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James B. Zagel

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FOREWORD—THE LION ROARED ONCE

JAMES B. ZAGEL*

Introduction

The leonine spirit of Sir Edward Coke receded rapidly into the mist during the last term of the Supreme Court. Just once did the Justices really exercise their power to check the will of the sovereign states and the central government. The result merits neither extravagant praise nor condemnation even for those who enjoy responding that way to the Court's opinions. Moreover, the favored exercise of predicting the Court's future direction has been made quite difficult. Perceiving the course of decisions from the bits and pieces of this term is like reading ancient runes.

Still another problem burdens any reviewer. Traditionally, it is not just the opinions of judges that grow stale or absurd or comic with the passage of time. It might seem so, but only because we often read vintage opinions and seldom examine vintage law reviews. Yet, the readers of old periodicals learn that contemporaneous comment about judicial opinions has aged somewhat less gracefully than the opinions themselves. Only after the test of time and practice can the wisdom or error of a significant decision be properly assessed. Quick judgments of the merits of disputed legal questions are too intellectually hazardous. While judges risk the hazard, they are compelled to do so. Further, they are paid for it. The commentator, on the other hand, is a heedless volunteer.

Accordingly, neither praise nor condemnation nor clear prediction of the future is my primary purpose. I shall try to avoid the hazards just described, secure in the expectation that legions of others will accept the dare, and that the Court will not suffer a shortage of strident criticism and visionary prophecy based on its work. My chief concern is to analyze the Court's performance, that is, what the Court did and the quality of its way of doing it.

Criminal Law

The two most discussed opinions of the 1972 Term concerned substantive provisions of state criminal law: prohibitions against abortion and pornography. That substantive provisions of state criminal law should command such attention is rather unusual for two reasons. First, in recent terms the predominant emphasis has been on police and judicial procedure. Second, the attention paid to substantive criminal law is not likely to continue in the future for there are not many enforced criminal laws that are subject to the same kind of difficulties encountered in the abortion and pornography cases. Moreover, what room there is for arguing about the substantive criminal law generally encompasses questions of defense, not issues of prohibition. The abortion and obscenity decisions, then, stand out for other reasons in addition to their sagacity, timeliness or importance.

Abortion

In *Roe v. Wade*,[1] the Court held unconstitutional a typical state law against abortion. Essentially the Court ruled first that there is a fundamental right, albeit qualified, to do with one's body as one pleases, including terminating a pregnancy. This right is part of the right of privacy, sometimes called the right to be let alone. Next, having established this basic premise, the Court followed a classical style of analysis: to justify a limitation on that right the State would have to show a compelling interest.

Three such interests were analyzed and found wanting. First, the prevention of illicit sexual conduct was deemed irrelevant as a proper State pur-

* Assistant Attorney General, Chief, Criminal Justice Division; Office of the Attorney General, State of Illinois. B.A. 1962; M.A. 1962, University of Chicago; J.D. 1965, Harvard Law School. The opinions expressed herein are those of the author and are in no way attributable to the Office of the Attorney General, State of Illinois.

[1] 410 U.S. 113 (1973).

pose since the prohibition applied to married women whose pregnancies resulted from intercourse with their husbands.

Second, the Court considered the State's interest in protecting the life and health of the pregnant woman, and correctly noted that this was the primary historical purpose of abortion statutes. The Court held squarely that this interest would be sufficient to deny abortion. Yet the protection of the mother's health could not justify the broad scope of existing statutes.

Statistically there is greater risk to health by allowing a pregnancy to come to term than there is by aborting the pregnancy in the first trimester. The State then had no valid interest in banning abortion during the first trimester except to limit its performance to physicians. Since the risk of harm from abortion increases in the second trimester, the State may regulate the abortion procedure to the extent it is reasonably related to maternal health.

Third, the State alleged an interest in protecting the right of the unborn. This contention has two facets. One is that human life begins at conception. Hence the State can take appropriate steps to protect it. The other is that, regardless of state law, a fetus is a person who cannot be deprived of life without due process of law as required by the fourteenth amendment.

The Court rejected the fourteenth amendment argument on essentially technical grounds. The fetus could not be considered a person within the meaning of that amendment without doing violence to precedent and the relevant historic milieu in which the amendment was formulated.

The State's interest in preserving human life was recognized as appropriate, but a state could not reasonably decide that human life begins at conception. Justice Blackmun acknowledged that many hold the view that human life begins at conception, but noted that there is no scientific consensus on this issue. When neither medicine nor ethics can arrive at a consensus there is no compelling state interest in the adoption of one of a number of competing theories. However, the Court recognized that as to the third trimester and some weeks prior thereto, there was a consensus as to viability. When viability of the fetus exists

> the State, in promoting its interest in the potentiality of human life, may, if it chooses, 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.[2]

In *Doe v. Bolton*,[3] the Court overturned an abortion statute based upon the Model Penal Code. *Doe* is particularly important because it severely limits the degree of indirect control that the state may exercise over abortion through the enactment of rigorous medical requirements. The Court found invalid Georgia provisions requiring (a) abortions to be performed in accredited hospitals; (b) abortions to be performed in hospitals in so far as that requirement applied to first trimester abortions; (c) prior approval by a hospital abortion committee; (d) the concurrence of two physicians and (e) a limitation of abortions to residents of Georgia.

The abortion decisions are fairly comprehensive. Yet, there are some unresolved issues, and the decisions will create new issues. For example, it seems clear that though the decisions create a barrier to state interference, they do not create a federally enforceable right to abortion.[4] Hence, a physician may refuse to perform an abortion if it is against the dictates of his conscience. Moreover, some unanswered questions will be extraordinarily difficult. Whether the right of the father to have his child[5] can impinge upon the mother's right to abortion is one such problem, though it may arise relatively infrequently. Also, the question of government or private insurance coverage for abortion will arise but should be resolved in some place other than the constitutional arena.

The opinions in *Roe* and *Doe* are persuasive although the approach is reminiscent of the opinions of an earlier day invalidating the regulation of business on substantive due process grounds.[6] Justice Blackmun has written a strong justification for the decision. Indeed, one is inclined to believe that the analysis compelled the result. There is no sense of post-hoc rationale jerry-built to support a reactive policy decision. But even those who agree with the decision must be troubled by some of its logic. The heavy reliance upon existing medical knowledge and practice is disturbing. If developments in medical practice some day render it safer to carry a pregnancy to term than to have an

[2] *Id.* at 164.
[3] 410 U.S. 179 (1973).
[4] *Id.* at 210 (Douglas, J., concurring).
[5] Stanley v. Illinois, 405 U.S. 645 (1972).
[6] *E.g.*, New State Ice v. Liebmann, 285 U.S. 262 (1932); Hammer v. Dagenhart, 247 U.S. 251 (1918).

abortion in the first trimester, do the decisions cease to have force? If medicine can preserve the viability of a fetus at earlier and earlier points in the pregnancy term, can the state expand its abortion prohibition to coincide with that date?

Decisions often are based on premises subject to change, but there is a particular risk in resting opinions upon a narrow statistical base. An example of this is *Witherspoon v. Illinois*.[7] In this case the Court decided against excluding from capital cases jurors who were merely opposed to the death penalty. The opinion relied upon polls showing that the number of persons favoring the death penalty had fallen to below fifty percent. Later polls showed an increase in support for the death penalty and a decrease in opposition to it. While there are other grounds to support the *Witherspoon* rule which in practice seemed to benefit or, at least, not harm the prosecution's position in jury selection, the change in the polls has eroded an important basis of the decision. As with *Witherspoon*, the abortion decisions may not ever be reconsidered even if the statistical and scientific bases upon which they rest are changed. The practical barriers to reenactment of unconstitutional statutes on the basis of changed conditions are enormous.[8]

When the Court rules as it did in the abortion cases, it cannot be expected to forego reliance on scientific materials, but it should make clear the precise degree of its reliance on statistical data and medical consensus. The Court also should clarify the extent to which its holding must be modified if the scientific premises on which it relies are modified or disproven. Otherwise the Court may erect a permanent barrier where its rationale (and perhaps its intent) supports only a temporary structure.

Lastly, it is interesting to speculate on the effect the population explosion and other social conditions had upon the abortion decision. Did the relatively poor job society does with its unwanted children affect the Court? The Court did not deal with, nor did anyone offer, the argument that the State had a compelling interest in preventing abortion because it was underpopulated, had no unemployment and needed manpower. If Australia or Siberia or Israel were in the union, could they sustain the enactment of an anti-abortion law? Could the United States or any of the states successfully enact an abortion law if we still had a frontier? If, for any reason, this nation someday requires a large increase in its population, will *Roe* and *Doe* still be good law?

The Pornography Cases

In *Miller v. California*,[9] a majority of the Court adopted a basic standard applicable to state and federal[10] prosecutions of obscenity cases:

> The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standard," would find that the work, taken as a whole, appeals to the prurient interest..., (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. We do not adopt as a constitutional standard the *"utterly* without redeeming social value" test....[11]

The Court reiterated the theme that obscenity was not protected by the first amendment and, in a series of cases accompanying *Miller*, settled many of the current controversies arising in the enforcement of obscenity laws. The decisions rejected contentions that community standards must be national in scope,[12] that a book without pictures cannot be obscene[13] and that the prosecution must produce expert testimony on the question of obscenity. However, the Court reserved judgment as to the necessity of expert testimony when the material is aimed at "such a bizarre deviant group" that its prurient appeal is incomprehensible to the ordinary trier of fact.[14] Also, the Court adhered to the principle established earlier in *United States v. Reidel*[15] and *United States v. Thirty-Seven Photo-*

[7] 391 U.S. 510 (1968).

[8] A state might enact an open-ended statute leaving unspecified the point in time the fetus becomes viable and the point in time that continuing pregnancy becomes safer than abortion. The state could provide for a commission of experts to determine on a periodic basis the proper dates in light of the latest scientific consensus and to issue an appropriate regulation having the force of law.

[9] 93 S. Ct. 2607 (1973).

[10] United States v. 12 200-Ft. Reels of Super 8 mm Film, 93 S. Ct. 2605 (1973).

[11] 93 S. Ct. at 2615. (emphasis in original).

[12] *Id.* at 2619. The Court may have left open the question of whether the standard must be statewide. The case before the Court involved a statewide standard and that standard was approved. Whether a local standard is proper is anybody's guess.

[13] Kaplan v. California, 93 S. Ct. 2680 (1973).

[14] Paris Adult Theatre I v. Slaton, 93 S. Ct. 2628 (1973).

[15] 402 U.S. 351 (1971).

graphs[16] in upholding a ban on import[17] and common carrier transportation[18] of obscene material intended solely for the private use of the importer or passenger.

The Court reached three procedural issues pertaining to the enforcement of obscenity laws. In *Heller v. New York*,[19] the Court upheld a warrant seizure of a single copy of a film for use at trial. The warrant was issued without an adversary hearing but after the issuing judge had seen the film. The procedure was enhanced both by the exhibitor's right to an immediate hearing after seizure and by his right to obtain a copy of the film seized if he has no other copy available. In *Roaden v. Kentucky*,[20] the officer who seized the film had seen it, but a magistrate had not. Thus, the seizure of the film without a warrant was held illegal. In *Alexander v. Virginia*,[21] the Court held that there is no right to a jury trial in a civil obscenity forfeiture proceeding.

Very early in the term the Court approved a California regulation prohibiting nude performers, simulated or real sexual acts and comparable conduct on premises licensed to serve alcoholic beverages by the drink.[22] The regulations, which admittedly applied to some cases where the performance was within the limits of constitutional protection were upheld primarily upon the power of the States to regulate the time, place and conditions of the sale of liquor.

These pornography cases were the subject of an incredible degree of public comment. The general theme was that the Court had made the prosecution of pornography a far easier matter and had extended the reach of the obscenity concept. I doubt that this initial view has any validity. In sum, the Court made no major change in the existing obscenity law that improves the position of the prosecutor. The test applied by the Court is essentially that offered in 1957.[23] The rejection of "utterly without redeeming social value" in favor of "lacks serious literary, artistic, political or scientific value" is interesting but insignificant. In recent years the materials subjected to prosecution have not been capable of supporting a contention of redeeming value. More importantly both court and jury will, in my experience, construe the "utterly without" language to mean the same thing as lacking "serious . . . value." Indeed the conviction reviewed in *Miller*, was obtained under a statute embodying the "utterly without" standard. The rejection of the national standard of the requirement of expert testimony and of the per se non-obscenity of printed words is surely no departure from the clear majority rule existing prior to June 21, 1973.

What is most "newsworthy" is that the Court fell one vote short of outlawing all obscenity prosecutions. The two votes of the immediate past (Douglas and Black) are now four (Douglas, Brennan, Stewart and Marshall). Justice Brennan, joined by Justices Stewart and Marshall, offers the view that the concept of obscenity is simply too vague to permit it to be the basis for criminal sanctions. This vagueness has imposed three unacceptable burdens: the absence of fair notice of what is prohibited, the chilling of protected expression and the stress upon judicial machinery caused by the attempt to apply a standard that is perpetually uncertain. The heart of this dissent is the conviction that it is beyond the power of man to clarify or delineate the notion of obscenity. Justice Brennan did not reach the contention that obscenity was protected by the first amendment or by a ninth amendment right of privacy, because he assumed arguendo that no such barriers existed. His opinion was grounded not on abstract principles but upon some lessons of experience.

The force of Justice Brennan's dissent should not be underestimated. Its arguments had a clear impact on the opinion of the Court as is evident in the following passages from the Chief Justice's opinion:

> We acknowledge . . . the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited . . . . As a result we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law as written or authoritatively construed. . . .
>
> It is possible to give a few plain examples of what a state statute could define for regulation . . . :
>
> (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.[24]

[16] 402 U.S. 363 (1971).
[17] United States v. 12 200-Ft. Reels, 93 S. Ct. 2665 (1973).
[18] United States v. Orito, 93 S. Ct. 2674 (1973).
[19] 93 S. Ct. 2789 (1973).
[20] 93 S. Ct. 2796 (1973).
[21] 93 S. Ct. 2803 (1973).
[22] California v. LaRue, 409 U.S. 109 (1972).
[23] Roth v. United States, 354 U.S. 476 (1957).
[24] 93 S. Ct. at 2615.

In adopting this view, it may be argued, with considerable force, that the Court now will require state law to embody the kind of obscenity prohibition proposed in Richard Kuh's *Foolish Figleaves*.[25] That sort of law specifies in exquisite detail precisely what cannot be depicted. Someone (I think William Buckley) said that Kuh's law would be an obscenity statute that is itself obscene. If the Court intends to require such state law, then the real significance of the obscenity decisions is that they leave most existing obscenity statutes unenforceable until amended or construed into compliance with *Miller*. And when this process is completed the scope of pornography prosecutions may well be narrowed. At the very minimum, the Court excluded from the reach of obscenity laws the depiction or exhibition of excessive violence though the reasoning of the opinion would seem to permit a State to enact some form of law restricting violence in media.

Apart from these questions of scope and effect considered in *Miller*, the other pornography opinions, particularly *Paris Adult Theater I v. Slaton*,[26] are characterized by a willingness to confront the dissents' premises: that (a) the first amendment bars regulation of speech and association (which occurs when consenting adults attend a film),[27] (b) the only regulation of offensive material should be that of the marketplace[28] and (c) there is a right to receive information and ideas regardless of their social worth (closely tied to the right to be free from unjustified governmental intrusions into one's privacy) and consequently the state cannot punish one who provides this information to a willing adult recipient. To these premises, the parties added a claim that there was no scientific data to prove that obscenity adversely affects humans or their society.

The majority offered articulate rebuttal. First, lawmakers have always relied on unprovable assumptions that certain practices are harmful. Thus the antitrust laws restrict association, and securities and consumer protection laws restrict public expression, though the harm from the forbidden practices may not be demonstrable. Anti-pollution legislation and aesthetic zoning requirements are similarly based on questionable assumptions. Second, the Court reasoned that if we are willing, as we have shown ourselves to be, to accept unprovable theses that a complete education requires certain books and that good books and art improve the condition of man, it is proper to allow the states to enact statutes on the assumption that obscene materials and exhibitions will corrupt and debase the condition of man.[29] Third, as to regulation by the exercise of individual free choice, the Court recognized the power of the states to choose this course, yet noted they are not compelled to do so. The unlimited exercise of freewill is not found in any society. And the power of states to regulate on the assumption that it will serve the general welfare is undoubted. The Chief Justice observed that, "States are told by some that they must await a 'laissez-faire' market solution to the obscenity-pornography problem, paradoxically 'by people who never otherwise had a kind word to say for "laissez-faire" particularly in solving urban commercial and environmental pollution problems.' "[30] Finally, the Court rejected the application of the privacy doctrine to the regulation of events at places of public accommodation such as stores and theaters. The denial of access to materials without serious social value could not be deemed an attempt to control thought. Further, the fact that government regulation may affect the nature of a citizen's mental life does not invalidate the regulation, just as prohibition of narcotics is not improper because it denies individuals access to drug induced fantasies and perceptions.

Anyone reading the pornography opinions may be tempted to criticize the arguments offered by both sides. But the arguments are quite subtle and appear irresolvable. In the end, one must simply judge for himself whether the social engineering analogy does apply to the control of pornography.

There is an unexplored but undeniable tension between the majority view in the abortion cases and that in the pornography cases. In *Roe*, the Court would not let the States enact laws on certain assumptions because there was no scientific consensus. But is the assumption that abortion destroys human life any less supportable than the assumption that pornography debases society?

[25] R. KUH, FOOLISH FIGLEAVES? PORNOGRAPHY IN AND OUT OF COURT (1967).

[26] 93 S. Ct. 2628 (1973).

[27] Miller v. California, 93 S. Ct. 2607 (1973) (Douglas, J., dissenting).

[28] Paris Adult Theatre I. v. Slaton, 93 S. Ct. 2628 (1973) (Brennan, J., dissenting).

[29] The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by gross commercial exploitation of sex. 93 S. Ct. at 2638.

[30] *Id.* at 2639.

Could a State argue that abortion may be prohibited because widespread, legal abortion can debase and distort "a sensitive, key relationship of human existence, central to family life, community welfare and the development of human personality?" [31] Do not the abortion laws have the same indirect effect on the life of the individual as do narcotics and pronography laws since the law in most cases does not punish the mother but only the one who seeks to supply the forbidden service? The difficulty in squaring the reasoning, if not the results, in the two cases was not even mentioned by the Justices. Perhaps the dissenters in *Miller*, all of whom joined in *Roe*, did not wish to say anything to diminish the authority of *Roe*. Two of the majority in *Miller* dissented in *Roe* and had no need to justify adoption of a new tack. The Chief Justice, who wrote *Miller*, had at least indicated in a concurrence his discomfort at the manner the Court supported its ruling in *Roe*. In any event, the abortion and pornography cases constitute an odd couple, but I doubt that they can exist together forever. The judicial odd couple, like the television series, will last for several terms, with endless reruns in lower federal courts before the synthesis (or cancellation) is achieved.

Entrapment

The other major criminal law decision was *United States v. Russell*,[32] in which the Court adhered to the traditional view that entrapment is a limited defense. In this view entrapment is, rather than a prophylactic rule for overzealous law enforcement, a theory simply allowing the defendant to contend that he lacked the requisite intent to commit the crime because he was induced to its commission by government agents. Accordingly, the government may offer, and the jury may consider, evidence of the predisposition of the defendant to commit the crime. While the Court recognized that law enforcement conduct may be so "shocking" that due process requires dismissal of the charge, it noted that such claims are not dealt with in terms of entrapment and are not limited to cases of entrapment. In *Russell* the Court found that reasonable drug law enforcement requires infiltration into drug rings and that limited participation in unlawful activities of the ring is necessary and proper. The dissent, however, urged the use of entrapment rules to regulate police conduct and argued that the existence of entrapment should be judged solely in light of police conduct without regard to the defendant's predisposition.

The distinction between the two approaches has some significant practical consequences. The "police conduct" approach presumably would result in a judicial determination of the propriety of the police conduct. Perhaps the accused would have a right to a pre-trial determination of entrapment and could use the hearing for discovery purposes. The approach adopted by the majority leaves that determination in the hands of the trier of fact as is the case with any other defense. Of course, a defense of entrapment, like that of self-defense, entails at least the implicit admission of some of the elements of the offense.

In concluding this section on criminal law, I reiterate that the major work of the Supreme Court in the substantive criminal law will, in future instances, be found in cases like *Russell* rather than in cases like *Roe*.[33] The novel and pressing questions of criminal law today are rooted in the scope of defenses, particularly in the nature of compulsion (by conscience or by drug addiction or other needs), diminished responsibility and justification resulting from the allegedly illegal acts of the victim or the prosecuting government.

Both sides in *Russell* advanced forceful arguments to support their views but the sum of *Russell* is that the Court left the law as it found it. The Court specifically left entrapment as a defense, refusing to make the doctrine comparable to an exclusionary rule. What the Court did do with its various piecemeal exclusionary rules is our next concern.

The Exclusionary Rules

The Court opened its annual wrestling match with the fourth amendment in a relatively unique context. In *United States v. Dionisio*[34] and in a

[31] Miller v. California, 93 S. Ct. 2607 (1973).
[32] 411 U.S. 423 (1973).

[33] The Court will continue, of course, to decide routine questions of substantive criminal law involving the construction of federal statutes. There were four such cases this term. United States v. Enmons 93 S. Ct. 1007 (1973) (Use of violence to obtain higher wages is not a violation of the Hobbs Act); Bronston v. United States 93 S. Ct. 595 (1973) (An answer which is literally true but not responsive and misleading by negative implication cannot be punished as perjury.); Erlenbaugh v. United States 93 S. Ct. 477 (1972) (Statute proscribing the use of interstate facilities to carry on unlawful gambling is applicable to one who used an interstate train to transport a newspaper scratch sheet.); United States v. Bishop 93 S. Ct. 2008 (1973) (Where the only issue at trial concerned wilfulness, the accused is not entitled to a lesser-included offense instruction because the element of wilfulness is the same in both the greater and lesser offense).
[34] 410 U.S. 1 (1972).

companion case,[35] the Court encountered and rejected a claim that voice and handwriting exemplars, unprotected by any fifth amendment privilege, cannot be subpoenaed by a grand jury without a preliminary showing of reasonableness. The Court noted the absence of valid fifth amendment claims and observed that obtaining an exemplar is not a serious infringement of the person. In comparison to a frisk, the intrusion is minimal, particularly where the subpoena is used, and the subject receives advance notice, may obtain legal assistance and is not in custody. Balanced against this minimal incursion are the needs of the grand jury.

The Court gave great weight to the role of the grand jury, noting that the fifth amendment mandates the use of the grand jury and presupposes an investigative body acting independently of judge and prosecutor. It stated,

> Any holding that would saddle a grand jury with mini-trials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws.... The grand jury may not always serve its historic role as a protective bulwark ... but if it is even to approach the proper performance of its constitutional mission, it must be free to pursue its investigations unhindered by external influence or supervision so long as it does not trench upon the legitimate rights of any witness called before it.[36]

While the Court did not foreclose a challenge to a subpoena in which the witness made an affirmative showing of unreasonableness, the Court did uphold subpoenas to twenty persons in *Dionisio* for voice comparison with recorded conversations. Thus it is fairly clear that a witness would have to make an extraordinary showing of abuse to gain even a hearing on his claim.

Justice Brennan dissented on fourth amendment grounds. Justice Marshall dissented on fourth and fifth amendment theories. Justice Douglas agreed with the Seventh Circuit opinion below and argued that the grand jury is the tool of the prosecutor. Parenthetically, it is difficult to see how Justice Douglas can regard the grand jury as a tool of the prosecution and also have joined in an opinion, the basic premise of which is that improper grand jury selection is prejudicial error.[37]

[35] United States v. Mara, 410 U.S. 19 (1972).
[36] 410 U.S. at 17.
[37] Tollett v. Henderson 411 U.S. 258 (1973); Davis v. United States, 411 U.S. 233 (1973).

Dionisio is another instance in which the Court refused to change the law, or to be precise, reversed a lower federal court which did change the law. No significant body of law has ever required the showing of reasonableness for the issuance of a subpoena.[38] Claims of privilege could defeat the subpoena, but no privilege existed in *Dionisio*. When the Court held in 1967 that voice and handwriting examplars were without the protection of the fifth amendment,[39] the result in *Dionisio* became inevitable unless the Court wished to adopt new rules of law.

This does not mean that *Dionisio* is a wise decision. Its ultimate value will be judged in terms of the good or evil that comes from grand jury investigation. If the books were to be closed today, I would be more than inclined to praise the decision. On rare occasions a grand jury may be used to harass political dissidents, but even if there were no grand jury, a prosecutor acting in bad faith could still find means to harass. The far more common, non-routine function of the grand jury has been the uncovering of political corruption, organized crime and high financial chicanery—often against the desires, and in spite of the interference, of local judges. If the grand jury were fettered, the prosecutor would have no other effective investigative resource excepting the personal administrative subpoena power which is subject to the same objections leveled against grand jury subpoenas.[40]

Search and Seizure

The remainder of the Court's fourth amendment ventures surfaced chiefly toward the end of the term. In April, the Court reiterated in *Brown v.*

[38] *See, e.g.*, United States v. Morton Salt Co., 338 U.S. 632 (1950).
[39] Gilbert v. California, 388 U.S. 263 (1967).
[40] In another subpoena case, Couch v. United States, 93 S. Ct. 611 (1973), the Court ruled that a taxpayer cannot assert a fifth amendment claim to defeat a subpoena of her records when the records were in her accountant's possession and the subpoena was directed to him. The Court held that "actual possession of documents bears the most significant relationship to Fifth Amendment protection...." The Court conceded that there may be situations where the constructive possession is so clear (*e.g.*, where the accountant is the full time employee of taxpayer and occupying space in the taxpayer's office) or the relinquishment of possession so temporary and insignificant that the subpoena is, in effect, directed to the taxpayer himself. The Court held that there was no federal accountant-client privilege, that the state created privileges are not to be recognized in federal cases and that there was no justification for such a privilege in federal criminal tax cases.

United States,[41] the viability of the standing requirement and held that an accused has no standing to challenge the illegal seizure of evidence, *i.e.*, stolen goods, from a conspirator's premises. The unanimous ruling was based on the fact that the accused was not on the premises when the search occurred, had no proprietory or possessory interests in the premises and was not charged with an offense which included as an essential element, possession of the goods at the time they were seized. The decision is neither unexpected nor especially significant.

In May, the Court held in *Schneckloth v. Bustamonte*,[42] that a police officer need not warn a citizen of his right to refuse to consent to a search as a prerequisite for securing a valid consent, at least in cases where the consenting individual is not in custody. To the extent that the decision applies to persons not in custody, it is consistent with the majority of decided cases and with the basic principles of *Miranda v. Arizona*.[43] The holding is narrow and continues the traditional test of voluntariness in consent search cases.

Another narrow holding is *Cupp v. Murphy*,[44] which approved the warrantless scraping of evidence from a suspect's fingernails when the police had probable cause to arrest. The scraping was upheld although it preceded formal arrest. Only Justice Douglas disagreed with the basic principle espoused by the majority. He agreed that exigent circumstances justified detention but argued that a warrant should have been obtained prior to the scraping. The Court did not consider the question of seizure of physical evidence, like the scrapings, upon a showing of reasonableness somewhat short of probable cause though the question was raised.

In late June, the final two fourth amendment cases were decided. In *Almeida-Sanchez v. United States*,[45] a plurality of the Court ruled unconstitutional a federal regulation promulgated under the authority of an Act of Congress, allowing administrative searches, without probable cause, for aliens in automobiles and conveyances within 100 miles of any border. The plurality cast no doubt on the right to conduct border searches without probable cause or to engage in their functional equivalents, but was unwilling to extend the rule to these alien searches and rejected the Congressional attempt to do so. The four dissenters argued that a roving check of vehicles to uncover illegal aliens is reasonable as a general practice and was reasonable in this particular case. The swing vote was cast by Justice Powell who agreed with the basic premises of the plurality but added his view that the procedure would be proper if authorized by an area search warrant issued upon less than probable cause. All four dissenters agreed that such warrants would be proper. The net effect is the authorization of another restricted class of searches that may be conducted without a showing of traditional probable cause.

In *Cady v. Dombrowski*,[46] the Court approved by a vote of five to four the warrantless search of the trunk of an automobile in police custody when the police had reason to believe the trunk contained a revolver and the trunk was vulnerable to intrusion by vandals. The decision has little value as precedent but may serve as the foundation for the future articulation of a doctrine approving inventory searches carried out pursuant to a standard operating procedure.

These decisions concerning police searches and seizures are commendably clear in large part and, with the possible exception of *Cady*, dealt with issues of sufficient significance to justify decision by the highest court. What the Court did not do, however, was more interesting than what it did do. In *Schneckloth*, three justices argued that claims of illegal search and seizure ought to be unavailable in collateral attack on state and federal convictions. A fourth justice expressed agreement with the view but thought the question need not be resolved. The writer of the opinion in *Schneckloth*, Justice Stewart, dissented in *Kaufman v. United States*,[47] which was the case establishing clearly the right to raise fourth amendment claims in post-conviction actions. Moreover, the Court voted to hear a case challenging validity of the application at trial of the exclusionary rule in its present form. After argument the Court entertained a concern that there was an adequate basis in state law for the decision independent of the federal question. The Court remanded the case without reaching the issue.[48] At least one case this coming term will

[41] 411 U.S. 223 (1973). The Court reserved the question of whether the automatic standing rule of Jones v. United States, 362 U.S. 257 (1960) has any continuing validity since the decision in Simmons v. United States, 390 U.S. 377 (1968), removed the danger of coerced self-incrimination.
[42] 412 U.S. 218 (1973).
[43] 384 U.S. 436 (1966).
[44] 412 U.S. 292 (1973).
[45] 93 S. Ct. 2535 (1973).
[46] 93 S. Ct. 2523 (1973).
[47] 394 U.S. 217 (1969).
[48] California v. Krivda, 409 U.S. 33 (1972).

present a direct challenge to the exclusionary rule,[49] and it is to the 1973 term that one must look for revolutions in fourth amendment law.

Identification

The only non-fourth amendment exclusion cases involved eyewitness identification. In *Neil v. Biggers*,[50] the Court reversed the decisions of two lower federal courts that an in-court identification was inadmissible. Three dissenters took issue, not with the result, but rather with the fact that the Court undertook to decide the case at all. The dissent saw no reason to decide an essentially factual question that had already been resolved by the district court and the court of appeals with both courts reaching the same conclusion.

The decision in *Neil* must be assessed in light of the state of the relevant law. The suppression of an in-court identification, as opposed to the suppression of evidence of prior out-of-court identifications, is a relatively infrequent occurrence. One can find only a handful of reported cases in which courtroom identifications are excluded. This condition is not surprising in light of the historical reluctance to exclude eyewitness testimony and the distaste with which most judges view the prospect of telling a lay (non-police) witness that he has no right to speak his piece in court. It is, however, impossible to determine from the basic lineup cases[51] whether the Court intended that the courts be so slow to suppress courtroom identification. That the Court was willing to give lower courts great leeway in admitting in-court identification became apparent in *Coleman v. Alabama*.[52] In *Neil*, the Court, by reversing one of the rare reported suppression decisions, gave clear affirmative notice that the exclusionary rule is not to be applied to exclude courtroom identification barring exceptional circumstances.

In *United States v. Ash*,[53] the Court refused to extend the right of counsel to photographic displays for witness identification. The rejection of the counsel requirement for photograph confrontations was unequivocal. Whether or not the accused is in custody or the confrontation occurs after indictment, the Court held that the right to counsel is applicable only when the personal presence of the accused is normally required. Further, it reasoned that even if counsel might in some cases be required to safeguard the adversary process despite the absence of his client, the photograph identification process is not so inherently risky that an extraordinary system of protections is required. Justice Stewart concurred on the ground that the possibility of irretrievable prejudice is not so great as to require the presence of counsel. The three dissenters argued that the same risks inherent in the lineup process are present in the photo display and both are "critical." Further, the dissent contended that the limitation of counsel to situations involving the presence of the accused is strained and unsupportable.

The result in *Ash* is in accordance with the vast majority of the earlier lower court decisions. Nevertheless, the reasoning of both majority and dissent are subject to valid criticism. The majority opinion is vulnerable to the objections of the dissenters. But the dissent assumes premises that are as difficult to support as those offered by the majority.

If the limitation of counsel to cases involving the defendant's presence is artificial, so too is the limitation which the writer (Justice Brennan) of the "critical" stage dissent first promulgated in the lineup trilogy.[54]

In *United States v. Wade*[55] the Court adopted a theory that the right to counsel arises "where counsel's absence might derogate from the accused's right to a fair trial." [56] It can be argued, as the dissent in *Ash* does, that *Wade* requires counsel whenever his presence would help to assure the reliability of the fact finding process. Yet, the dissenters draw their own artificial line to restrict the logically inevitable consequences of their basic premises.

In the lineup cases the Court held that scientific testing procedures did not require the presence of counsel. However, an unscrupulous, unwatched laboratory technician can report phony results particularly where the test destroys all of the material available for testing and this assuredly derogates from a fair trial. Indeed, most of the abuses cited in the lineup cases involved deliberate misconduct, not honest error.

[49] United States v. Robinson, 471 F.2d 1082 (D.C. Cir. 1972), *cert. granted*, 93 S. Ct. 1500 (1973); *See also* State v. Gustafson, 258 So. 2d 1 (Fla. 1972), *cert. granted*, 93 S. Ct. 1494 (1973).

[50] 409 U.S. 188 (1973).

[51] United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967); Stovall v. Denno, 388 U.S. 293 (1967).

[52] 399 U.S. 1 (1970).

[53] 93 S. Ct. 2568 (1973.

[54] United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967); Stovall v. Denno, 388 U.S. 293 (1967).

[55] 388 U.S. 218 (1967).

[56] *Id.* at 226.

None of the dissenters would require the right to counsel when the prosecutor interviews the witnesses,[57] when the prosecutor presents evidence to the grand jury,[58] or when the police present a suspect to a witness for identification shortly after commission of the crime.[59] Nor would the dissenters require the presence of counsel at every step of the police investigation. Nonetheless, the essential principles upon which the dissent relies would in fact require these holdings in the absence of arbitrary limitations.

It is my view that the Court would do better to re-examine its emphasis upon the use of counsel as a solution to difficult problems in criminal justice. It has been persuasively argued that the imposition of counsel at line-ups does not serve in practice the purpose of preventing unfairness.[60] First, an attorney is not necessarily skilled in detecting subtle suggestions, he cannot witness deliberately concealed suggestion and he is likely to be considered as biased a witness as to what occurred as his client. Second, the lawyer is clearly a less effective witness than is a videotape. Finally, the lawyer cannot properly view his role as one of ensuring a fair line-up. It is the lawyer's duty to see that the line-up is as unfair in favor of his client as he can make it. Moreover, the lawyer may feel obliged to convert the line-up into a discovery procedure.

It can be seen, then, that the lawyer is being asked to assume a role in lineup cases unsuited to his qualifications and his essential role in the criminal process. This is particularly apparent in cases which follow the model envisioned in the line-up cases. If a lawyer attends a line-up, assures its fairness and witnesses the identification, he becomes a liability to his client. He cannot challenge the line-up even if his client demands that he do so, and, if he files a motion to suppress, he may be called by the prosecution as its witness.[61] The lawyer may even be called at trial in those jurisdictions where witnesses to a pre-trial identification may testify about that confrontation.[62]

The lineup cases represent the apex of the Court's unconsidered effort to solve difficult situations by throwing counsel into the breach and asking counsel to find the answer. The right to counsel is vital but counsel is not a panacea. Both the Court and the system it oversees would be better served by a careful analysis of the real value of counsel and of the real limits on that value.[63]

Procedure

The Court's work in the field of procedure was not particularly adventuresome. In *Fontaine v. United States*,[64] the Court in a per curiam opinion seemed to hedge somewhat on its commitment to the proposition that a properly admonished defendant will not, except in the rarest cases, be able to secure a hearing on a claim that the plea was coerced. The value of the per curiam opinion may be of limited use as precedent since it is difficult to assess whether *Fontaine* signals a real shift in attitude or merely a disposition compelled by the particulars of the record.

The Court did not retreat from its commitment to the rule that a voluntary plea of guilty entered with the advice of counsel serves to waive any claim of violation of rights occurring prior to the plea. In *Tollett v. Henderson*,[65] the Court held that a plea waives a claim of discriminatory grand jury selection. This rule applies even if the attorney did not specifically advise his client of the potential claim unless the defendant shows that the failure to advise him renders counsel incompetent. The Court observed that it would be difficult to fault a Tennessee lawyer for failing to perceive the claim in 1948, and the Court further noted that counsel has no obligation to advise a pleading defendant of every conceivable contention that could be made.

[57] *See* United States v. Bennett, 409 F.2d 888, 898–900 (2d Cir. 1969).

[58] *See* Gollaher v. United States, 419 F.2d 520, 523–24 (9th Cir. 1969).

[59] *See* Russell v. United States, 408 F.2d 1280 (D.C. Cir. 1969).

[60] *See* Read, *Lawyers at Lineups: Constitutional Necessity or Avoidable Extravagance*, 17 UCLAL. REV. 339 (1969). Read's study of the opinions and their practical effect in the District of Columbia is particularly excellent. It is to be noted that Professor Read arrived at his criticism of the use of counsel despite his essential agreement with the decision of the Court to extend constitutional review to lineup procedures. *Id.* at 363.

[61] What the lawyer sees at the lineup is not privileged. *See* 8 J. WIGMORE, EVIDENCE § 2292 (McNaughten Rev. ed. 1961).

[62] People v. Gould, 54 Cal. 2d 621, 354 P.2d 856 (1960); Johnson v. State, 237 Md. 283, 201 A.2d 138 (1965); People v. Dozier, 22 Mich. Appl. 528, 177 N.W. 2d. 694 (1970); State v. Funicello, 49 N.J. 553, 231 A.2d 579, 596–97 (1967), *cert. den.*, 390 U.S. 911 (1968).

[63] It may be that Gagnon v. Scarpelli, 93 S. Ct. 1756 (1973), reflects the beginning of a more analytic and less blind faith approach to counsel questions. There the Court held that administrative revocation of probation did not require, in all cases, that counsel be offered. The Court approved a doctrine which is founded on the assumption that counsel need be appointed only when counsel serves some real need.

[64] 93 S. Ct. 1461 (1973).

[65] 411 U.S. 258 (1973).

Waiver rules generally have been sustained in the last few terms and the pattern continued in *Davis v. United States*,[66] where the failure to raise a claim of discriminatory grand jury selection prior to trial was held to preclude the claim either in the subsequent criminal proceeding or in post-conviction review.

In summary, the Court sustained the waiver provision of rule 12(b)(2) of the Federal Rules of Criminal Procedure.

The Court ruled on two classical pleas to bar prosecution. In *Strunk v. United States*,[67] a unanimous Court reached the unsurprising view that the only possible remedy for denial of a speedy trial is dismissal of the charge. The Court did indicate considerable impatience with the government's refusal to dispute the basic issue of whether trial was speedy. In *Illinois v. Sommerville*,[68] the Court rejected a claim of double jeopardy. The facts of the case are complex and not worth discussion here.[69] The significance of *Sommerville* is its rejection of the principle that any mistrial not requested or caused by the accused is prohibited unless it is declared solely for the benefit of the accused. In this respect *Sommerville* clarified (or overruled, if you prefer) the apparent stringency of *United States v. Jorn*.[70]

The validity of rules requiring discovery of the defense's case came before the Court in *Wardius v. Oregon*.[71] Wardius had failed to comply with a state alibi notice statute and was precluded from presenting his defense at trial. The Court was, therefore, presented with the propriety of exclusion as a remedy for failure to comply with discovery orders. The question is quite important since, in criminal cases, the absolute prohibition of exclusion would render many discovery rules unenforceable. Despite its importance the question remains unresolved. Instead, the Court chose to decide that discovery cannot be had against the defense unless the law provides the defendant with a similar opportunity for discovery. The Court held that it was "unfair to require a defendant to divulge the details of his own case while . . . subjecting him to the hazard of surprise concerning refutation of the . . . evidence . . . he disclosed." [72] Yet, other language in the opinion which emphasizes the existence of reciprocal discovery rights casts doubt on the precise nature of the holding. Whether the Court was specifically requiring that the State give discovery of its rebuttal evidence or whether it would be sufficient if the State simply gave general discovery rights to the defendant is debatable. It is apparent that a state which gives little or no initial discovery to the defense could, under *Wardius*, require discovery of the defense merely by providing a limited right of the defense to discovery of the prosecution's rebuttal evidence. *Wardius* does bring into the camp of those who support discovery of defenses all members of the Court save Justice Douglas.

In an opinion early in the term, the Court considered one aspect of trial seldom the subject of its review: the constitutionally mandated scope of jury *voir dire*. The holding in *Ham v. South Carolina*,[73] is scarcely earthshaking. The Court unanimously held that the trial judge was constitutionally obliged to interrogate jurors on the question of racial bias in a case where the accused was a bearded, black, civil rights activist who claimed that a police conspiracy lay behind the marijuana charge on which he was tried. Over two dissents, the Court also held that the voir dire need not include questions about bias toward beards. The refusal of questions about beards did not present a constitutional claim.

Ham is a nicely turned opinion. The Court did open the *voir dire* to constitutional scrutiny not often before encountered, but in its disposition of the beard issue it clarified its intent not to elevate any but the most fundamental claims of *voir dire* error to the status of possible constitutional violations. This inclusion of clear indications of the limits of the doctrine is a sound exercise of judicial discretion. In the past, failure to do this has caused the Court much grief.[74]

The Court in *Barnes v. United States*,[75] approved

[66] 411 U.S. 233 (1973).
[67] 92 S. Ct. 2260 (1973).
[68] 410 U.S. 458 (1973). The issue in *Sommerville* was similar to that first thought to be presented by Duncan v. Tennessee, 405 U.S. 127 (1972). In addition to *Sommerville* the Court decided four other jeopardy or estoppel cases: Robinson v. Neil, 93 S. Ct. 876 (1973) (doctrine barring retrial on state charges after trial on municipal charges arising from the same conduct is retroactive.); Chaffin v. Stynchcombe, 93 S. Ct. 1977 (1973); (doctrine barring higher sentence on retrial is inapplicable to jury sentencing); Michigan v. Payne, 93 S. Ct. 1966 (1973) (ban on higher sentence retrial is not retroactive); One Lot Emerald Cut Stones and One Ring v. United States, 409 U.S. 232 (1972) (acquittal of crime does not stop forfeiture).
[69] For a discussion of the case see text at 445 *infra*.
[70] 400 U.S. 470 (1971).
[71] 93 S. Ct. 2208 (1973).
[72] *Id.* at 2213.
[73] 93 S. Ct. 848 (1973).
[74] *Compare* Fay v. Noia, 372 U.S. 391 (1963) *with* Henry v. Mississippi, 379 U.S. 443 (1965).
[75] 93 S. Ct. 2357 (1973).

jury instructions that possession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which one may reasonably infer, in light of the facts of the case, that the person in possession of the property knew it was stolen. A troubling aspect of this decision is the recognition that constitutional standards by which inferences are judged are not clear. Yet, the Court refused to clarify them. Instead, the Court noted the use of three standards: "rational connection," "more likely than not" and "reasonable doubt." The Court did not settle the issue because it found that the inference in the case met a reasonable doubt standard and, *a fortiori*, all other standards as well.

The Court, in two cases, took further steps along the route opened by its 1970 ruling in *Procunier v. Atchley*.[76] It gave clear evidence of its intent that state prisoners seeking federal habeas corpus use all state remedies first. Then, when such remedies have been invoked, great deference must be paid to the state court resolution of the claims. In *Murch v. Mottram*,[77] the Court upheld the permanent foreclosure of federal relief to a state prisoner who, knowing that he was obliged to raise all claims in a single state collateral proceeding or waive them, failed to challenge his conviction in state court. The Court held that petitioner's testimony that he did not intend to waive his claims is not sufficient to preclude a finding of deliberate bypass. In *LaVallee v. Delle Rose*,[78] the Court, by five to four, reversed a district judge, reluctantly affirmed by the court of appeals, who refused to accept a state court ruling because it did not contain specific findings of fact. The state court had recited the evidence and simply concluded that the confessions were "voluntary." The Court held that "although ... the state trial court did not specifically articulate its credibility findings, it can scarcely be doubted from its written opinion that respondent's factual contentions were resolved against him." [79] The Court reiterated that, in these circumstances, the prisoner must show by convincing evidence that the state court determination was erroneous.[80]

Lastly, the Court decided three cases requiring perceptive judgment about particular criminal trials. In *Webb v. Texas*,[81] the facts were these: the trial judge had warned a defense witness of his right to refuse to testify and of the possible adverse use of anything he might say on the stand. The judge implied that he expected lies from the witness, who was serving one sentence. Consequently, he wanted to inform him of the adverse consequences which could flow from such perjury. The Court in a per curiam opinion held that the remarks effectively drove the only defense witness off the stand and denied due process to the accused. The ruling surely has little value as precedent but it demonstrates an appropriate sensitivity to the practical effect of such judical conduct in mid-trial. In addition, the summary disposition is reflective of the judgment that nice arguments, carefully construing the judge's remarks, were simply not a realistic way to cope with the question presented.

In *Cool v. United States*,[82] the Court reversed a conviction because the jury was instructed in regard to the testimony of an accomplice defense witness that it could credit it "if the testimony carries conviction and you are convinced it is true beyond a reasonable doubt." [83] The dissenters argued with considerable merit that picking an isolated passage out of a very long instruction is not a sensible way to assess trial error. "The Court's reversal on the ground that one of the instructions contained a 'negative pregnant' smacks more of scholastic jurisprudence ... than it does of ... common sense."[84] I tend to agree with the dissent. It is quite hard to square the Court's approach in *Cool* with its approach in *Webb*, both decided on December 4, 1972. If a dry scholastic reading of the *Cool* instructions is justified, why not a dry, scholastic reading of the judge's comments in *Webb*? If the Court was unwilling to listen to clever arguments about grammar in *Webb*, it should not have based its ruling in *Cool* upon a grammarian's analysis unrelated to any

[76] 400 U.S. 446 (1970).
[77] 409 U.S. 41 (1972).
[78] 410 U.S. 690 (1973).
[79] *Id.* at 692.
[80] The 1972 term was rich in habeas law. Apart from *Murch* and *LaValle*, there was the concern over the availability of habeas corpus for search and seizure claims. *See* Schneckloth v. Bustamonte, 411 U.S. 218 (1973) (Powell, J., concurring). The Court also decided Braden v. 30th Judicial Circuit Court, 93 S. Ct. 1123 (1973) (jurisdiction over habeas petition by prisoner in one state seeking speedy trial in another state is available in the state where the trial is sought); Hensley v. Municipal Court, 93 S. Ct. 1571 (1973) (state court "recognizance" is sufficient custody to justify habeas corpus jurisdiction); Preiser v. Rodriguez, 93 S. Ct. 1827 (1973) (claims of improper deprivation of "good time" credit must be raised in habeas corpus and may not be litigated under the Civil Rights Acts).
[81] 409 U.S. 95 (1972).
[82] 409 U.S. 100 (1972).
[83] *Id.* at 102.
[84] *Id.* at 108 (Rehnquist, J., dissenting).

consideration of the error in its trial context. Still another problem is how to square the approach of the dissenters who, with the exception of the Chief Justice who dissented only in *Cool*, are the same in both cases!

The third case, *Chambers v. Mississippi*,[85] involved the most compelling set of facts the Court encountered in this term. Chambers was prosecuted for murder. However, a man named McDonald had confessed the murder to several close acquaintances of his and, in writing, to Chambers' attorneys. Nonetheless, before Chambers came to trial, McDonald repudiated his confessions. At trial, the defense called McDonald who admitted but repudiated the written confession. The defense was denied the right to cross-examine McDonald about the other confessions since he was a defense witness. The testimony of witnesses to the other confessions was ruled inadmissible hearsay.

The resolution of the issues was accomplished without dissent on the merits though Justice Rehnquist suggested that the ruling on the merits could not be sustained as constitutionally required.[86] First, the Court criticized the denial of cross-examination, asserting that the ancient rule by which a party vouches for the witnesses he calls has no validity in the context of present day criminal cases. Second, the Court found the denial of cross-examination was crucial because the repudiation of the written confession would be weakened by exploration of the facts surrounding the oral confession to others. Third, the Court rejected as narrow, unrealistic and technical the argument that McDonald was not an adverse witness because he did not accuse Chambers of the crime. Finally, the Court held the denial of cross-examination may not have been sufficient to occasion reversal, but, when combined with the exclusion of witnesses to prior oral confessions; the effect was a deprivation of the right to present a defense. Moreover, the hearsay ruling at trial had been erroneous. The reasons the Court gave were: the confessions were made spontaneously, they were corroborated and they constituted admissions against penal interest. Most important, McDonald was present in court, under oath, and could be cross-examined by the state concerning his prior confessions, and the jury could judge directly his credibility.

The Court's disposition of *Chambers* demonstrates close analysis of the facts and of the applicable legal rules and is a considered and appropriately limited resolution of the issues. The case is unusual and the Court treaded unfamiliar ground. Any court could sense the legitimacy of Chambers' demand for evidence, but to satisfy that demand could require the destruction of several traditional and, ordinarily, sound rules of law. If the concern for the continuity of legal rules prevails, the accused endures a patently disturbing kind of trial. If the established rules are hastily wrenched away, the resulting decision may be a legal cannon used for pounding at both sound structures and rotting timbers. In *Chambers* the Court avoided both extremes by conforming its rules closely to the facts of the case. Accordingly, there is in the case the *sine qua non* for the admission of oral confessions: the maker must be present in court and available for cross-examination. This prevents contrived evidence that some unavailable person confessed to the crime with which the accused is charged. So too, there is the necessary emphasis on spontaneity and corroboration of the confessions. The opinion in *Chambers* performs precisely the task set before the Court.

Cool, *Webb* and *Chambers* are not great cases. No abiding or particularly novel principles are established. The rulings are limited, tied closely to the facts of the particular case. When the Court decides cases of this sort, it is criticized because it spends its time and effort serving as little more than an ordinary court of errors and appeals. The criticism has validity, but it is of value to see how the Court deals with ordinary cases. It allows comparison with the job done by other courts. There is a scale to measure some judicial weaknesses and strengths. So much of the Court's work is unique that its members usually claim that no prior judicial experience really prepares one to fill the role demanded of a Justice. Nevertheless, some assessment must be made of Justices in the same way that judges are assessed. Though a fine judge may become an inept Justice, I doubt that a mediocre judge can achieve greatness as a Justice. The ability of a Justice to be a good judge is an indication of necessary (though not sufficient) qualifications. For this reason alone, *Cool*, *Webb*, *Chambers*, and *Neil v. Biggers* as well, are worthy of close study.

Conclusion

Nothing changed very much this term. The prosecution won more cases than it used to, but this is simply the continuation of an established

[85] 410 U.S. 284 (1973).
[86] *Id.* at 308 (Rehnquist, J., dissenting).

mode.[87] The Court maintained its recently acquired practice of hearing many cases in which the prosecution is seeking review.[88] More importantly, the Court has not abandoned the broad role it now plays in the development of criminal justice. If the slow, measured pace of this last term means anything at all, it means the Court will not alter the doctrines of the 1960's with the degree of haste that attended their original adoption. Only the abortion decision resembles the sort of judicial bombshell that fell throughout the 1960's. But the Supreme Court remains the most important criminal law court in the land. There is little dissent to the continuing pattern of vigorous review and of tight constitutional control over state and federal criminal procedure. If the opinions in this term show change, the change is exceedingly subtle. Perhaps *Chambers v. Mississippi* is a sign of things to come. As in recent years, the Court subjected two traditional state law rules, with no apparent constitutional significance, to a searching constitutional analysis. No one disputes that *Chambers* represents a "further constitutionalization of the intricacies of the common law of evidence." [89] The result in *Chambers* resembles the result the Court would have reached six years ago. But in reaching its end, the Court followed a very different star. The Court found constitutional error because an accused was prevented from offering highly probative evidence in his defense—part of the relevant truth was kept from the jury. There was no reliance on absolutes or abstract principles. The decision was not founded on value judgments about which party to the criminal case ought to have a handicap. The criterion was solely whether, after careful analysis, it could be said that the state rules served the interests of truth. Often, in recent years, the debate has centered on the abstract issue of whether or not the Constitution "was designed to make the job of the prosecutor difficult." [90] In *Chambers*, the Court simply ignored such questions. *Chambers* may signal a new emphasis on the pursuit of truth as the fundamental concern of a constitutional system of criminal justice. If this is so, then we are about to embark on another criminal law revolution.

[87] See Table 1.
[88] See Table 2.
[89] 410 U.S. at 308.
[90] Barnes v. United States, 93 S. Ct. 2366 (1973) (Douglas, J., dissenting).

TABLE 1

CRIMINAL CASES[a]

Term	For Government	Against Government	Total
1968	17	38	55
1969	16[b]	26[b]	42[b]
1970	29	14	43
1971	28	37	65
1972	36	26	62

[a] The table was compiled by first checking the final index in the appropriate volume of the BNA CRIMINAL LAW REPORTER for all cases decided by the Supreme Court that Term. Next, U.S. REPORTS were checked to find all opinions that went to the merits of the case. This turned up some per curiam opinions which are included in the totals. For the 1972 Term, the advance sheets for volumes 409, 410 and part one of volume 411, of U.S. REPORTS; volumes 12 and 13 of the BNA CRIMINAL LAW REPORTER; and 93 S. Ct. have been used.

[b] In one case, each side won one issue.

TABLE 2[a]

Term	Total Cases	Brought by Government
1968	55[b]	7
1969	41[c]	10
1970	43[d]	20
1971	65[e]	16
1972	62[f]	24

[a] Table includes federal and state habeas corpus decisions, and military cases.

[b] 11 per curiam opinions which reached the merits are included.

[c] 2 per curiam.

[d] 2 per curiam.

[e] 3 per curiam.

[f] 8 per curiam.