been fired from a state position contrary to state law and because of local political considerations. As to substantive due process, the court found that plaintiff's rights were governed entirely by state law. On the issue of procedural due process the court held that the state employee did not have a right to a hearing, since he lacked an expectancy of continued employment, and failed to assert the violation of any specific constitutional right as a basis for his dismissal.

22. 459 F.2d at 781.

23. Lynch v. Household Fin. Corp., 405 U.S. 538 (1972); Fuentes v. Shevin, 407 U.S. 67 (1972).

24. Turner v. Colonial Fin. Corp., 467 F.2d 202 (5th Cir. 1972).

25. 408 U.S. 564 (1972).

26. Lewis v. Spencer, 468 F.2d 553 (5th Cir. 1972).

27. 465 F.2d 1342 (5th Cir. 1972).

Although the court recognized that a state is not as free as a private employer from restrictions upon its dealing with employees, the court found that a state may hire employees without giving them tenure or "rights of job continuity." The court concluded that the Supreme Court's decision in *Roth* and *Perry v. Sindermann*,[28] the latter arising from the Fifth Circuit, confirmed the opinion the Court of Appeals had originally reached.

In *Karr v. Schmidt*[29] the court by an 8-7 decision held against a high school boy who had sought (and in the trial court obtained) an injunction against a public school board, restraining the board from enforcing a hair-length regulation that had been invoked to prevent his enrollment. The opinion by Judge Morgan was agreed to by six other judges. Judge Bell concurred specially, and there were three separate dissenting opinions. The split in the court is emphasized by Judge Tuttle's specially concurring opinion in a later case[30] stating that if he had been a member of the en banc court that decided *Karr v. Schmidt* he, too, would have dissented. The opinion of the court in *Karr* found that the right to wear one's hair a particular way is not protected by the first amendment.[31] The right of personal privacy found by the Supreme Court in *Griswold v. Connecticut*[32] was thought not to be properly expandable to include the right of an individual to wear his hair as he pleased, and such a right was said to be insufficiently important to receive substantive due process recognition. Finally, the court denied the equal protection argument on the basis that the classification was not founded on suspect criteria, and thus the undemanding "no rational basis" test was readily satisfied. Upon the foundation thus laid, the court constructed a "per se" rule that grooming codes are constitutionally valid, and directed district courts to dismiss for failure to state a valid claim any complaint merely alleging the constitutional invalidity of such regulations.

The decision may cause one to believe that the judges have simply evaluated long hair and concluded that the issue is not important enough to waste the time of the federal judiciary which "has urgent tasks to perform,"[33] and the conclusion suggests insensitivity to the intensity

28. ___ U.S. ___, 92 S.Ct. 2694 (1972).

29. 460 F.2d 609 (5th Cir. 1972), *cert. denied*, ___ U.S. ___, 93 S.Ct. 307 (1972).

30. Sherling v. Townley, 464 F.2d 587 (5th Cir. 1972).

31. Obviously the court has reference to the speech and press provisions of the first amendment. If a particular hair style were required by one's religious beliefs, it may be suggested that the first amendment's protection of the free exercise of one's religion would be ample to prevent the enforcement of a grooming code such as the one at issue here.

32. 381 U.S. 479 (1965).

33. 460 F.2d at 618.

and seriousness with which a high school student may hold convictions for which he has very limited means of expression. The dissenting opinions, stressing the fundamental nature of the right involved, the improper classification of students on a basis found by the district judge to have no reasonable relationship to the educational process, and the relatively long-lasting impact on the individual who conforms,[34] all suggests that the opposite result would have more securely preserved individual rights and would have encouraged school officials to direct their energies to more pertinent and pressing problems than enforcing their idea of whether a high school boy's hair should be above or below his shirt collar.

EQUAL PROTECTION

Preferring legitimate children over illegitimate children was found constitutionally permissible in *Parker v. Secretary of H.E.W.*[35] At issue was that portion of the Social Security Act[36] giving priority to the legitimate children of a deceased wage earner so that an acknowledged illegitimate child is denied benefits if payments to legitimate children will exhaust available benefits. Although the court adopted the not unreasonable approach that the result complained of was not improper because Congress may have had in mind counterbalancing the possibility of the illegitimate child's receiving benefits from his legal father, it is not at all certain that the court's approach will stand in the future. The court primarily relied upon precedents from the field of equal protection. While this provision is not in terms applicable to Congressional statutes, equal protection may be regarded as a more narrow, more specific illustration of the broader principle of due process. The future of the decision will probably depend upon whether the court correctly analyzed *Labine v. Vincent*[37] as resolving "[a]ny doubt in regard to the legislature's power to distribute rights on the basis of status stemming from legitimate or illegitimate birth. . . ."[38] When writing the opinion, Judge Bell did not have the benefit of the subsequent Supreme Court decision in *Weber v. Aetna Casualty & Surety Co.*,[39] which struck down a provision of Louisiana's workmen's compensation law because of its failure to give unacknowledged illegitimate children rights of re-

34. "[H]e cannot grow and ungrow his hair." *Id.* at 624 (Roney, J., dissenting).
35. 453 F.2d 850 (5th Cir. 1972).
36. 42 U.S.C. § 403 (1970).
37. 401 U.S. 532 (1971).
38. 453 F.2d at 852.
39. 406 U.S. 164 (1972).

covery equal to those of dependent legitimate children. In doing so, the Court distinguished *Labine v. Vincent* as reflecting "the traditional deference to a State prerogative to regulate the disposition at death of property within its borders."[40] Of course, no such factors are to be found in the Social Security Act. Furthermore, the reliance of the court of appeals upon Congress's wish to strengthen and preserve family ties now seems less secure. The Court in *Weber* pointed to the lack of rational relationships between statutory benefits and the prevention of illicit relations, and it characterized condemning an infant for his parents' irresponsible extra-marital liaison as "illogical and unjust." Also, the Court in *Weber* suggests that the rights of an illegitimate child may well be of the sensitive and fundamental nature that will in any case require something more than mere rationality to justify a classification that imposes unfavorable consequences upon him.

Similarly, the court upheld a provision of the Immigration and Nationality Act[41] which fails to confer citizenship upon the adopted child whose parents are naturalized, although citizenship is granted to a natural child under the same circumstances.[42] Congress's power to treat adopted children differently from natural children was said to follow from the nature of naturalization as a matter of grace.[43]

A troublesome question of the sale of public school property to a private group confronted the court in *McNeal v. Tate County School District*,[44] which was an action to set aside the sale on the basis that the purchasers would operate an all-white school on the property. The court was greatly concerned to see that the public school system did not foster racially segregated educational facilities. When the case was first decided, the court ordered the sale to the private foundation set aside on the ground that school boards have an affirmative duty to create a unitary school system, and that even though the board in selling the dilapidated, scanty and uneconomic school facilities did not know the purchasers' intended use of the property, they knew of efforts to thwart integration, and they had a duty to make inquiries. Judge Gewin strongly dissented on the basis that the court's findings were not supported by the facts and that the duty to investigate the purchasers' use

40. *Id.* at 170.

41. 8 U.S.C. § 1432(b) (1970).

42. Hein v. U.S. Immigration and Naturalization Serv., 456 F.2d 1239 (5th Cir. 1972).

43. It may be noted that the court treats the question as one arising under the equal protection clause of the fourteenth amendment, although of course the challenge should have been on the basis of the due process clause of the fifth amendment.

44. 460 F.2d 568 (5th Cir. 1972).

of the property was improperly placed. Upon petitions for rehearing the court modified its judgment by permitting the sale to stand, but ordering the purchasers not to operate the facilities as a private school except on a nondiscriminatory basis. The court cautioned school authorities that in considering the sale of public school property they should avoid its conversion to discriminatory private schools. The opinion is not fully satisfactory as to how this consequence should be avoided—in effect, is there to be an implied covenant running with the land, as Judge Gewin perceives the majority to create? On the other hand, while the court is seeking to foster an important equal protection concept, will the injunction to prevent racial discrimination actually be of any effect? The court pointed out that the purchaser had "assembled an all-white faculty and staff and accepted applications from 134 white students."[45] The court went on to point out that no black students had applied because the financial cost of tuition was outside the reach of most black families in the area.

The court upheld a lower court's holding enjoining public officials from denying building permits for the purpose of perpetuating a pattern of residential racial segregation.[46]

In a class action by black citizens alleging jury commissioners had systematically excluded blacks from the jury rolls, the court held that the gross disparity between the percentage of eligible black adults in the community and the percentage of blacks on the jury list shifted to the state the burden of justifying the disqualification of so many blacks. Thus the lower court had erred in accepting the jury commissioners' reasons without holding a hearing on the question.[47]

The equal protection clause was the basis for holding that Florida's constitutional and statutory provisions were invalid in restricting to owners of freeholds the right to vote on ad valorum taxes.[48]

In *Romero v. Coldwell*,[49] the court applied the abstention doctrine to dismiss a class action to determine whether the one-man, one-vote rule applies to elected justices of the peace. Texas law on the issue of jurisdiction of justices of the peace was found to be unclear, and since Texas courts might construe the law in such a way as to avoid constitutional litigation, it was proper for the federal courts to abstain.

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45. *Id.* at 570.

46. Crow v. Brown, 457 F.2d 788 (5th Cir. 1972).

47. Black v. Curb, 464 F.2d 165 (5th Cir. 1972).

48. Tornillo v. Dade County School Bd., 458 F.2d 194 (5th Cir. 1972), relying upon the line of United States Supreme Court cases beginning with Kramer v. Union Free School Dist., 395 U.S. 621 (1969).

49. 455 F.2d 1163 (5th Cir. 1972).

CRIMINAL LAW

Most constitutional law cases during the survey period arose from a criminal law background, with the validity of searches and seizures most frequently presented. This question shares with many others the characteristic of being so heavily dependent upon its factual setting that broad conclusions can rarely be drawn, and a case-by-case factual analysis or summary would be tedious and relatively unrewarding. For this reason only a comparatively small number of criminal law cases have been selected for comment.

Congressional power derived from the commerce clause has been used so extensively and in recent decades has been upheld so consistently, that it is surprising to find within the survey period four cases in which it was seriously contended that the activities made criminal were local in nature and were thus beyond the reach of Congress. It is less surprising to note that the challenge failed in each case.[50]

The difficult question as to the extent, if at all, a newly announced constitutional principle of criminal law will apply retroactively split the court in *Bassett v. Smith*,[51] the question arising in the context of the holding that the Georgia courts' instructions as to the proof of an alibi defense violated due process. The crucial date for beginning application of the new ruling was held to be the date on which the Supreme Court denied certiorari in a case holding unconstitutional an Iowa alibi instruction quite similar to that of Georgia. The court weighed each of the three significant factors—the purpose of the new rule, the extent of reliance upon the old rule, and the effect of retroactivity on the administration of justice. Concluding that the impact of the older rule upon the integrity of the fact-finding process was problematical, the court decided that complete retroactivity was not required. On the other hand, the effect of complete retroactivity would be extensive, and state authorities could justifiably have concluded that the instruction was valid until the Supreme Court, by denying review of a case invalidating a similar charge put them on notice of the defect in theirs.[53]

The question of complete retroactivity was more easily resolved in *Vaccaro v. United States*,[54] where the court, in an opinion by Chief

50. United States v. Lebman, 464 F.2d 68 (5th Cir. 1972); United States v. Webb, 463 F.2d 1324 (5th Cir. 1972); United States v. Harris, 460 F.2d 1041 (5th Cir. 1972); United States v. Lopez, 459 F.2d 949 (5th Cir. 1972); United States v. Nelson, 458 F.2d 556 (5th Cir. 1972).

51. 464 F.2d 347 (5th Cir. 1972).

52. Smith v. Smith, 454 F.2d 572 (5th Cir. 1971).

53. The court attributes significance to the denial of certiorari because of the sequence of cases arising from the Eighth Circuit and involving the Iowa instruction. 464 F.2d at 352.

54. 461 F.2d 626 (5th Cir. 1972).

Judge Brown containing many helpful examples, held that the invalidation of a statutory presumption should be applied retroactively because the use of the invalid presumption may have caused convictions of many defendants who, in fact had not violated the statute.

A denial of equal protection of indigent defendants was found in a penal system that imposed alternative punishment of imprisonment or a fine but required immediate payment of the fine.[55] Starting with the proposition that the resulting basic classification was defined by the suspect criterion of wealth and thus required the state to show it was necessary for the purpose of furthering a compelling state interest, the court held the state failed to do so. Methods of fine collection other than immediate payment could adequately serve the state's interest in punishment and prevention. Judge Coleman dissented on the basis that installment-plan collection of fines was illusory and that the court's decision deprived defendants with funds of the equal protection of the law.

During the survey period the court was badly split on a petition for rehearing and a petition for rehearing en banc[56] of a case decided before this period began and involving the constitutonality of the conditions under which prisoners were kept in solitary confinement by the Texas Department of Corrections. Three justices of the Supreme Court dissented from the denial of certiorari in this case, with Mr. Justice Douglas writing a strong opinion.[57] With so many judicial minds so firmly convinced that unconstitutional practices were being followed, it seems regrettable that the fullest and highest consideration was not given to the questions raised.

In other cases, too, the court demonstrated an unwillingness to become involved with the administration of state prisons,[58] although the court showed that it was eager to protect a prisoner's right of access to the courts.[59]

Imposing upon a defendant a harsher penalty than the penalty he received after a first trial which he has had reversed for error was sustained in *Chaffin v. Stynchcombe*,[60] which construed the Supreme Court holding in *North Carolina v. Pearce*[61] as designed to prevent

55. Frazier v. Jordan, 457 F.2d 726 (5th Cir. 1972).

56. Novak v. Beto, 456 F.2d 1303 (5th Cir. 1972).

57. ___ U.S. ___, 93 S.Ct. 279 (1972).

58. *See, e.g.*, Gardner v. Thompkins, 464 F.2d 1031 (5th Cir. 1972); Huguenot v. Wainwright, 464 F.2d 1077 (5th Cir. 1972).

59. *See, e.g.*, Hooks v. Kelley, 463 F.2d 1210 (5th Cir. 1972); Brown v. Wainwright, 464 F.2d 1034 (5th Cir. 1972).

60. 455 F.2d 640 (5th Cir. 1972).

61. 395 U.S. 711 (1969).

apprehension of a retaliatory motive on the part of the trial judge. Chaffin had received a 15-year sentence from the jury that first found him guilty, and a life sentence from the jury when he was re-tried after he had the first trial set aside. The court pointed out that as the second trial was before a judge and jury different from those at his first trial, there could have been no purpose to punish him for having exercised his right to have the first conviction set aside.[62] The precise reasoning of the court is convincing, but the effect of the holding may be to discourage defendants from attacking invalid convictions if they know they may fare even worse upon a new trial.[63]

The court's holding in *Braswell v. Wainwright*[64] was unusual but apparently quite sound and warrants mention in spite of being highly dependent upon its particular facts. Defendant was convicted of aggravated assault after a trial at which he invoked the "rule" that witnesses be sequestered. Defendant's first witness (one Rogers), who was his only corroborating witness to his claim of self defense, was a friend who had accompanied him to a bar at which other patrons were hostile. Rogers had, in apparent innocent violation of the rule, and without the knowledge of defendant or his attorney, entered the courtroom and heard all of the prosecution testimony, and for that violation of the rule he was precluded from testifying. The court found this action violative of defendant's sixth amendment right to call witnesses in his behalf and of his due process right to a fair trial.[65]

The exclusionary rule of *Miranda v. Arizona*[66] was held inapplicable to a hearing to revoke probation even though the probationer's statements elicited without the *Miranda* caution provided the sole basis for the revocation.[67] A hearing to revoke probation is like an administrative hearing involving rehabilitation, and it would be poisonous to inject it with the protections accorded in an adversary or criminal proceeding.

A defendant can be asked his name without being given the *Miranda* warning.[68]

When the government obtains a statement from a defendant without a lawyer being present, the government must carry the heavy burden of

62. The same result was reached in Casias v. Beto, 459 F.2d 54 (5th Cir. 1972).

63. The court points out that its view is not shared by the Fourth Circuit, citing Levine v. Peyton, 444 F.2d 525 (4th Cir. 1971).

64. 463 F.2d 1148 (5th Cir. 1972).

65. Because the witness who was excluded died after the trial, the court imposed specific limitations upon the state if it should elect to try the defendant again.

66. 384 U.S. 436 (1966).

67. United States v. Johnson, 455 F.2d 932 (5th Cir. 1972).

68. United States v. Jones, 457 F.2d 697 (5th Cir. 1972).

showing waiver of the *Miranda* rights, but this burden can be carried.[69]

Without demonstrating prejudice, a defendant cannot complain about a delay that occurred prior to the time when he asked for a speedy trial.[70]

Although a suspect subjected to custodial interrogation is given many cautions, he does not have the full benefit of *Miranda* unless he is advised that he is entitled to the presence of an attorney during the interrogation.[71]

A pretrial exhibition to the prosecution's key witness of defendant while he was bound by leg irons and handcuffed to a man identified as a robber, and the later in-court identification of defendant by the witness, constituted denial of due process.[72]

When defendant, after a lawful arrest, requested officers to safeguard his property (bags in a truck that could not be locked), whatever the officers discovered while making an inventory of the bags came to their attention through a search to which defendant consented, and thus a motion to suppress was properly denied.[73]

Denial of due process may result from good faith errors of retained counsel that deprive defendant of his right to appeal, such as by incorrectly advising defendant that he would be eligible for parole by the time for perfecting an appeal when in fact parole was prohibited for the offense for which defendant was convicted.[74]

In *Bueno v. Beto*[75] the court followed the rule of *Stovall v. Denno*[76] that extension of the right to the assistance of counsel to post-indictment line-ups[77] would not be given retroactive effect.[78]

Congress's power to make rules and regulations for a territory of the United States[79] prevails over the fifth amendment's grand jury requirement, so as to make indictment for infamous crimes unnecessary in the Canal Zone.[80]

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69. United States v. Brown, 459 F.2d 319 (5th Cir. 1971).
70. United States v. Jones, 457 F.2d 697 (5th Cir. 1972).
71. Sanchez v. Beto, 467 F.2d 513 (5th Cir. 1972).
72. United States v. Johnson, 461 F.2d 1165 (5th Cir. 1972).
73. United States v. Ratner, 464 F.2d 169 (5th Cir. 1972).
74. Arrastia v. United States, 455 F.2d 736 (5th Cir. 1972).
75. 458 F.2d 457 (5th Cir. 1972).
76. 388 U.S. 293 (1967).
77. As developed in United States v. Wade, 388 U.S. 218 (1967) and Gilbert v. California, 388 U.S. 263 (1967).
78. *See also* Gonzales v. Beto, 460 F.2d 314 (5th Cir. 1972).
79. U.S. CONST. art. IV, § 3.
80. Canal Zone v. Griffith, 459 F.2d 1036 (5th Cir. 1972).