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Recent Trends in the Criminal Law

not yet widely regarded as criminal.[113] However, the existence of injunctive relief along with the criminal sanctions, establishes the Refuse Act of 1899 as a formidable anti-pollution enactment. The Refuse Act Permit Program curtails the applicability of the Refuse Act and attempts to link it to the Federal Water Pollution Control Act by limiting the imposition of the Refuse Act penalties to instances where an industry has failed to comply with FWPCA-approved water quality standards and has not received a permit. By relying on water quality standards, the Refuse Act Permit Program imposes criminal liability without regard to the harm done to the receiving waterway by a particular discharge. This result is contrary to the purpose of the Refuse Act as expressed by the Supreme Court in *United States v. Republic Steel Corp.*,[114] and to the national policy of nondegradation as expressed by the Congress in the National Environmental Policy Act of 1969.[115] The Federal Water Pollution Control Act[116] sets a different standard of compliance than the one laid down in the Refuse Act. While under the Refuse Act, all discharges made without a permit constitute a criminal offense, the FWPCA states that only discharges of certain substances above specified levels are civil offenses, and are not subject to criminal presecution. The three programs when considered together constitute a confusing, contradictory, and seldom effective scheme for regulating water pollution.

To eliminate the confusion produced by the existing series of legislative enactments dealing with water pollution and to insure non-degradation of the waterways, a comprehensive re-expression of Congressional intent is necessary—one that has as its aim the eventual elimination of all discharges. Congress must establish a readily enforcible enforcement procedure with meaningful deterrent levels. This procedure might provide civil penalties for negligent and minor offenses with criminal sanctions like those of the Refuse Act but with more stringent punishments reserved for cases of willful and extreme violations. Such a scheme would preserve the stigma of criminality for blatant violations where culpability is greatest, and establish more effective criminal deterrents. The proposed Senate amendment to the FWPCA[117] has many of these attributes.

[113] *See* notes 34 and 35 *supra*.
[114] 362 U.S. 428 (1960).
[115] 42 U.S.C. §§ 4332 *et seq.* (Supp. V, 1970).
[116] 33 U.S.C. §§ 1151 *et seq.* (1970).
[117] *See* note 105 *supra*.

RECENT TRENDS IN THE CRIMINAL LAW

NONUNANIMOUS VERDICTS

In *Johnson v. Louisiana*, 92 S.Ct. 1620 (1972), and *Apodaca v. Oregon*, 92 S.Ct. 1628 (1972), the Supreme Court held that 9-3 and 10-2 verdicts, respectively, are constitutionally sufficient to convict in state criminal trials. In *Johnson*, tried before the sixth amendment was applied to the states,[1] the defendant claimed that less than unanimous verdicts circumvented the due process requirement of proving guilt beyond a reasonable doubt.[2] Mr. Justice White, writing for a five-justice majority, rejected the argument that nine individual jurors could not vote conscientiously in favor of guilt beyond a reasonable doubt when three of their colleagues are arguing for acquittal. He perceived no basis for concluding that the nine Jurors voting for conviction disregarded the instruction pertaining to standard of proof. The majority also held that three acquittal votes did not demonstrate that guilt was not in fact proved beyond reasonable doubt. The Court emphasized that a "substantial majority" of the jury was convinced, and there was no reason to equate lack of unanimity with the existence of reasonable doubt.

In *Apodaca* four justices agreed that the sixth amendment applied in its entirety to the states, but concluded that its guarantee of a jury trial does not require unanimous verdicts. Justice White, joined by Chief Justice Burger, and Justices Blackmun and Rehnquist, noted that the drafters of the Bill of Rights deleted from the sixth amendment the express requirement of unanimity in criminal cases. Furthermore, the plurality felt that the historical purpose of the jury, to interpose the common sense of laymen between the accuser and the accused, did not compel unanimous verdicts.

[1] The sixth amendment right to trial by jury was made applicable to the states in Duncan v. Louisiana, 391 U.S. 145, 149 (1968). *Duncan* does not apply retroactively. DeStefano v. Woods, 392 U.S. 631, 633 (1968).
[2] *In re* Winship, 397 U.S. 358, 363–64 (1970), held that the due process clause of the fourteenth amendment protects an accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

Mr. Justice Powell, although concurring in the result, argued that historically the sixth amendment right to jury trial has carried with it the safeguard of unanimous verdicts in federal trials. However, he contended that the due process clause of the fourteenth amendment does not incorporate all the particulars of the sixth amendment right to a jury trial. Therefore, he concluded, the states are free, within certain bounds, to experiment with jury trial variations.

Justices Douglas, Stewart, Brennan and Marshall dissented in both cases. Justice Douglas, joined by Justices Brennan and Marshall, pointed out that the Court long ago held that the verdict in civil trials must be unanimous,[3] and argued that it is anomalous to allow a person to be stripped of his liberty by a lesser standard. Justice Stewart, also joined by Justices Brennan and Marshall, argued that a unanimous verdict was necessary to minimize the potential effects of bigotry. Justices Brennan and Marshall each filed dissents in which the other joined. Justice Brennan noted that unanimous verdicts assured that each juror would be heard. Justice Marshall felt that the decision cut the heart out of the right to trial by jury and the right to proof beyond reasonable doubt.

Testimonial Immunity

In *Kastigar v. United States*, 92 S.Ct. 1653 (1972), and *Zicarelli v. New Jersey*, 92 S.Ct. 1670 (1972), the Supreme Court upheld the constitutionality of the federal statute[4] and a state statute[5] conferring use and derivative use immunity, but not transactional immunity, on witnesses compelled to testify against themselves. Mr. Justice Powell, writing for a 5-2 majority in both cases, stated that the fifth amendment privilege is coextensive with immunity from use of the compelled testimony in subsequent proceedings and use of evidence derived from the testimony, but does not require immunity from prosecution for offenses to which the compelled testimony relates.

In so holding, the Court disregarded language in *Counselman v. Hitchcock*[6] that the constitution required absolute transactional immunity. Mr. Justice Powell noted that this language was dicta, since the statute then under consideration had been construed to afford only use immunity and not derivative use immunity, as did the federal and New Jersey acts. Furthermore, he argued that both the reasoning and the result in *Murphy v. Waterfront* Commission[7] compelled the conclusion that transactional immunity was not constitutionally mandated.[8]

The Court emphasized that in a subsequent prosecution the government must prove that its evidence is derived from a legitimate source wholly independent of the compelled testimony.

Justices Douglas and Marshall dissented in both cases; Justices Brennan and Rehnquist did not take part in the consideration or decision of either case.

Search and Seizure

In *United States v. Doyle*, 456 F.2d 1246 (5th Cir. 1972), the court of appeals upheld a warrantless search of a drug suspect's garage incident to his warrantless arrest in the house. An informant of proven reliability had told federal agents that the defendant had drugs stored in his garage and was preparing to leave town. With this information justifying his immediate arrest, the agents entered the house and found the defendant and a female companion locked in the bathroom, the toilet flushing. The court determined that the crime of illegal possession of drugs had been committed in the officers' presence, and that the search of the garage was reasonable in order to prevent further destruction of evidence.

The per curiam opinion does not mention *Chimel v. California*, which held that a warrantless search incident to an arrest should be limited to the arrestee's person and the area within his immediate control.[9] Rather, the Fifth Circuit opinion seemingly adopts Mr. Justice White's dissent in *Chimel*. Justice White contended that if there is probable cause for a search, an extensive search following an arrest is reasonable, since the arrest is an exigent circumstance justifying police action before evidence can be removed or destroyed.[10]

[3] The seventh amendment right to a trial by jury in civil cases has been held to require a unanimous verdict. American Publishing Co. v. Fisher, 166 U.S. 464 (1897).

[4] 18 U.S.C. § 6002 (1970).

[5] N.J. Rev. Stat. § 52:9 M-17(a) (Supp. 1970).

[6] 142 U.S. 547, 585–86 (1892).

[7] 378 U.S. 52 (1964).

[8] In *Murphy*, witnesses were granted transactional immunity under the laws of New York and New Jersey, but continued to refuse to testify on the ground that their answers might tend to incriminate them under federal law. The Court held that the fifth amendment privilege protects state witnesses against federal as well as state law, and thus the compelled testimony and its fruits may not be used by federal officials in a subsequent prosecution. 378 U.S. at 79.

[9] 395 U.S. 752, 763 (1969).

[10] *Id.* at 780 (dissenting opinion of Justice White).