Journal of Criminal Law and Criminology

Volume 68
Issue 4 *December*

Article 1

Winter 1977

Doctrinal Doldrums: The Supreme Court 1976 Term Criminal Law Decisions

B. J. Jr. George

THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 68, No. 4

Printed in U.S.A.

CRIMINAL LAW

FOREWORD—DOCTRINAL DOLDRUMS: THE SUPREME COURT 1976 TERM CRIMINAL LAW DECISIONS

B. J. GEORGE, JR.*

Particularly in the law affecting criminal investigations, the present Supreme Court has moved steadily away from the approach of the Warren Court, which looked at the functioning of the criminal justice system rather than at the impact of that system on individual defendants.[1] To some that is a highly desirable return to a sound constitutional approach,[2] while to others a serious threat to fundamental rights of criminal defendants has occurred or is in the process of occurring.[3] The Burger Court cannot fairly be said to be oblivious to the claims of citizens to fundamental fairness; its decisions delineating new rights for prisoners[4] and mentally-ill persons[5] establish a contrary premise. Nevertheless, several decisions of the Court's Term under consideration suggest enough of the Justices are wavering between adherence to a concern for individual protections under the Constitution and reduction of the staggering burden on federal courts posed by state convicts through eliminating or restricting doctrines and remedies, that clear development of controlling federal principles has been set back. A consequence has been a state of doctrinal doldrums responsible for certain rulings difficult to reconcile with other recent holdings. Nevertheless, one can only assume that a functional majority of the Court is committed to standards of constitutional construction, many of which would have been abhorrent to a majority of the Warren Court.

* President, Southwestern Legal Foundation.

[1] Cardinal examples of the systems approach are Miranda v. Arizona, 384 U.S. 436 (1966) (regulating interrogation) and the paired decisions of Gilbert v. California, 388 U.S. 263 (1967), and United States v. Wade, 388 U.S. 218 (1967) (governing eyewitness identification procedures). Schneckloth v. Bustamonte, 412 U.S. 218 (1973), well illustrates the current Court's approach, rejecting as it does a warning of rights as a condition precedent to waiver of fourth amendment rights in the form of a consent to search.

[2] *E.g.*, Skinner, *Foreword—A New Balance*, 67 J. CRIM. L. & C. 365 (1977).

[3] *E.g.*, Hartman, *Foreword—The Burger Court—1973 Term: Leaving the Sixties Behind Us*, 65 J. CRIM. L. & C. 437 (1975).

[4] *E.g.*, Procunier v. Martinez, 416 U.S. 396 (1974) (censorship of mail and access to counsel); Wolff v. McDonnell, 418 U.S. 539 (1974) (disciplinary proceedings); Gagnon v. Scarpelli, 411 U.S. 778 (1973) (probation and parole revocation).

[5] O'Connor v. Donaldson, 422 U.S. 563 (1975) (Civil Rights Act liability for improper detention as patient when outpatient treatment was available); Jackson v. Indiana, 406 U.S. 715 (1972) (regulation of procedures for commitment of procedurally incompetent defendants); *see generally* George, *Emerging Constitutional Rights of the Mentally Ill*, 27 NAT'L J. CRIM. DEFENSE 35 (1976).

I

CRIMINAL INVESTIGATION

A. Search and Seizure

In its 1975 Term, the Court stringently limited the application of fifth amendment privilege against self-incrimination to seizure or production of documents,[6] choosing to rely instead on the fourth amendment. That has not brought about relaxation of fourth amendment requirements, however, as illustrated by *G. M. Leasing Corporation v. United States*.[7] IRS agents made a warrantless entry into a taxpayer's combined office and residential premises and seized records and evidence there.[8] The taxpayer thereafter sued the government for damages and other relief, but was met by

[6] Andresen v. Maryland, 427 U.S. 463 (1976); Fisher v. United States, 425 U.S. 391 (1976). *See also* Garner v. United States, 424 U.S. 648 (1976) (availability of tax return information to support prosecution).

[7] 429 U.S. 338 (1977).

[8] The agents also seized certain vehicles of the taxpayer from the street, parking lots and other places accessible to the public. The Court ruled that no protected right of privacy had been invaded by those seizures.

the contention that the Constitution[9] allows seizure of taxpayer property to meet tax deficiencies, as a particular application of the Court's administrative search doctrine.[10]

The Court disagreed with the government's position. No advance judicial authorization is required before property can be distrained to meet tax obligations,[11] but that does not extend to searches to discover such property. Nor does liability for taxes convert otherwise protected premises into business premises subject to administrative inspection. Some form of regulated business is required under *Biswell*. In the absence of exigent circumstances posing danger of loss or destruction of property subject to seizure, tax authorities must comply with standard search warrant requirements before they can seize taxpayer property within an area of protected privacy.[12]

The Court's decisions allowing warrantless searches of arrested persons upon arrest[13] and after booking,[14] and of vehicles under analogous circumstances[15] had seemed to signal the eventual repudiation of the Court's holding in *Chimel v. California*[16] that the warrants clause of the fourth amendment is paramount, thus forbidding warrantless searches in other than exigent circumstances. However, that a majority of the Court is not yet ready to return to the pre-*Chimel, Rabinowitz* doctrine[17] is made most clear in *Chadwick*.[18] Information from railway employees and the reactions of dogs trained to detect controlled substances led federal authorities to believe that defendant's locked footlocker, seized from the open trunk of his car to which it had been removed from a baggage room, contained marijuana. A key to the footlocker was seized from a defendant at time of arrest, but search was not conducted for well over an hour following arrest. The government claimed that no protected right of privacy existed if homes, offices or private conversations were unaffected by search and seizure, that the search could be taken as incident to arrest if liberally construed, and that the vehicle search doctrine covered the case because the footlocker was seized from the trunk of a car which in turn was mobile.

The Supreme Court, by a substantial majority,[19] rejected all three propositions. The right of privacy under the fourth amendment is not restricted. It extends to any unreasonable government infringement upon a legitimate expectation of privacy. Hence, personal property like the defendant's locked footlocker was clearly within the protection of the fourth amendment. Personal possessions of that sort, even though movable, are the subject of a much greater legitimate expectation of privacy than vehicles. Defendant's footlocker in the secure control of federal authorities in a federal building posed no threat of loss or destruction constituting exigent circumstances. That conclusion is not affected by the fact that the container had earlier been placed in a vehicle. Finally, although the footlocker might have been legitimately searched incident to a valid arrest, that justification could not continue beyond the time and circumstances during which an arrestee could gain access to a weapon or destroy evidence. Under such circumstances *Preston*[20] was the controlling analogy.

[9] Reliance was placed on U.S. CONST. art. I, § 8, cl. 1, setting forth the right to lay and collect taxes.

[10] *See* United States v. Biswell, 406 U.S. 311 (1972).

[11] A related principle had been established in instances of seizure of property for forfeiture as contraband. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).

[12] The issue of whether the IRS agents could defend against individual liability asserted under Bivens v. Six Unknown Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), on the basis of good faith reliance on apparently valid IRS procedures, was left for the trial court on remand.

[13] Gustafson v. Florida, 414 U.S. 260 (1973); United States v. Robinson, 414 U.S. 218 (1973).

[14] United States v. Edwards, 415 U.S. 800 (1974); *cf.* Cupp v. Murphy, 412 U.S. 291 (1973) (recovery of "highly evanescent evidence" from under petitioner's fingernails, well before arrest and without consent, reasonable under fourth amendment standards).

[15] South Dakota v. Opperman, 428 U.S. 364 (1976) (search of impounded vehicle); Texas v. White, 423 U.S. 67 (1975) (deferred search of vehicle impounded at scene of crime); Cady v. Dombrowski, 413 U.S. 433 (1973) (search of unattended, wrecked vehicle for police weapon believed to be there held reasonable as in exercise of police community caretaking functions).

[16] 395 U.S. 752 (1969).

[17] United States v. Rabinowitz, 339 U.S. 56 (1950).

[18] United States v. Chadwick, 97 S. Ct. 2476 (1977).

[19] Only Justices Blackmun and Rehnquist dissented. They believed no warrant should be required to search and seize movable property in the possession of a person lawfully arrested in a public place. 97 S. Ct. at 2486 (Blackmun, Rehnquist, J.J., dissenting).

[20] Preston v. United States, 376 U.S. 364 (1964) (search of defendant's car at a police station after impoundment for defendant's convenience after arrest for minor offense not involving use of vehicle).

If exigency is present, even though on a somewhat abstract basis, then warrantless search is permissible. In *United States v. Ramsey*,[21] a federal postal inspector suspected that several bulky first-class envelopes from common sources to the same addresses might contain a controlled substance. Inspection revealed white powder in one which on the basis of a standard field test was heroin. Heroin was then found in the other envelopes. On the basis of a search warrant, the envelopes once more were opened at the post office of delivery and most of the contents removed. After delivery the recipients were kept under surveillance and Ramsey arrested when the envelopes were delivered to him. Ramsey obtained a reversal of his conviction because the court of appeals found the original inspection to have been in violation of the first and fourth amendments, thus tainting everything that followed.

The Supreme Court disagreed. The federal legislative standard of reasonable cause to suspect the presence of contraband in the mail, invoked in this case because the shipment was international and not domestic, is compatible with the fourth amendment, which recognizes a special norm for border searches and inspections.[22] The federal employee who initiated the inspection had a reasonable basis for suspicion and therefore acted properly. Further, there was no unwarranted chill on the exercise of first amendment rights which may have followed from the possibility that first-class mail might be inspected. Federal regulations[23] prohibit perusal of correspondence in sealed international first-class mail without an authorizing search warrant. This constitutes a sufficient control over abuses, and renders a chill "not only 'minimal,' . . . but also wholly subjective."[24]

Given the Court's continuing concern for retaining search warrants as the norm and warrantless searches as the exception, it is not surprising that the Court outlawed a system under which lay magistrates received fees for issuing search warrants but not for refusing them.[25] This ran counter to the constitutional requirement that officials issuing warrants be "neutral and detached."[26] Neutrality and detachment are unimpaired by receipt of hearsay evidence,[27] but the same evidence cannot be used to help establish the prosecution's case at trial.[28]

Former President Nixon's efforts to obtain return of his presidential papers were based, in part, on a contention that federal legislation which authorized the General Services Administrator to take custody of those papers was invalid under the fourth amendment as a general warrant. The Court found no unreasonableness in legislation which was aimed at papers that had had public exposure. The Court authorized retention only of documents which were of historical significance and those required for judicial proceedings. Administrative screening was the functional equivalent of judicial controls in more orthodox seizure situations.[29]

B. Data Compilations

Detection of certain regulatory offenses can be facilitated through maintenance of data banks. The Court had already interpreted the federal bank secrecy act[30] as designed to aid law enforcement rather than to preserve the privacy of bank depositors and customers.[31] Therefore, it was hardly surprising that the Court sustained the validity of a state controlled substance statute which provided for a central computerized data bank of names and addresses of those who obtained controlled substances through medical prescription.[32] The Court, however, left ajar a suitable door to scrutinize inadequate security precautions which permit unofficial use of computerized data.[33]

[21] 97 S. Ct. 1972 (1977).

[22] *See* United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (border inspection of vehicles).

[23] 19 C.F.R. § 145.3 (1977).

[24] United States v. Ramsey, 97 S. Ct. at 1983 (citations omitted).

[25] Connally v. Georgia, 429 U.S. 245 (1977).

[26] Coolidge v. New Hampshire, 403 U.S. 443 (1971); *see also* Shadwick v. City of Tampa, 407 U.S. 345 (1972) (clerk of municipal court could issue arrest warrants based on municipal ordinance violations, being independent of law enforcement agencies).

[27] Aguilar v. Texas, 378 U.S. 108 (1964), and see the plurality opinion in United States v. Harris, 403 U.S. 573 (1971).

[28] Moore v. United States, 429 U.S. 20 (1976).

[29] Nixon v. Administrator of General Services, 97 S. Ct. 2777 (1977).

[30] 12 U.S.C. § 1829b(d) (1970).

[31] United States v. Miller, 425 U.S. 435 (1976).

[32] Whalen v. Roe, 97 S. Ct. 869 (1977).

[33] The collection of taxes, the distribution of welfare and social security benefits, the supervision of public health, the direction of our

C. Electronic Surveillance

The Court has never directly passed on the constitutionality of federal eavesdropping legislation[34] under the standards established in *Katz*.[35] Nevertheless, the Court has construed statutory language in a number of cases since 1971.[36] Despite the fact that each case offered opportunity to strike down some or all of the statutory provisions on constitutional grounds, the Court has contented itself with construing language so as to avoid constitutional difficulties and in applying the statutory exclusionary rule[37] only to enforce aspects of the statute viewed to be indispensable to its effective operation. (One may assume that the Warren Court approach would have been precisely the opposite; given that if any part of the legislation were valid, all but trivial departures from statutory requirements would have been sanctioned through invocation of a statute-based exclusionary rule.) The Burger Court approach has been strongly confirmed in the Court's *Donovan* ruling.[38]

In *Donovan*, federal authorities obtained an eavesdropping order against certain named suspects, but in an application for an extension order they did not name Donovan and others though the authorities had probable cause to believe Donovan would use the telephone lines. The names of some of the individuals whose conversations were intercepted also were omitted from information supplied to the issuing district court preliminary to issuance of inventory notices.[39] Lower federal courts found the government's activities in violation of the legislation as they affected the individuals not named and ordered all eavesdropping-derived evidence against them suppressed. The Supreme Court reversed.

The Court rejected the prosecution's contention that before persons need be listed in an application for an original or extension order they must be subscribers to or operators of the transmission media to be monitored. The Court noted that "a wiretap application must name an individual if the Government has probable cause to believe that the individual is engaged in the criminal activity under investigation and expects to intercept the individual's conversations over the target telephone."[40] In addition, a district court should know the names of those whose conversations have been intercepted whether or not they are likely to be indicted (a distinction urged by the government), since otherwise it cannot properly exercise its discretion whether or not to notify such persons "in the interest of justice"[41] about the fact of interception. In sum, the legislation should be given a liberal construction in order to avoid constitutional concerns,[42] an attitude clearly manifested in the lower court decisions in the *Donovan* matter.

A more slender majority of the Court,[43] however, disagreed with the premise that eavesdropping evidence must routinely be excluded if applicant officials have failed to comply with the statutory system. Reaffirming its position in *Giordano*, that suppression of evidence is required only for "those statutory requirements that directly and substantially implement the congressional intention to limit

> armed forces and the enforcement of the criminal laws, all require the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed. The right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures. Recognizing that in some circumstances that duty arguably his [*sic*] its roots in the Constitution, nevertheless New York's statutory scheme, and its implementing administrative procedures, evidence a proper concern with, and protection of, the individual's interest in privacy.

Id. at 879-80.

[34] 18 U.S.C. §§ 2510-2520 (1970).

[35] Katz v. United States, 389 U.S. 347 (1967).

[36] United States v. Chavez, 416 U.S. 562 (1974); United States v. Giordano, 416 U.S. 505 (1974); United States v. Kahn, 415 U.S. 143 (1974); United States v. United States District Court, 407 U.S. 297 (1972).

[37] 18 U.S.C. § 2518(10) (1970). *See also* 18 U.S.C. § 2515.

[38] United States v. Donovan, 429 U.S. 413 (1977).

[39] 18 U.S.C. § 2518(8)(d) (1970).

[40] United States v. Donovan, 429 U.S. at 428.

[41] 18 U.S.C. § 2518(8)(d) (1970).

[42] The Court cites preenactment materials suggesting statutory coverage to forestall difficulties under Katz v. United States, 389 U.S. 347 (1967), and Berger v. New York, 388 U.S. 41 (1967). 429 U.S. at 426-27.

[43] Only Chief Justice Burger disagreed with the interpretation of the statute on the identification issue. 429 U.S. at 440. However, three Justices dissented on the exclusionary rule aspect of the opinion. 429 U.S. at 445 (Brennan, Marshall, Stevens, J.J., dissenting).

the use of intercept procedures to those situations clearly calling for the employment of this extraordinary device" (the exclusionary rule),[44] it found no such weight in the statutory provisions involved in *Donovan*. Therefore, the evidence should not have been suppressed.

If the matters dealt with in *Donovan* are of insufficient importance to justify application of a statutory exclusionary rule, it is difficult to see what provisions would be necessary in this statute, which has been invoked and construed for almost a decade. It appears likely, therefore, that the federal statute will be interpreted by the Court on selected narrow points, but that didactic effect will be achieved through the Court's discussion of doctrine, not the invocation of an exclusionary remedy to benefit defendants who have advanced such points of law for resolution.

D. Undercover Surveillance

Interesting implications about the propriety of the use of undercover agents are to be gleaned from *Weatherford v. Bursey*.[45] An undercover officer, Weatherford, sat in on conferences between Bursey (charged with vandalizing a selective service office) and counsel, principally to preserve his assumed identity. Although various matters of defense strategy and tactics were discussed, the trial court finding that Weatherford communicated nothing to law enforcement superiors or the prosecution about the contents of the discussions remained undisturbed. Weatherford appeared at trial, however, as a witness to the clandestine criminal activities of which Bursey was convicted. Bursey later sued under the federal civil rights act[46] for damages, claiming an unconstitutional infringement upon the right to counsel. A federal court of appeals laid down a per se exclusionary rule allowing recovery if the prosecution knowingly allows intrusion into an attorney-client relationship. The Supreme Court reversed.

The opinion first distinguishes two decisions by the Warren Court[47] which had reversed convictions because of eavesdropping upon prisoners and counsel during preparation for trial. The Court noted that at most[48] these cases stood for the principle that actual use of evidence obtained from monitored conversations between defendants and attorneys could violate the sixth amendment. Nothing in them stood for an automatic liability or retrial rule.[49] Nor was the Court persuaded that the possibility a participant in such conversations might be an undercover law enforcement agent exerts a chilling effect on the attorney-client relationship in the way that monitored conversations might.[50] The Court had already recognized "the unfortunate necessity of undercover work and the value it often is to effective law enforcement."[51] Lacking "general oversight authority with respect to state police investigations," the Court could "disapprove an investigatory practice only if it violates the Constitution,"[52] a premise ignored by the court of appeals' per se exclusionary rule.[53]

[44] United States v. Giordano, 416 U.S. 505, 527 (1974).

[45] 429 U.S. 545 (1977).

[46] 42 U.S.C. § 1983 (1970).

[47] O'Brien v. United States, 386 U.S. 345 (1967); Black v. United States, 385 U.S. 26 (1966).

[48] The Solicitor General had confessed error in both cases, precluding the necessity for a judicial inquiry into whether evidence thus derived actually was used. 429 U.S. at 551.

[49] It is not clear whether the rule below was one of absolute liability under § 1983 or a rule of automatic reversal of convictions obtained after infringement upon private attorney-client consultations. The latter of course would not be directly germane to civil rights litigation, and would not be particularly effective unless converted into a form of immunity against prosecution at any time. Obviously, no such exclusionary doctrine arises based on improper arrest and detention. Gerstein v. Pugh, 420 U.S. 103, 109 (1975). The only analogy for such an approach seems to be the Court's due process reanalysis of the entrapment doctrine. Hampton v. United States, 425 U.S. 484 (1976); *see* George, *United States Supreme Court Term 1975-76: Criminal Law Decisions*, 23 WAYNE L. REV. 1, 5-6 (1977).

[50] The Court found nothing in Hoffa v. United States, 385 U.S. 293 (1966), to support the contention "that the chill is the same whether induced by electronic surveillance or by undercover agents." Weatherford v. Bursey, 429 U.S. at 554 n.4.

[51] Weatherford v. Bursey 429 U.S. at 557. "We have also recognized the desirability and legality of continued secrecy even after arrest." *Id.*

[52] *Id.*

[53] The Court also disapproved a lower court application of Brady v. Maryland, 373 U.S. 83 (1963), to require disclosure of the undercover agent's identity before trial. Noting the want of a general constitutional right to discovery, it found no due process rule requiring disclosure before trial of the names of witnesses who might testify unfavorably to the defense. This was not altered by the fact that the prosecution at first indicated that Weatherford would not testify at trial and then changed its mind. Nor

Weatherford can of course be read fairly narrowly if one chooses. Nevertheless, the entire tone of the opinion is consistent with the Court's reversion to *ad hoc* invocations of due process, looking to denial of fundamental fairness in specific cases[54] rather than to defects in the operation of the entire criminal justice system. Accordingly, even in the instance of as fundamental a right as the right to counsel,[55] the burden rests on the criminal defendant (or the plaintiff in a civil rights action) to show an actual impairment of the working relationship between client and counsel.[56] Certainly no new exclusionary rules, whether of evidence or otherwise, will be endorsed by a majority of the Court as now constituted.

E. Interrogation

The Court has been engaged for the past three terms in curtailing the scope of *Miranda*[57] without directly overruling it. An illustration of the process is found in *Oregon v. Mathiason*,[58] in which a parolee responded to a police request for an interview and, without *Miranda* warnings and waiver, incriminated himself. He was not arrested until some time later. State appellate courts found the equivalent to *Miranda* custody in that Mathiason was under the focus of suspicion and was being questioned in a police facility. The Supreme Court disagreed:

> Such a noncustodial situation is not converted into one in which Miranda applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement the questioning took place in a "coercive environment." Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer Miranda warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioned person is one whom the police suspect. Miranda warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody." It was that sort of coercive environment to which Miranda by its terms was made applicable, and to which it is limited.[59]

Such an approach had been signaled in the preceding term when the Court voided a focus test in the setting of IRS intelligence division interviews.[60] This clearly indicates that *Miranda* concepts will be quite literally interpreted.

Nor will the constitutional voluntariness doctrine be given a mechanical interpretation. In *Hutto v. Ross*,[61] a state defendant contended that his confession, made in the presence of defense counsel after *Miranda* warnings, was involuntary because it had been brought about by a guilty plea, later withdrawn. The Court rejected the contention. Noting that the plea bargain was not conditioned on a confession, it found no basis for a "but for" causation chain which would render the confession the product of plea negotiations for purposes of the voluntariness test. Either direct or implied promises, or coercion, would have to be established in order to trigger a constitutional exclusionary rule.[62]

Limiting interpretations of *Miranda* and other constitutional doctrines affecting admissibility of confessions of course serve to reduce the number of state prisoner claims, or at least

---

did the fact that defendant might have decided to plead guilty rather than stand trial had he known about Weatherford's role as an undercover agent add an important dimension. There is no constitutional right to plea bargain, and hence no constitutional infringement of defendant rights if the prosecution decides to go to trial rather than engage in plea bargaining.

[54] "Due process" emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. Ross v. Moffitt, 417 U.S. 600, 609 (1974).

[55] *See, e.g.*, Faretta v. California, 422 U.S. 806 (1975), *discussed in* Allen, *Foreword—Quiescence and Ferment: The 1974 Term in the Supreme Court*, 66 J. CRIM. L. & C. 391, 391–93 (1976).

[56] The Court suggests that *O'Brien* and *Black*, against the background of *Hoffa*, may have been fourth amendment cases because of the use of unlawful eavesdropping devices. Weatherford v. Bursey, 429 U.S. at 552. *Cf.* Justice Marshall's dissent, *id.* at 567 n.6.

[57] Miranda v. Arizona, 384 U.S. 436 (1966).

[58] 429 U.S. 492 (1977).

[59] *Id.* at 495.

[60] Beckwith v. United States, 425 U.S. 341 (1976).

[61] 429 U.S. 28 (1976).

[62] In the reverse context, the Court had held that an otherwise voluntary guilty plea could not be attacked because of an earlier confession arguably obtained in violation of *Miranda* requirements. Parker v. North Carolina, 397 U.S. 790 (1970).

reduce the number of those in which relief will be given. A more direct way of accomplishing the aim of restricting habeas corpus dockets of federal district courts is to require that state defendants take advantage of available state remedies or else be foreclosed from raising constitutional issues. The Court had done this during its 1975 Term by instructing federal courts to withhold exercise of their habeas corpus jurisdictional powers concerning fourth amendment claims if state convicts had been afforded a "full and fair opportunity" to litigate such matters in state courts but failed to do so, for whatever reason.[63] During the same Term the Court also applied a similar contemporaneous objection requirement to other claims of procedural irregularity.[64] In *Wainwright v. Sykes*,[65] the Court applied *Francis* standards to govern *Miranda* matters and presumably any other doctrines affecting admissibility of confessions. Particularly if *Sykes* is given retroactive effect as *Powell* has been,[66] the result should be an immediate further reduction of the number of state prisoner habeas petitions in federal courts.[67]

Thus, in three of its four confessions-related decisions during the 1976 Term the Court moved in the direction of restricting either doctrine or federal remedy. The fourth, *Brewer v. Williams*,[68] is more troublesome. Examined closely, it does nothing more than revivify the Court's earlier *Massiah*[69] holding, that formally charged defendants cannot be directly or indirectly interrogated by law enforcement officials in the absence of retained or appointed counsel. Indeed, the majority opinion eschews any consideration of either *Miranda* or the voluntariness doctrine.[70] Nevertheless, in a dichotomy somewhat reminiscent of that encountered in the eyewitness identification field,[71] the Court distinguishes interrogation transactions before formal charges have been laid and (or?) counsel retained or provided from those in which one or both of those events have occurred. As the Court noted: "[O]nce adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him."[72]

Williams may prove to have fairly limited impact on the law of interrogation. For one thing, the Court recognizes that the sixth amendment right to counsel can be waived for purposes of interrogation. Williams was not shown by the state to have knowingly and voluntarily waived the right to counsel, but waiver may be easier to establish in more routine cases.[73] It also remains to be seen whether actual representation by counsel is important,

[63] Stone v. Powell, 428 U.S. 465, 482 (1976); *see also* George, *supra* note 49, at 17–19.

[64] Francis v. Henderson, 425 U.S. 536 (1976). The Court had also ruled that federal habeas relief is unavailable to a state prisoner who failed to utilize available state appellate remedies. Murch v. Mottram, 409 U.S. 41 (1972).

[65] 97 S. Ct. 2497 (1977).

[66] Based on Stone v. Powell, 428 U.S. at 495 n.38. *See, e.g.*, Jordan v. Estelle, 551 F.2d 612 (5th Cir. 1977); Hines v. Augur, 550 F.2d 1094 (8th Cir. 1977); Kahn v. Flood, 550 F.2d 784 (2d Cir. 1977); United States *ex rel.* Saiken v. Bensinger, 546 F.2d 1292 (7th Cir. 1976). Retroactivity also precludes a federal prisoner from using a § 2255 motion to attack, on fourth amendment grounds, a state conviction used to enhance a later federal sentence. United States v. Tisnado, 547 F.2d 452 (9th Cir. 1976).

Sykes does not address specifically the retroactivity issue, but the tenor of the opinion, which suggests that the principle of exhaustion of remedies has been long established, lays a doctrinal basis for a holding of retroactivity.

[67] Because of its use of *Francis* principles the Court found it unnecessary to pursue an interesting doctrinal issue, namely, whether the reinterpretation of *Miranda* requirements, as distinguished from concerns as to voluntariness, as "prophylactic rules" developed to protect fifth amendment rights, Michigan v. Tucker, 417 U.S. 433, 439 (1974), renders "a bare allegation of a *Miranda* violation, without accompanying assertions going to the actual voluntariness or reliability of the confession" a nonconstitutional issue inappropriate to be submitted under 28 U.S.C. § 2241(c)(3) (1970). Wainwright v. Sykes, 97 S. Ct. at 2506 n.11. On the conceptual matter, see, e.g. George, *Future Trends in the Administration of Criminal Justice*, 69 MIL. L. REV. 1, 17–18, 20–21 (1975).

[68] 97 S. Ct. 1232 (1977).

[69] Massiah v. United States, 377 U.S. 201 (1964).

[70] Brewer v. Williams, 97 S. Ct. at 1239. However, Justice Powell, concurring, dwells on certain aspects of the *Williams* facts suggesting involuntariness. *Id.* at 1245.

[71] *Compare* Kirby v. Illinois, 406 U.S. 682 (1972), applying due process standards to precharging identification procedures, *with* Gilbert v. California, 388 U.S. 263 (1967), *and* United States v. Wade, 388 U.S. 218 (1967), applying the right to counsel to postcharging activity.

[72] Brewer v. Williams, 97 S. Ct. at 1240 (footnote omitted).

[73] *But see* Witt v. State, 342 So. 2d 497 (Fla. 1977) (specific oral or written waiver of representation by counsel at interrogation required before interrogation can commence).

not the fact of commencement of formal proceedings alone. In both *Massiah* and *Brewer* the defendants were indeed represented at the time of questioning. Neither decision, therefore, had to contend with the matter of whether one charged but not yet represented must have counsel supplied before interrogation.[74] If that must be done, then *Williams* will have a major impact on interrogation practices; but, if the question is one of actual appointment or retention of counsel, then presumably relatively few cases will be affected by it. Moreover, in forecasting the decision's effect, one cannot ignore the fact that two attorneys representing Williams obtained specific commitments from law enforcement officials that they would not interrogate him. Despite those commitments, the principal investigator engaged in conversational tactics that appeared to have the clear purpose of eliciting incriminating responses.[75] However, if there were no such specific commitment, would the decision have gone as it did? Justice Stevens' concurring opinion, essential to the five-Justice majority, dwells on that aspect of the *Williams* facts. Eliminate Stevens' opinion and one might project a different outcome in a case in which officers otherwise met *Miranda* requirements.[76]

The dissenting Justices were more concerned about the likelihood that Williams would go free of charges of murdering a child because of the invocation of a derivative exclusionary rule, which would exclude evidence of the condition of the child's body, than they were about excluding Williams' confession itself.[77] The majority recognizes the problem and in dictum endeavors to forestall it by recognizing the "inevitable discovery" doctrine[78] as a limitation on the derivative evidence rule. Such a doctrine, if ultimately ratified by the Court, might well have application in fourth amendment settings as well.

F. Eyewitness Identification Proceedings

The Court substantially reduced the impact of its earlier decisions applying due process standards to identification procedures[79] by refusing to invoke a per se exclusionary rule in such instances. If a per se rule were adopted, an eyewitness would have been precluded from testifying on the identification issue if he or she had participated in identification procedures subsequently determined to have violated standards of fundamental fairness. The "taint"-"fruit" standard for determining whether to allow identification testimony in postcharging lineup cases, namely, whether a witness's impressions actually went back to the time of the criminal transaction or simply to the time of confrontation under police auspices,[80] has proven to be the Achilles heel of *Wade-Gilbert* doctrine. Perusal of the plethora of decisions on this point over the past decade shows that few appellate courts will overturn a lower court decision when an independent basis for a witness's identification testimony existed. A number of courts and writers had assumed, however, that the only appropriate sanction for a violation of basic due process rights in the identification context is an automatic exclusion rule. That approached was rejected by the

[74] Under *Wade-Gilbert,* there is authority allowing appointment or provision of special counsel for purposes of identification proceedings. Zamora v. Guam, 394 F.2d 815 (9th Cir. 1968); Thompson v. State, 85 Nev. 134, 451 P.2d 704, *cert. denied,* 396 U.S. 893 (1969); *see also* People v. Dates, 52 Mich. App. 544, 218 N.W.2d 100 (1974) (*semble:* counsel supplied under state rule requiring counsel for photographic identification procedures).

[75] *See also* State v. Weedon, 342 So. 2d 642 (La. 1977) (statement by defendant made during booking excluded because of commitment by officers to attorney that defendant would not be interrogated).

[76] The surreptitious interrogation aspects of *Massiah* seem no longer important under *Williams*: "That the incriminating statements were elicited surreptitiously in the *Massiah* case, and otherwise here, is constitutionally irrelevant." 97 S. Ct. at 1240. That suggests the appropriateness of reevaluating such decisions as State v. Daugherty, 221 Kan. 612, 562 P.2d 42 (1977), and People v. Cardona, 41 N.Y.2d 333, 360 N.E.2d 1306, 392 N.Y.S.2d 606 (1977), which give prominence to this feature of *Massiah.*

[77] "With the exclusionary rule operating as the Court effectuates it, the decision today probably means that, as a practical matter, no new trial will be possible at this date eight years after the crime, and that this respondent necessarily will go free." 97 S. Ct. at 1261 (Blackmun, J., dissenting).

[78] "[E]vidence of where the body was found and of its condition might well be admissible on the theory that the body would have been discovered in any event, even had incriminating statements not been elicited from Williams." 97 S. Ct. at 1243 n.12.

[79] Neil v. Biggers, 409 U.S. 188 (1972); Simmons v. United States, 390 U.S. 377 (1968); Stovall v. Denno, 388 U.S. 293 (1967).

[80] United States v. Wade, 388 U.S. 218, 241 (1967). The prosecution must be given an opportunity to establish the independent basis of such testimony. Gilbert v. California, 388 U.S. 263 (1967).

Court in *Manson v. Brathwaite*.[81]

The decision recognizes that important policy factors have been advanced to support a per se exclusionary rule. Nonetheless, countervailing policies merit priority, according to the Court. Accordingly, though the per se rule aims to keep unreliable evidence from juries, it goes too far through its "automatic" and "peremptory" application to exclude what may be reliable and relevant evidence. The per se rule is also designed to deter police misconduct, but the majority opinion concludes that an equivalent effect is wrought because unreliable evidence will be excluded, and officers cannot be sure that the evidence they obtain outside proper procedures will be characterized as reliable. Finally, in a balancing approach identical to that now manifested in fourth amendment[82] and confession (*Miranda*) cases,[83] a per se exclusionary rule may frustrate justice by allowing a guilty person to go free, when reliable evidence is excluded in an effort to compel police to revise their investigatory methods. Such considerations impel the conclusion, according to the majority of the Court, that reliability of identification evidence is the hallmark of admissibility under due process standards.[84]

In sum, the Court has put to rest the enterprise, flowing from the Warren Court days, of controlling police conduct through sweeping exclusionary rules. Courts may have an opportunity from time to time to comment on police methods of obtaining identifications, but it is likely to be a rare event when a state or federal court, on federal due process grounds, upsets a jury verdict based on confident assertions by witnesses of the identification of defendants as perpetrators.[85]

[81] 97 S. Ct. 2243 (1977).

[82] Stone v. Powell, 428 U.S. 465 (1976); United States v. Janis, 428 U.S. 433 (1976); United States v. Peltier, 422 U.S. 531 (1976).

[83] Michigan v. Tucker, 417 U.S. 433 (1974).

[84] Factors listed by the Court as important include opportunity of a witness to view a criminal at the time of a crime, the witness' degree of attention, accuracy of earlier description of the criminal, the level of certainty of identification expressed at a confrontation, and the time elapsed between crime and confrontation. Manson v. Brathwaite, 97 S. Ct. at 2253.

[85] It also seems inevitable that the exhaustion of remedies requirements, set forth for confessions issues in *Wainwright v. Sykes*, discussed in text accompanying notes 63-67 *supra*, will be applied in all classes of identification cases as well.

II

Pretrial Proceedings

A. Grand Jury

The Court determined several issues during the Term which have significance for the conduct of grand jury proceedings. One governs the procedures to be followed if unconstitutional discrimination in the selection of juries is asserted.[86] In *Castaneda v. Partida*, a state prisoner sought federal habeas corpus on the ground that Mexican-Americans had been systematically excluded from grand jury panels, including that which had indicted him, thus denying him equal protection.[87] Statistical data which he advanced showed that half or less of typical grand juries were composed of Hispanic-surnamed individuals in a county in which nearly eighty percent were of that ethnic origin. The state, in response, relied on little else than the fact that three of the five persons responsible for preparation of jury panels were also Hispanic-surnamed. It urged the conclusion be drawn that these persons would not discriminate against those of similar origins. The Court sustained the appeals court's ruling that habeas should issue under such circumstances.

Relatively few jurisdictions will be affected by *Partida*, since most provide for random selection based on voter lists, a practice which appears to forestall equal protection attacks.[88] Even in instances in which there may be discrimination, the *Partida* holding establishes nothing new in constitutional doctrine. Instead, it serves only to confirm that state authorities are unwise to ignore the procedural burden which establishment by defendants of statistical discrepancy between ethnic percentages in population and juror lists places on them to show a valid explanation for such a discrepancy. In some instances no valid explanation may be possible. But in a county system in which minority (or in *Partida*, majority) repre-

[86] Castaneda v. Partida, 97 S. Ct. 1272 (1977).

[87] Under such cases as Alexander v. Louisiana, 405 U.S. 625 (1972); Hernandez v. Texas, 347 U.S. 475 (1954); and Smith v. Texas, 311 U.S. 128 (1940).

[88] *See* Castaneda v. Partida, 97 S. Ct. at 1275 n.1; *cf.* Hamling v. United States, 418 U.S. 87 (1974) (three-year lag in revising federal jury lists, so that no panelist could be younger than 24, did not violate Constitution).

sentatives participate in determining juror eligibility, all that need be done is prove by testimony that there are valid criteria for selection like literacy, mental condition, moral character and past criminal records.[89]

Grand jury witnesses traditionally have had no right to be warned about the privilege against self-incrimination before questions are put to them. The Court is clearly disinclined to tamper with that tradition on constitutional grounds. In *United States v. Wong*,[90] it reaffirmed its 1976 *Mandujano*[91] holding that no infringement upon self-incrimination rights, even assumed *arguendo*, justifies perjury, and held in addition that omission of warnings is not so fundamentally unfair as to deny due process of law. The Court continued to skirt about the issue, dealt with only in the *Mandujano* plurality opinion, whether *Miranda* warning requirements, as such, govern grand jury proceedings. That matter again was disregarded in *United States v. Washington*[92] because the prosecutor conducting the federal grand jury proceeding in question gave a slightly adapted version of *Miranda* warnings to a target witness. Washington claimed that warnings should have been given before a witness entered a grand jury room, so that he or she would have time to ponder their significance and would not be in danger of producing an adverse inference of guilt drawn by grand jurors who would hear the warning. The Court rejected this contention. Warnings given in a grand jury's presence gain solemnity in the process, and the grand jury is but an investigative body, "not the final arbiter of guilt or innocence."[93]

Nevertheless, despite the disinclination of the Court to decide the *Miranda* issue in *Washington*, its discussion in *Beckwith*,[94] coupled with its decision in *Mathiason*,[95] leaves little likelihood that it will apply *Miranda* to formal proceedings like grand jury hearings. That is as it should be, since there is no logical or doctrinal reason why a specialized application of privilege like *Miranda* should be allowed to govern the historical privilege when law enforcement officials are not directly involved. If warnings to all witnesses, including grand jury witnesses, are fairer, the matter should be dealt with by statute or court rule, since the Court has clearly stated that the matter is not one for resolution under the due process clause.

The Court dealt once more with the problem of prohibited penalties under the fifth amendment. In this instance a state statute divested political party officials of party office and disabled them from serving in a similar capacity for five years after refusing to waive immunity before a grand jury or other specified tribunal.[96] Continuing the position taken in earlier decisions, that public employees cannot be discharged,[97] professional persons disciplined,[98] or individuals disqualified from contracting with governmental entities,[99] the Court ruled that the sort of disqualification mandated by the state legislation produced social and professional consequences which constituted a prohibited penalty when triggered by a valid claim of privilege. Moreover, the opinion notes that Cunningham was forced to balance one right against another in violation of the *Simmons*[100] ban against such choices. In this instance he was forced to weigh the fifth amendment privilege against the right to participate in private voluntary political associations.

Thus, those conducting grand jury and other investigative proceedings cannot demand waiver of immunity. If those responsible for conducting these proceedings want information then a source must be immunized against all use, including that affecting livelihood as quite broadly delineated by the Court. The

[89] *See* Castaneda v. Partida, 97 S. Ct. at 1282.

[90] 97 S. Ct. 1823 (1977).

[91] United States v. Mandujano, 425 U.S. 564 (1975).

[92] 97 S. Ct. 1814 (1977).

[93] *Id.* at 1821.

[94] Beckwith v. United States, 425 U.S. 341 (1976); *see* Skinner, *supra* note 2, at 365-66.

[95] Oregon v. Mathiason, 429 U.S. 492 (1977), discussed in text accompanying notes 58-60 *supra*.

[96] Lefkowitz v. Cunningham, 97 S. Ct. 2132 (1977).

[97] Uniformed Sanitation Men Ass'n, Inc. v. Comm'r of Sanitation, 392 U.S. 280 (1968); Gardner v. Broderick, 392 U.S. 273 (1968); Garrity v. New Jersey, 385 U.S. 493 (1967) (incriminating admissions obtained under threat of discharge unusable in criminal prosecution).

[98] Spevack v. Klein, 385 U.S. 511 (1967).

[99] Lefkowitz v. Turley, 414 U.S. 70 (1973).

[100] Simmons v. United States, 390 U.S. 377, 389 (1968) (defendant could not be forced to choose between vindication of fourth amendment rights through freedom to testify in support of a motion to suppress and preservation of privilege through silence in such proceedings; the Court privileged testimony and derivative evidence elicited during suppression proceedings).

majority opinion also suggests that these problems can be avoided by providing for use immunity (prohibition against using specific answers and evidence derivative from them) rather than transactional immunity (disability to prosecute for any crime arising from the transaction to which testimony relates). The former is an available constitutional option.[101] How practical that suggestion is, however, is open to debate, since there appears to be reluctance on the part of most sources, acting on advice of counsel, to accept use rather than transactional immunity.

Efforts to exploit the Court's earlier indications that due process might be infringed if institution of formal charges were delayed to the point where important defense evidence was lost[102] have failed. In *United States v. Lovasco,*[103] the prosecution did not present Lovasco's case to a grand jury until seventeen months after the defendant's possible commission of a crime had come to the government's attention. During that time a witness material to Lovasco's defense died. In reliance on the *Marion* statements, the trial court dismissed the charges and the court of appeals affirmed. The Supreme Court reversed.

The Court first noted that *Marion* held only that proof of actual prejudice makes a due process claim ready for adjudication but does not automatically justify a claim for relief. Instead, "the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused."[104] Because it is unprofessional conduct for prosecutors to recommend indictments on less than probable cause, hasty action on their part is improper. Beyond that, however, fairness can justify delay until the government believes that it can prove a case beyond a reasonable doubt. Premature prosecution can result in frustrated investigations into other wrongdoing, unneeded multiple indictments, subjection of defendants to charges which might otherwise not be brought, and inadequate evaluation of the basic desirability of moving against individuals in given circumstances. Since some or all of these factors governed the delay in Lovasco's case, it was error to grant him immunity from prosecution, even though his defense "might have been somewhat prejudiced by the lapse of time."[105]

B. Guilty Plea Practice

As the Court has confirmed, there is no right to engage in plea negotiations.[106] If a prosecutor or a trial court refuses to accept plea bargains except those without sentence concessions and based on the most serious offense charged, defendants can obtain no federal constitutional relief. But if, as appears to be the prevailing policy in most jurisdictions, plea negotiations continue to be standard practice, careful procedural requirements must be met.

This was confirmed in what may be a large body of dictum in *Blackledge v. Allison.*[107] The formal concern was over whether a federal district court properly denied a habeas fact-finding hearing on a claim that a promise bearing on sentence had been defaulted upon,[108] in reliance on a form embodying yes or no responses to stereotyped inquiries, signed by defendant and adopted by the trial court. The Court held that a record or document of that sort would not automatically preclude an evidentiary hearing by the habeas court.

However, the decision can be taken as an encouragement to bringing plea negotiations into the open, at least after the fact, through true, adequately recorded inquiry. Pointing to reforms in North Carolina procedure after *Allison* had been decided, the Court noted that "[t]he careful explication of the legitimacy of plea bargaining, the questioning of both lawyers, and the verbatim record of their answers at the guilty plea proceedings would almost surely have shown whether any bargain did exist and, if so, insured that it was not ignored."[109] In this context, in contrast to its position on availability of confessions issues on

[101] Zicarelli v. New Jersey State Comm'n of Investigations, 406 U.S. 472 (1972); Kastigar v. United States, 406 U.S. 441 (1972).

[102] United States v. Marion, 404 U.S. 307, 325–26 (1971) (delayed arrest). After formal charges have been filed, the balancing test of Barker v. Wingo, 407 U.S. 514 (1972), governs.

[103] 97 S. Ct. 2044 (1977).

[104] *Id.* at 2049.

[105] *Id.* at 2052.

[106] Weatherford v. Bursey, 429 U.S. 545, 560–61 (1977).

[107] 97 S. Ct. 1621 (1977).

[108] Either such a commitment must be honored or the plea must be vacated. Santobello v. New York, 404 U.S. 257 (1971).

[109] Blackledge v. Allison, 97 S. Ct. at 1632.

federal habeas corpus,[110] the Court has left some encouragement for prisoners in jurisdictions with primitive plea practices to litigate cases arising from them, while at the same time manifesting a disinclination to use federal habeas to reevaluate pleas in states with modern, elaborate rules.

III

Trial Proceedings

A. Double Jeopardy

The Court considered several important aspects of the double jeopardy clause.[111] One is the status of lesser included offenses under the "same offense" aspect of the prohibition against repeated proceedings. This in turn requires a consideration of the *Blockburger* standard "for determining whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment":

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.[112]

The Court made clear in two decisions of the Term[113] that lesser included offenses are within the same offense as the most serious crime charged. In *Brown*, the defendant was convicted of joyriding and later charged with theft of the same vehicle on the same occasion. In *Jeffers*, that relationship was found to exist between two provisions of the federal controlled substances act.[114] When such a finding is made on the basis of statutory construction, it does not matter in which order the separate trials occur. One proceeding on either exhausts the power of the government to proceed.

There are circumstances, recognized in *Brown* and *Jeffers*, in which repeated proceedings are possible. Thus, if circumstances which aggravate a lesser offense into a greater offense either have not occurred at the time of the first trial or could not have been discovered in the exercise of due diligence by that time, retrial on the more serious charge is permissible.[115] Any effort to cumulate punishments for both greater and lesser offenses constitutes prohibited multiple punishment.[116] Moreover, if a defendant successfully moves to sever trial or resists prosecution efforts to consolidate charges or even fails to assert that greater or lesser charges are involved in a repetitive prosecution, double jeopardy objections are waived.[117]

The content of counts also can be governed by double jeopardy considerations. In *Brown v. Ohio*, the prosecution carved a nine-day joyriding transaction into a period of unauthorized use and a period of theft. This the Court would not allow. The Court stated, "The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units."[118] The converse problem of duplicitous counts (a single count alleging commission of two or more offenses) raises primary problems in the context of the defendant's claim to know the nature and cause of the accusations against him.[119] However, if a defendant obtains an instruction that a jury must unanimously find beyond a reasonable doubt all the elements of all the crimes charged in a duplicitous count, and a guilty verdict is returned, a defendant cannot object to retrial on one of the crimes charged if a defense appeal results in retrial.[120]

For all of the purposes discussed above, the felony murder doctrine and the specific

[110] See text accompanying notes 63–67 *supra*.

[111] U.S. Const. amend. V.

[112] Blockburger v. United States, 284 U.S. 299, 304 (1932), *quoted in* Brown v. Ohio, 97 S. Ct. 2221, 2225 (1977).

[113] Brown v. Ohio, 97 S. Ct. 2221 (1977); Jeffers v. United States, 97 S. Ct. 2207 (1977).

[114] 21 U.S.C. §§ 846, 848 (1970). The Court distinguished Iannelli v. United States, 420 U.S. 770 (1975), because different provisions of the act were involved, which did not bear the relationship *inter se* of greater and lesser included offenses.

[115] Brown v. Ohio, 97 S. Ct. at 2227 n.7; Jeffers v. United States, 97 S. Ct. at 2216–17.

[116] "Fines, of course, are treated in the same way as prison sentences for purposes of double jeopardy and multiple punishment analysis." Jeffers v. United States, 97 S. Ct. at 2218.

[117] *Id.* at 2217.

[118] Brown v. Ohio, 97 S. Ct. at 2227.

[119] U.S. Const. amend. VI. The right to jury trial also is involved, in that it is possible for some jurors to convict on the basis of one offense while others utilize one or more of the others. *See* Abney v. United States, 97 S. Ct. 2034, 2043 (1977).

[120] Abney v. United States, 97 S. Ct. at 2043.

felony on which it is based constitute a single offense.[121]

This Term's "same offense" decisions do not place the Court behind the same transaction test which some jurisdictions have adopted.[122] Coupled with the collateral estoppel cases,[123] however, the Court has moved far enough toward the coverage of the broader test (which in effect works compulsory joinder of all offenses relating to the same act or transaction or related series of acts or transactions) that there seems little reason to hold back from incorporating it into the fifth amendment.

The other primary issues dealt with by the Court are the circumstances under which trial courts can terminate proceedings without barring retrial and the related matter of the prosecution's ability to appeal termination orders. Until a defendant has been placed in jeopardy, either through the swearing of a jury or commencement of the evidentiary process in a bench trial,[124] proceedings can be halted and restarted until either a speedy trial has been denied or the prescriptive period has run. There seems to be no due process bar against such activities. But once jeopardy has attached retrial is possible only under certain circumstances: (1) the first trial results in a deadlocked jury;[125] (2) trial must be interrupted because of manifest necessity;[126] (3) the defense moves for mistrial or the necessity for mistrial can be traced to defense misconduct;[127] or (4) the defense appeals a conviction successfully.[128] Only if a trial court grants a mistrial without adequate cause over defense objection or without defense concurrence is retrial barred.[129]

If a jury acquits a defendant,[130] the prosecution cannot appeal on the merits[131] because that would subject defendant to a repeated trial on the merits. Exactly the same results follow if acquittal follows bench trial,[132] if a trial court rules for the defense on the merits based on stipulated or agreed-to facts[133] or if a defense motion for acquittal is reserved and then acted favorably upon following report of a deadlocked jury.[134]

The related mode of raising these important issues is in terms of the prosecution right to appeal. At the threshhold, since there is no right to appeal on the part of either party,[135] an authorizing statute or rule is needed before prosecution appeal is possible. If, however, there is a general authorization to that end, it must be construed against the backdrop of the double jeopardy provision. If a prosecution is terminated favorably to the defense before defendant has been placed in jeopardy, for example by a finding that a criminal pleading is fatally defective[136] or by a suppression order affecting key prosecution evidence,[137] the government properly may be allowed an appeal.[138]

---

[121] Harris v. Oklahoma, 97 S. Ct. 2912 (1977).

[122] *See, e.g.*, Crampton v. 54-A District Judge, 397 Mich. 489, 245 N.W.2d 28 (1976).

[123] Harris v. Washington, 404 U.S. 55 (1971); Ashe v. Swenson, 397 U.S. 436 (1970).

[124] United States v. Martin Linen Supply Co., 97 S. Ct. 1349, 1353–54 (1977).

[125] United States v. Sanford, 429 U.S. 14 (1976).

[126] Illinois v. Somerville, 410 U.S. 458 (1973).

[127] United States v. Dinitz, 424 U.S. 600 (1976).

[128] Abney v. United States, 97 S. Ct. at 2043.

[129] United States v. Jorn, 400 U.S. 470, 479–87 (1971).

[130] Conviction of a lesser included offense on some but not all of the counts in a multiple count indictment has the effect of an acquittal of the rest of the crimes charged, barring retrial on them after successful appeal. Price v. Georgia, 398 U.S. 323 (1970). Recall also that retrial cannot result in enhanced punishment unless factors subsequent to appeal, established on the record, justify that enhancement. North Carolina v. Pearce, 395 U.S. 711 (1969). An exception to the latter rule applies if juries sentence and a later jury is unaware of the sentence earlier assessed. Chaffin v. Stynchcombe, 412 U.S. 17 (1973); Colten v. Kentucky, 407 U.S. 104, 119–20 (1972) (appeal in form of de novo trial).

[131] There is no objection to use of advisory opinions, but few states allow for the practice.

[132] United States v. Morrison, 429 U.S. 1 (1976).

[133] Finch v. United States, 97 S. Ct. 2909 (1977).

[134] United States v. Martin Linen Supply Co., 97 S. Ct. 1349, 1356–57 (1977). The Court found that action under FED. R. CRIM. P. 29(c) amounts to a determination on the merits even though delayed until after a jury has proven unable to agree on a verdict.

[135] Abney v. United States, 97 S. Ct. at 2038–39.

[136] United States v. Sanford, 429 U.S. 14 (1976); Serfass v. United States, 420 U.S. 377 (1975).

[137] United States v. Kopp, 429 U.S. 121 (1976); United States v. Rose, 429 U.S. 5 (1976); United States v. Morrison, 429 U.S. 1 (1976).

[138] Abney v. United States, 97 S. Ct. at 2040–41, treats a trial court rejection of a defense claim of double jeopardy as a final judgment under 28 U.S.C. § 1291 (1970). Such a decision is critical to a defendant's triability, and if interlocutory appeal is not allowed may result in the very harm which the double jeopardy provision is designed to prevent—repetitive trial. Grounds other than double jeopardy cannot be considered on such an appeal even though a trial

A reversal of such a trial court ruling will bring a first trial, not a repeated trial. At the other end of trial court proceedings, if after conviction a court grants a defense motion in arrest of judgment or for a new trial, the prosecution can be allowed to appeal because reversal of the ultimate trial court action will but restore the jury finding, not subject a defendant to further trial proceedings.[139] It is only when jeopardy has attached that a successful appeal by the prosecution, no matter how well founded in principles of abstract law, will result in retrial, and this the double jeopardy concept in Anglo-American law is designed to prevent.[140] These principles the 1976 Term adequately illustrates.[141]

B. Allocation of Burden of Persuasion

Only in rare circumstances has the Supreme Court undertaken to consider points of state criminal law under the guise of evaluating the validity of instructions. That has been a technique reserved for interpreting points of federal law.[142] The Court's 1975 *Mullaney v. Wilbur*[143] decision, however, led to efforts to translate criminal law doctrine into a constitutional matter through alleging a legislative lessening of the prosecution responsibility to establish all elements of a substantive offense through proof beyond a reasonable doubt.[144] Something of a check has been placed on such efforts through the Court's decision in *Patterson v. New York*.[145]

In *Patterson* the trial court instructed, in conformity with New York law, that if the defendant was shown beyond a reasonable doubt by the prosecution to have intended to cause the death of another and in fact to have caused the death of that or another person, the jury could convict of second-degree murder, and that it was then incumbent on the defendant to establish that he had acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse. State appellate courts rejected the claim that such a transfer of the burden of persuasion to the defense was proscribed by *Mullaney*, finding that no responsibility was placed by the statute on the defense to disprove an element which the state had to establish in order to justify convictability. The Supreme Court agreed.

In holding as it did, the Court also confirmed the continued viability of a relatively elderly decision[146] allowing the burden to be placed on defendants to establish mental condition (insanity) as a defense to criminal responsibility. In effect, due process is satisfied if the prosecution is required to establish each specific element of the crime charged; thereafter, proof establishing affirmative defenses can be made the responsibility of the defense. Only if a legislature should attempt to exploit such a distinction through excessive use of presumptions would due process intervention be appropriate.

Patterson does not eliminate *Mullaney* as a viable constitutional principle, at least as the Court views it. Indeed, it was important enough to be given retroactive effect.[147] But it

court took cognizance of them in rejecting defense efforts to forestall trial.

If the government seeks a rehearing or reconsideration of a federal district court action favoring the defense in matters like a suppression hearing, that renders the original order nonfinal for purposes of the running of the period for filing a government appeal. United States v. Dieter, 429 U.S. 6 (1976).

[139] United States v. Wilson, 420 U.S. 332, 339–53 (1975).

[140] United States v. Jenkins, 420 U.S. 358 (1975).

[141] *See also* Finch v. United States, 97 S. Ct. 2909 (1977) (dismissal of indictment on grounds federal territorial jurisdiction was lacking was equivalent to acquittal on merits which precluded government appeal); Lee v. United States, 97 S. Ct. 2141 (1977) (trial court deferred motion to dismiss indictment as defective until after bench trial and then granted it, indicating at the same time that the evidence was ample to convict; retrial was permissible under *Dinitz*).

[142] *See, e.g.*, Scarborough v. United States, 97 S. Ct. 1963 (1977) (scope of federal firearms legislation); United States v. Pomponio, 429 U.S. 10 (1976) (construction of "willfully" in I.R.C.).

[143] 421 U.S. 684 (1975) (state could not place on defense the burden of persuading the trier of fact of the existence of passion or provocation sufficient to reduce murder to manslaughter).

[144] *In re* Winship, 397 U.S. 358 (1970).

[145] 97 S. Ct. 2319 (1977).

[146] Leland v. Oregon, 343 U.S. 790 (1952). The majority opinion in *Patterson* also indicates that this was accomplished through Rivera v. Delaware, 429 U.S. 877 (1976), in which the Court dismissed an appeal alleging unconstitutionality of a statute requiring defendants to prove the insanity defense by a preponderance; the Court found no substantial federal issue.

[147] Hankerson v. North Carolina, 97 S. Ct. 2339 (1977). The criminal law doctrine involved in *Hankerson* was self-defense, which the state court thought could not be made a phase of a case which the

would seem that as long as a state statute sets forth an act (or equivalent) and a culpability (mens rea) requirement in some form which the prosecution must establish by proof beyond a reasonable doubt, any doctrine which reduces or destroys criminality can be made the responsibility of the defense to establish.[148]

Defendants who wish to transform questions of the propriety of instructions into issues of due process must move timely in trial court to present the issue. In *Henderson v. Kibbe*,[149] a state prisoner complained that a failure on the part of a state trial court in a homicide case to instruct on causation denied him due process. After relief had been refused in state courts and a federal district court, a federal court of appeals characterized the failure to raise the issue promptly and properly in state court as "obviously inadvertent" and granted relief on the basis that a failure to instruct on an important element of an offense created a risk that a jury might not make the requisite constitutional finding on each element the prosecution is required to prove. Without reaching the merits, the Court reversed. While not ruling out absolutely the possibility that an improper instruction could warrant reversal on constitutional grounds even though no objection was made, the burden of establishing extreme prejudice is on the defense. In addition, the defense must meet a higher standard than governs regular appeals. In the absence of a draft defense instruction or other procedure to pose the constitutional issue, and in light of the fact that causation was covered through a standard instruction, there was no basis for federal intervention. In short, the procedural requirements of *Kibbe* coupled with the substantive due process standards of *Patterson* leave quite limited scope for the construction of criminal law instructions under the due process clause.

defense must establish *if Mullaney* were given retroactive effect. The Supreme Court disagreed on the matter of retroactivity but did not find the *Mullaney* status of self-defense to have been preserved for federal review. In light of the analysis in *Patterson* it seems most clear that the burden of establishing something in the nature of confession and avoidance, which self-defense and other doctrines of justification are, can constitutionally be placed on the defense.

[148] The Court's handling of Leland v. Oregon, 343 U.S. 790 (1952), suggests that its approval of a defense burden stated in terms of proof beyond a reasonable doubt rather than by a preponderance still stands.

[149] 97 S. Ct. 1730 (1977).

IV
Federal Remedies

A. Habeas Corpus

The impact of some of the Court's pronouncements on scope of federal habeas corpus has been noted *passim* above. It may, however, be useful to comment briefly on the procedural significance of some of these decisions.

That habeas corpus deserves its appellation of the great writ cannot be gainsaid. In a federal system, however, it has caused considerable problems, in that the legislatively stated ground of "custody in violation of the Constitution . . . of the United States"[150] has given ready access to federal courts by state prisoners with even the limited imagination required to convert investigative, pretrial or trial procedural error into a matter of constitutional significance.[151] Since 1971 the Court has steadily increased the barriers which state prisoners must hurdle before obtaining a hearing on the merits of their claims.[152]

[150] 28 U.S.C. § 2241(c)(3) (1970).

[151] Another problem has been the venue of habeas corpus, the place of detention, which has concentrated the load of habeas corpus petitions in districts in which penal institutions are located. A statutory postconviction review proceeding commenced in a sentencing court eliminates this problem; the Court has reconfirmed that utilization of such a remedy is required unless a petitioner can establish that the statutory remedy is less adequate than habeas corpus. Swain v. Pressley, 97 S. Ct. 1224 (1977), applying to a District of Columbia proceeding the same construction earlier used to sustain the validity of the plenary federal postconviction review proceeding, 28 U.S.C. § 2255 (1970). United States v. Hayman, 342 U.S. 205 (1952).

Traditional rigid venue requirements in state cases were also relaxed somewhat in Braden v. 30th Judicial Circuit, 410 U.S. 484 (1973), which allows federal habeas to be lodged in either the federal district in which a state prisoner is confined or that in which state officials whose conduct is complained of are to be found.

[152] Federal courts in habeas proceedings cannot redetermine factual issues adequately dealt with in recent state proceedings: 28 U.S.C. § 2254(d) (1970), legislatively restating the rule of Townsend v. Sain, 372 U.S. 293 (1963). A detail of this is dealt with in part II-A of Brewer v. Williams, 97 S. Ct. 1232 (1977), discussed in text accompanying notes 68–78 *supra*. The Court noted the propriety of an agreement by the parties that a case be decided on a state trial court record; new factual findings beyond those made by the state court were carefully explained and based on the record, making them proper under the circumstances.

The principal means of controlling state prisoner habeas applications is by strictly applying the legislative requirement[153] that an applicant has exhausted state remedies.[154] In *Wainwright v. Sykes*,[155] the Court held that a failure to offer a timely objection in state court on a matter of federal constitutional significance creates an adequate and independent state legal ground which precludes federal court consideration of what otherwise would be a clear federal issue.[156] Sykes asserted a *Miranda* objection for the first time in state postconviction proceedings. Then, on federal habeas corpus, a federal district court ruled that Sykes had a right to a *Jackson v. Denno*[157] hearing on the matter. The court of appeals affirmed, noting that the burden was on the state to establish the admissibility of a confession, not on the defendant to demand that it be established. The Supreme Court disagreed and held that a failure to take advantage of a procedural device before or during trial sufficient to present the matter constitutes an independent and adequate state ground which forestalls examination of the matter through federal habeas corpus.

The Court finds several policy reasons in support of its conclusion. One is that a contemporaneous objection rule is widely encountered in the United States because it facilitates an early determination of objections on the basis of fresh evidence. Well-founded objections in some instances produce early termination of proceedings on federal grounds, thus promoting a finality to criminal litigation.[158] Moreover, a contrary rule can promote what the Court calls "sand bagging," in which defense counsel gamble on a jury acquittal and then, barring that outcome, advance federal issues in postconviction proceedings.[159] Finally, a contemporaneous objection rule accords to state proceedings the character of "a decisive and portentous event."[160] Any rule which "encourages the result that those proceedings be as free of error as possible is thoroughly desirable," since it makes them the "'main event,' so to speak, rather than a tryout on the road for what will later be the determinative federal habeas hearing."[161] In this fashion, the Court places the quietus on its earlier expansive precedent which forestalled federal review only in exceptional circumstances.[162] Under the new regimen, a failure to make timely objection to what is later asserted to be federal constitutional error can be circumvented only through a showing that there was good cause for not complying with local requirements of a prompt objection *and* the claimed constitutional violation resulted in actual prejudice to a petitioner.[163] Sykes made no such showing, and it

[153] 28 U.S.C. § 2254(b) (1970).

[154] The Court noted three other related issues bearing on the availability of federal habeas corpus: the types of claims which might be litigated; the degree of deference to be paid to earlier state determinations in the same matter; and determination of what amounts to an exhaustion of remedies in a given state, but found none to be presented by the particular case. Wainwright v. Sykes, 97 S. Ct. at 2506–08.

[155] 97 S. Ct. 2497 (1977).

[156] 28 U.S.C. § 2254(a) (1970) allows a federal court or judge to accept a habeas corpus proceeding *only* on the basis of a claim that a prisoner is detained in violation of the Constitution or laws or treaties of the United States. This is taken to mean that if state law offers a nonfederal ground to dispose of a matter, a habeas petition should be dismissed. Absent a clear indication, however, that there is an alternative state procedural ground, a failure to exhaust remedies or a patently correct disposition of a matter in state courts, an application should not be summarily dismissed. Blackledge v. Allison, 97 S. Ct. 1621 (1977), discussed in text accompanying notes 107–10 *supra*.

[157] 378 U.S. 368 (1964).

[158] The opinion notes that even if a constitutional objection is overruled a prosecutor nevertheless may decide to withdraw prosecution because of the possibility a state appellate or federal habeas court might rule the other way. Wainwright v. Sykes, 97 S. Ct. at 2507.

[159] Presumably this aspect of the Court's opinion will preclude claims that a failure by counsel to render a timely objection constitutes incompetency of counsel under the sixth amendment, since a contrary ruling would allow state prisoners to submit in alternative guise the very issue which the Court in *Sykes* holds to be dispositive of federal habeas corpus. *Cf.* United States v. Agurs, 427 U.S. 97, 102 n.5 (1976) (failure to pursue a detailed request for discovery does not demonstrate ineffectiveness of counsel).

[160] Wainwright v. Sykes, 97 S. Ct. at 2508.

> [T]he accused is in the court room, the jury is in the box, the judge is on the bench, and the witnesses, having been subpoenaed and duly sworn, await their turns to testify. Society's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens.

Id.

[161] *Id.*

[162] Fay v. Noia, 372 U.S. 391 (1963); Brown v. Allen, 344 U.S. 443 (1953).

[163] The requirements distilled in *Sykes* from Francis v. Henderson, 425 U.S. 536 (1976), and Davis v. United States, 411 U.S. 233 (1973).

is doubtful that many state prisoners represented by counsel during state proceedings will be able to make such a showing.[164]

B. Federal Civil Rights Act Proceedings

During the era of wide-ranging federal examination of state legal administration on the basis of federal constitutional standards, persons unable to meet the procedural requirements for federal habeas corpus increasingly resorted to civil damage, injunctive or declaratory judgment proceedings under the Federal Civil Rights Act.[165] Beginning with *Younger v. Harris*[166] in 1971, however, the Court has engaged in the same process of progressive restrictions on civil federal relief that has characterized its treatment of federal habeas corpus.

One mode of proceeding has been to expand the forms of state proceedings governed by *Younger v. Harris,* which requires that all possible state procedural avenues be utilized before turning to federal courts. The *Younger* series of cases all involved actual or threatened criminal prosecutions, but in 1975 the Court applied exactly the same standards to what might be called quasi-criminal or collateral enforcement proceedings.[167] In 1977, the Court extended these restrictions to actions by civil judgment debtors attacking their incarceration,[168] and then to all litigation, no matter its formal characteristics, to which a state is a party and concerning which federal constitutional objections have been advanced.[169] Only if a proceeding is alleged and proven to have been "motivated by a desire to harass or is conducted in bad faith, or where the challenged statute is 'flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it,'"[170] or a federal constitutional issue cannot be litigated in the state hearings on the merits,[171] may federal intervention be proper.

Another limitation on civil rights act proceedings, similar to that governing habeas corpus, is that available state remedies be invoked before resorting to federal remedies. If plaintiffs could have raised their federal issues in the course of state proceedings but did not, they are barred from asserting them in civil rights act form.[172]

Finally, actual harm must be posed by a state proceeding even if abstention and exhaustion of remedies requirements are met. Abstract or hypothetical questions cannot be advanced.[173] The latter concern embraces a criminal judgment and collateral consequences not assailed in state proceedings.[174] However, if further prosecutions (or other state proceedings embraced within *Trainor*) are likely to flow from activity protected by the federal constitution, Civil Rights Act intervention is proper, as *Maynard* illustrates. In *Maynard*, the plaintiff had already been prosecuted three times in five weeks for driving his automobile with the motto on its license plates obscured.[175] He did not seek to annul those convictions or their collateral consequences, but rather to prevent repeated future prosecutions which would threaten the ability of plaintiff and wife to "perform the ordinary tasks of daily life which require an automobile."[176] Thus, *Maynard* becomes one of a limited group of cases[177] in which state plaintiffs have been successful in

[164] Granted the Court's attitude toward self-representation in Faretta v. California, 422 U.S. 806 (1975), see also Allen, *supra* note 55, at 391–93, *pro se* defendants will receive the same treatment.

[165] 42 U.S.C. § 1983 (1970).

[166] 401 U.S. 37 (1971), and companion decisions.

[167] Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) (state padlock law invoked against premises used to purvey obscene matter).

[168] Juidice v. Vail, 97 S. Ct. 1211 (1977).

[169] Trainor v. Hernandez, 97 S. Ct. 1911 (1977).

[170] Huffman v. Pursue, Ltd., 420 U.S. at 611, *quoted in* Juidice v. Vail, 97 S. Ct. at 1218.

[171] *Vail* distinguishes the pretrial detention case of Gerstein v. Pugh, 420 U.S. 103 (1975), on this ground, since the Court noted in *Pugh* that errors in pretrial detention (or arrest) procedures have no impact on the power of a court to proceed to trial. 97 S. Ct. at 1218.

[172] Juidice v. Vail, 97 S. Ct. at 1218, "Here it is abundantly clear that appellees had an *opportunity* to present their federal claims in the state proceedings. No more is required to invoke *Younger* abstention." (Emphasis in original). *See also* Jones v. Hildebrant, 97 S. Ct. 2283 (1977) (certiorari dismissed as improvidently granted when it appeared civil rights act issue had not been presented to state courts).

[173] Ashcroft v. Mattis, 97 S. Ct. 1739 (1977) (basic issue of damages, sought in federal proceeding, already determined favorably to plaintiff in state proceedings).

[174] Wooley v. Maynard, 97 S. Ct. 1428 (1977).

[175] Plaintiff and wife found the slogan "Live Free or Die" repugnant to their beliefs as Jehovah's Witnesses. The Court ruled that prosecution on the grounds asserted violated their first amendment rights.

[176] Wooley v. Maynard, 97 S. Ct. at 1434.

[177] *E.g.,* Allee v. Medrano, 416 U.S. 802 (1974).

obtaining relief in criminal law related matters. Narrow, indeed, is the gateway leading to federal relief in this form.

V

Prisoners' Status

One form of litigation concerning which the Court has rather sparingly invoked the strictures on civil rights litigation, as discussed above, involves objections to prison conditions and procedures bottomed on the eighth amendment ban on cruel and unusual punishment. The Court during the 1976 Term once more considered prisoner claims on the merits, displaying a certain ambivalence in the process. On the one hand, it continues to recognize that, judged by essentially administrative due process standards, prisoners can be denied fundamental rights during incarceration[178] or termination of probation or parole status.[179] On the other hand, it has evinced manifest reluctance to place federal courts "astride the day-to-day functioning of state prisons and involve the judiciary in issues and discretionary decisions that are not the business of federal judges."[180] That wavering between polar extremes remained observable in three decisions concerning the status of state prisoners.

In *Bounds v. Smith*,[181] the Court ruled that if penal authorities do not provide adequate legal assistance to residents[182] they must make available adequate legal reference materials[183] so that the prisoners can conduct their own legal research preliminary to seeking federal relief.[184] Such a holding, in the Court's thinking, did not place federal courts in the position of closely supervising the decisions of prison administrators, since it had indicated an array of possibilities from which selections might be made to meet local needs. Nor did it matter that states would incur financial obligations in meeting sixth amendment-based demands. The only legitimate scope for such concerns is in selecting which of the permissible modes of vindicating the sixth amendment will be used in a given jurisdiction.

For the most part, however, the Court held back in delineating the rights of prisoners under the Constitution.[185] In *Estelle v. Gamble*,[186] it entered quite gingerly into the sphere of prisoners' claims to adequate medical treatment. Using its capital punishment decisions of an earlier era[187] as the departure point, it found that only deliberate indifference to serious medical needs constitutes "unnecessary and wanton infliction of pain" proscribed by the eighth amendment. Accidental injury or inadvertent or negligent failure to provide adequate treatment does not state an actionable claim

[178] Wolff v. McDonnell, 418 U.S. 539 (1974); Procunier v. Martinez, 416 U.S. 396 (1974).

[179] Gagnon v. Scarpelli, 411 U.S. 778 (1973).

[180] Meachum v. Fano, 427 U.S. 215, 228–29 (1976) (Court refuses to inquire into prisoner assignments and transfers unless for clearly punitive purposes). *See also* Montanye v. Haymes, 427 U.S. 236 (1976) (same issue as *Fano*); Baxter v. Palmigiano, 425 U.S. 308 (1976) (self-incrimination privilege does not prevent drawing adverse inference from prisoner's refusal to comment on disciplinary charges).

[181] 97 S. Ct. 1491 (1977).

[182] Among the alternatives are the training of inmates as para-legal assistants to work under lawyers' supervision, the use of paraprofessionals and law students, either as volunteers or in formal clinical programs, the organization of volunteer attorneys through bar associations or other groups, the hiring of lawyers on a part-time consultant basis, and the use of full-time staff attorneys, working either in new prison legal assistance organizations or as part of public defender or legal service offices.
Id. at 1499–1500.

[183] *See id.* at 1493–94 n.4 for possible standards governing adequacy of prison library collections.

[184] The claim to legal assistance under Johnson v. Avery, 393 U.S. 483 (1969), extends to preparation for both habeas corpus and civil rights actions. Wolff v. McDonnell, 418 U.S. 539 (1974).

[185] In Moody v. Daggett, 429 U.S. 78 (1976), the Court found no obligation under Morrissey v. Brewer, 408 U.S. 471 (1972), to hold a preliminary or final parole revocation hearing upon the issuance of a parole violation warrant when Moody was imprisoned under a later criminal conviction. As long as confinement turned on something other than the violation warrant, nothing was to be gained by a hearing on the violation; in any event, paroling authorities should have the benefit of Moody's institutional record, a factor which would be denied them if an immediate revocation hearing had to be held.

A state court decision had the potential to offer issues of parole granting procedures under due process, but the matter was remanded for consideration of the mootness issue when one petitioner died and the other was paroled during pendency of the appeal. Scott v. Kentucky Parole Board, 429 U.S. 60 (1976).

Dixon v. Love, 97 S. Ct. 1723 (1977), has some potential implication for the prisoner litigation context, in that it holds no preliminary hearing is required before an operator's permit can be suspended through administrative action, based on convictions for specified traffic offenses.

[186] 429 U.S. 97 (1976).

[187] Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947); *see also* Gregg v. Georgia, 428 U.S. 153 (1976).

under federal civil rights legislation. Since Gamble's claim of neglected treatment amounted at most to a medical malpractice matter, it should have been litigated in state, not federal, court.

Prisoners have but limited first amendment rights,[188] as the opinion in *Jones v. North Carolina Prisoners' Labor Union, Inc.*[189] starkly shows. State prison authorities prevented union members from sending bulk mailings into prisons and from encouraging union membership through conducting meetings and personal interviews. This action was asserted to have infringed the prisoners' first amendment rights. In addition, the fact that outside organizations like Jaycees and Alcoholics Anonymous were allowed to meet with prisoners, while the union was not, was asserted to deny equal protection as an irrational classification. The Court strongly disagreed.

Its beginning premise is that incarceration produces curtailment of the right to associate with persons in and out of prison. Moreover, in support of the first premise, appropriate deference is to be given to administrative decisions intended to promote security and achievement of institutional goals. That being so, the restrictions imposed by state correctional authorities on bulk mailings and meetings were justified, at least in the sense that those authorities were not "conclusively" shown to have been mistaken in their evaluation of the threat posed by union activities. Nor had those authorities unreasonably discriminated in their selection of outside organizations allowed to conduct meetings for prisoners. Groups like Jaycees and Alcoholics Anonymous aided in efforts to prepare inmates for release into the community, while the "avowed intent" of the prisoners' union was to pit residents against administrators. Decisions reached according to such criteria are not unreasonable by equal protection standards.

In short, penal administration is hardly immune from federal constitutional scrutiny. But the *Prisoners' Union* decision, in particular, serves notice on the federal judiciary that its members cannot treat the recipients of correctional attention as if they are members of the general population. A substantial burden rests on prisoner litigants to establish that constitutional rights have been substantially impaired by administrative action shown to be without justification in terms of the demands of penal administration.

VI

Capital Punishment

The Court's 1976 capital punishment decisions[190] have an identifiable holding, namely, that under some circumstances a discretionary death penalty does not violate the eighth amendment. It is difficult to project with confidence a controlling rationale for the Court's handling of this volatile issue because doctrinal statements are by a plurality only. That problem continued during the 1976 Term in *Coker v. Georgia.*[191] The only doctrinal premise acceded to by a majority of the Court is "that the capital sentencing decision allow for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense."[192] In line with this premise, the Court held that the mandatory death penalty cannot be exacted for murder of a law enforcement officer[193] or rape of an adult woman.[194] But the primary concern of the Court's recent capital punishment decisions is the procedure to be followed before the death penalty can be imposed.

Such a rationale is illustrated by *Dobbert v. Florida,*[195] in which the Court ruled there to be

[188] Censorship of prisoner correspondence is permissible only under restricted circumstances, because the first amendment rights of those who correspond with prisoners are also involved. Procunier v. Martinez, 416 U.S. 396 (1974). Correspondence from counsel, if clearly identified as such, may be opened in the prisoner's presence and inspected for contraband, but not read, by prison authorities. Wolff v. McDonnell, 418 U.S. 539 (1974). Media representatives have no right to interview inmates of their choice, but the Court intimated that it would reach out at efforts to conceal prison conditions from the media or general public. Saxbe v. Washington Post Co., 417 U.S. 843 (1974); Pell v. Procunier, 417 U.S. 817 (1974).

[189] 97 S. Ct. 2532 (1977).

[190] Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976); *see* Skinner, *supra* note 2, at 371–72.

[191] 97 S. Ct. 2861 (1977).

[192] Roberts v. Louisiana, 97 S. Ct. 1993, 1996 (1977).

[193] *Id.* The Court once more reserved the question of whether such a penalty can be applied to life prisoners who commit murder. *Id.* at 1996 n.5.

[194] Coker v. Georgia, 97 S. Ct. 2861 (1977). This can be taken to leave open the question of the death penalty if forcible rape of a child should be involved.

[195] 97 S. Ct. 2290 (1977).

no ex post facto violation when, after the date of the murder committed by Dobbert, the state enacted the capital penalty provisions later sustained in *Proffitt*.[196] The procedures mandated by the revised state legislation were more beneficial to the defendant than those in the earlier statutes,[197] thus eliminating that aspect of the ex post facto doctrine. Although *Furman* had seemingly outlawed capital punishment, Dobbert was on notice that as far as Florida was concerned the offense was a capital one. Therefore, a change in procedure which rendered the death penalty an available sentencing alternative did not add a new substantive element to the offense of which the defendant could not have been aware at the time of the homicide. Finally, there was no merit in Dobbert's contention that a new provision forestalling parole for a life convict earlier than twenty-five years after conviction amounted to ex post facto legislation. If Dobbert had been sentenced to life imprisonment there might have been a basis for him to object, but the death sentence imposed on him rendered a limitation on parole irrelevant as far as he was concerned.[198]

One obvious consequence of *Dobbert* is that it gives a form of retroactive effect to the 1976 decisions sustaining discretionary capital punishment under some circumstances. Beyond this, however, the Court has also indicated, at least in result, that the infliction of a mandatory death sentence does not make a defendant eligible for an automatic retrial. All that is required is a new sentencing procedure which gives scope to the exercise of appropriate discretion.[199]

Gardner also confirms the stress placed on trial court proceedings in the course of which the decision is reached whether or not to execute a given defendant. In that case, after a jury had recommended a life sentence, the trial court used the undisclosed contents of a presentence report as a basis to assess the death penalty. This, the Court ruled, denied due process to the defendant. It found no merit in the state's assertion that disclosure would dry up confidential sources of information, unnecessarily delay proceedings, and interfere with rehabilitation, as well as denigrate the ability of state judges to exercise discretion in a responsible manner. The need for a realistic opportunity for defendants to controvert factual data in a presentence report, particularly one bearing on the death penalty, overrode all these considerations, assuming any had merit if invoked in a noncapital case. *Gardner* supersedes the Court's earlier *Williams*[200] decision as far as capital cases are concerned. It also lends support to those who advocate full disclosure of presentence reports in all but exceptional cases, regardless of penalty, although of course it constitutes no constitutional precedent outside the death penalty context.

Revival of capital punishment in some settings serves also to revive the rule precluding automatic rejection of jury venire persons who express scruples against the death penalty,[201] a conclusion attested to by *Davis v. Georgia*.[202]

An oddity of the term was the Court's handling of the *Gilmore* case. In efforts to override Gilmore's unwillingness to contest the propriety of his death sentence, his mother sought to challenge the validity of his pending execution. A majority of the Court thought that if the person primarily concerned had competently foregone the opportunity to contest the sentence imposed, all other persons lacked interest to litigate.[203] This of course is a straightforward

[196] Proffitt v. Florida, 428 U.S. 242 (1976). The homicide occurred after Furman v. Georgia, 408 U.S. 238 (1972), which had ruled the death penalty (under the particular legislation, in light of the 1976 rulings) to be cruel and unusual punishment.

[197] The historic decision of Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798), includes "every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offence, in order to convict the offender." *Id.* at 390.

[198] *Dobbert* thus places a practical limitation on the holding in Lindsey v. Washington, 301 U.S. 397 (1936), in which a discretionary maximum at the time of the commission of larceny was changed to a mandatory penalty by the time of sentencing. The impact of that change on Lindsey was obvious.

The Court also found no denial of equal protection in the fact that after *Furman* the state supreme court ordered all condemned prisoners to be resentenced to life imprisonment, while Dobbert, sentenced after the subsequent legislation, received no such reconsideration.

[199] Gardner v. Florida, 97 S. Ct. 1197 (1977). Obviously, this has no application in a jurisdiction which has not amended its legislation to provide for discretion, as *Dobbert* allows.

[200] Williams v. New York, 337 U.S. 241 (1948).

[201] Witherspoon v. Illinois, 391 U.S. 510 (1967).

[202] 429 U.S. 122 (1976).

[203] Gilmore v. Utah, 97 S. Ct. 436 (1976). Gilmore's execution in January, 1977 was the first to occur in the United States in almost a decade.

application of waiver rules, but it does create at least a limited opportunity for what one might call judicially approved suicide.

VII

Substantive Crminal Law

The decisions discussed earlier under the heading of allocation of the burden of persuasion[204] have an important bearing on the fields of criminal law out of which they arose. But there are other rulings by the Court, principally on constitutional grounds, which impact on the law of crimes.

A. Sex Discrimination

Legislatures that wish to discriminate between the sexes in defining criminal conduct bear the burden of establishing what one might call a "bona fide occupational qualification"[205] for crime. In *Craig v. Boren*,[206] a vendor of alcoholic beverages attacked his conviction for selling liquor to a male under age twenty-one, on the basis that the statute penalized the sale of alcoholic beverages to females only if they were younger than eighteen. The state endeavored to justify the distinction by showing that male drivers are involved in more vehicle accidents because of intoxication than females. A majority of the Court found this unpersuasive, particularly when underage males who succeeded in purchasing alcoholic beverages unlawfully were not punishable for drinking them. Prosecution efforts to use statistical analysis to support a sex-differentiated statutory system were not persuasive to the Court, and the legislative system fell under the impact of the fourteenth amendment equal protection clause.

B. Bill of Attainder

The shock waves of Watergate continue to create new jurisprudence.[207] After former President Nixon left office, Congress by special legislation[208] required him by name to surrender to the General Services Administration a vast number of documents and recordings. These were to be screened by GAO archivists who would return personal or private documents and retain the rest as historical documents. The statute represented a sharp departure from nearly two centuries of tradition which viewed presidential papers as private property, frequently sold by heirs for profit in earlier generations but for the most part lodged in university or other public libraries since the turn of the century. Mr. Nixon attacked the statute as facially void on several grounds,[209] but met with no success before the Supreme Court.[210]

A doctrinally interesting branch of the attack rested on the constitutional prohibition against bills of attainder.[211] The former president maintained that because the statute named him specifically and rested on the assumption that he had participated in criminal activity which would motivate him to conceal or destroy incriminating materials, the legislation amounted to a prohibited bill of attainder. A majority of the Court disagreed. Mr. Nixon was named because he was the only former president whose papers were not already in the custody of a public library facility; therefore, he constituted "a legitimate class of one."[212] Nor was the legislation enacted for a punitive purpose, *i.e.*, to aid in criminal investigation; rather, it was designed to preserve materials of historical significance and thus was not within the concept of bills of attainder.

C. First Amendment Conflicts

(1) *Regulation of obscene material.* Judicial efforts at drawing a workable line between those sex-related materials which may be outlawed and those which must be allowed to circulate by virtue of the first amendment seem foredoomed to failure. The Supreme Court has never been willing to accept the proposition that freedom of speech extends to allow free traffic in all materials, no matter how abhorrent a substantial majority of the populace may find

[204] See text accompanying notes 142–149 *supra*.

[205] *See* 42 U.S.C. § 2000e-2(e) (1970); 29 C.F.R. § 1604.2(a) (1976), dealing with discrimination under the Federal Civil Rights Act of 1964.

[206] 429 U.S. 190 (1976).

[207] *See* United States v. Nixon, 418 U.S. 683 (1974) (litigation over subpoenas for presidential tapes in connection with Watergate prosecutions).

[208] 44 U.S.C. § 2107 (1974).

[209] See text accompanying note 29 *supra*, on the general warrant aspects of the litigation.

[210] Nixon v. Administrator of General Services, 97 S. Ct. 2777 (1977).

[211] U.S. Const. art. I, §§ 9, 10.

[212] Nixon v. Administrator of General Services, 97 S. Ct. at 2805. By a process of reverse incorporation, equal protection is part of the fifth amendment where federal activity is concerned. *See, e.g.*, Marshall v. United States, 414 U.S. 417 (1974).

them to be.[213] At the other extreme, the Court will not allow legislatures or prosecuting authorities to bow to a vocal minority or even a majority and prosecute those who deal in materials which such groups find objectionable.[214] But the attempt to shift backward and forward the boundary between protected and prohibited sexually-tinctured material, currently represented by the *Miller* doctrine,[215] appears to produce more constitutional litigation than it forestalls.

One perhaps transient problem has been the effective date of application of the *Miller* test for obscenity. In *Marks v. United States*,[216] a federal trial court applied the *Miller* definitions to conduct which had occurred before the date of that decision. This the Court viewed to be an ex post facto application of a substantive law standard more disadvantageous to the accused than the *Roth-Memoirs*[217] test. Therefore, to the extent that Marks' conduct might have been proscribed under *Miller* but allowed under the earlier standard, it could not be reached in a post-*Miller* prosecution, without infringing upon the ex post facto provision.[218]

Marks does not mean that state legislation affecting activities before the *Miller* decision is not possible. Changes in procedure, including the content of jury instructions, can be accomplished as long as they do not ease the ultimate burden of persuasion borne by the prosecution.[219] In *Splawn v. California*,[220] the defendant's 1971 conviction was reversed on the strength of *Miller*. The basic criminal statute remained unchanged throughout the *Splawn* litigation, but between 1973 and the defendant's retrial the state legislature provided for a "pandering" instruction[221] to guide juries in deciding whether material was utterly without redeeming social importance. Because state courts had ruled that evidence of this sort had been admissible before the statute, a conclusion which the Supreme Court would not impeach, there was no ex post facto result wrought in instructing the jury according to statute in the petitioner's post-*Miller* retrial.

In cases arising after *Miller*, states have at least two options to bring their law into conformity with constitutional standards for obscenity. One option is to amend or replace earlier legislation with language which tracks the *Miller* test. Statutes in such a form will survive attacks based on a contention that they are vague and indefinite.[222] The other option is for courts to construe older legislation so as to incorporate *Miller* standards. Carried to an extreme, this process can contravene the constitutional requirement that statutes give fair warning of their coverage,[223] but there seems a fair degree of latitude in salvaging earlier legislation through this avenue.[224] Indeed, a state judiciary may extend by analogy the *Miller* standard to cover material not precisely involved in that and ensuing litigation.[225] The

[213] The closest approach to that position is perhaps Stanley v. Georgia, 394 U.S. 557 (1969), which held that private citizens could not be penalized for possession (at least not involving display to others) of pornographic materials in their homes.

[214] Jenkins v. Georgia, 418 U.S. 153 (1974).

[215] Miller v. California, 413 U.S. 15 (1973). Three elements satisfy constitutional requirements under *Miller:* (1) the work as a whole appeals to prurient interest, judged by an "average person applying contemporary community standards"; (2) the material depicts or describes sexual conduct specifically defined by state law, in a "patently offensive way"; and (3) the material as a whole lacks "serious literary, artistic, political, or scientific value." *See* Smith v. United States, 97 S. Ct. 1756, 1763 (1977), summarizing the *Miller* standard.

[216] 97 S. Ct. 990 (1977).

[217] Memoirs v. Massachusetts, 383 U.S. 413 (1966); Roth v. United States, 354 U.S. 476 (1954).

[218] The appropriate trial procedure would have been to instruct the jury to acquit unless it found the materials "utterly without redeeming social value," the *Memoirs* standard. Marks v. United States, 97 S. Ct. at 995.

[219] The same principle embodied in the capital punishment decision of Dobbert v. Florida, 97 S. Ct. 2290 (1977), discussed in text accompanying notes 197–200 *supra*.

[220] 97 S. Ct. 1987 (1977).

[221] On the basis of Hamling v. United States, 418 U.S. 87 (1974) and Ginzburg v. United States, 383 U.S. 463 (1966), "evidence of pandering to prurient interests in the creation, promotion, or dissemination of material is relevant in determining whether the material is obscene." Splawn v. California, 97 S. Ct. at 1990.

[222] Splawn v. California, 97 S. Ct. 1987 (1977), and Smith v. United States, 97 S. Ct. 1756 (1977), suggest this to be a valid assumption.

[223] Bouie v. Columbia, 378 U.S. 347 (1964).

[224] Ward v. Illinois, 97 S. Ct. 2085 (1977).

[225] In *Ward* the Court rejected a contention that sadomasochistic material could not be comprehended within the categories of materials set forth in *Miller*. *Cf.* Ross v. Locke, 423 U.S. 48 (1975) (statute punishing "crime against nature" could be extended through judicial interpretation to include cunnilingus, when state court had already included fellatio; no infringement of constitutional fair warning requirements).

Supreme Court appears disinclined to convert itself into a superlegislature to review the details of statutory language penalizing traffic in obscene matter.

The Court clearly views federal obscenity legislation as a body of law directed at achieving a federal purpose (essentially undelineated), and not something in aid of state law enforcement. That, at any rate, seems to be the message of *Smith v. United States*.[226] At the time Smith was arrested for mailing, within Iowa, material explicitly portraying adult homosexual and heterosexual activity, Iowa law prohibited only dissemination of such material to minors. At trial Smith sought to inquire on voir dire whether panelists knew contemporary standards relating to obscene matter in the federal judicial district, the source of their knowledge if any, and their understanding of the Iowa law on the subject. The trial court refused to allow such inquiries. During trial, the defendant introduced similar publications available at Des Moines adult bookstores, and the text of the Iowa legislation. A defense motion for a directed verdict of acquittal was denied, and the jury convicted. The Supreme Court sustained the conviction.

A principal contention by Smith was that the community standard envisioned in *Miller* had to be that of the state of the federal district. Since the Iowa legislature at that time had not proscribed the kind of matter in which Smith dealt, and similar material was being purveyed to adults without official state interference, his position was that the subject matter of the prosecution against him could not be considered prurient under contemporary community standards. The Court disagreed. The *Miller* test has been incorporated into a federal legislative system[227] independent of any state's statutes. A state or local legislative body does not conclusively determine or freeze contemporary community standards, no matter what the form of the statutes or ordinances it enacts.[228] Federal juries are to be allowed to implement their own notions of community standards as long as they do not abuse their factfinding discretion in the process,[229] even if the results they reach would not be acceptable under state jurisprudence.[230] Nor, in the Court's thinking, would this amount to nullification of local policy. Just as the Court had allowed a ban on importation of material which a successful recipient might possess without legal hindrance,[231] so federal postal authorities could bar either intrastate or interstate postal shipments of matter left unregulated by local law. Federal law controls for federal purposes. Despite this holding, one may still wonder whether federal law enforcement would not be best served by using federal statutes to aid those states which wish to utilize the *Miller* standards. In addition, federal goals might be better served by returning wanted persons who transmit forbidden material from out-of-state havens, rather than by promoting independent federal regulation of conduct not at the moment of concern to local legislators.

(2) *Advertising as protected speech.*[232] The Court had already held that some forms of commercial advertising or announcements are a form of first amendment-protected speech.[233] In

[226] 97 S. Ct. 1756 (1977).

[227] Hamling v. United States, 418 U.S. 87 (1974); United States v. Orito, 413 U.S. 139 (1973); United States v. 12 200-Ft. Reels of Film, 413 U.S. 123 (1973).

[228] The Court notes that states can restrict the coverage of their penal obscenity legislation to less than the sphere of control allowed by *Miller*, set geographical limits on the community to be used in establishing community standards, promulgate jury instructions on community standards, and utilize zoning ordinances rather than criminal prosecutions to control local problems. Smith v. United States, 97 S. Ct. at 1764–65.

[229] *See* Jenkins v. Georgia, 418 U.S. 153 (1974).

[230] The Court indicated it would be proper to let federal juries know of the coverage of local law. Smith v. United States, 97 S. Ct. at 1767. However, voir dire cannot go beyond ascertaining that jurors can apply community standards objectively; it cannot inquire into the venire persons' understanding of the meaning of the standard, a meaning presumably to be supplied by a trial court's instructions of law on the point. Inquiry is proper if it is directed to "how long a juror has been a member of the community, how heavily the juror has been involved in the community, and with what organizations having an interest in the regulation of obscenity the juror has been affiliated." *Id.*

[231] The effect wrought, according to the Court, by United States v. 12 200-Ft. Reels of Film, 413 U.S. 123 (1973), on Stanley v. Georgia, 394 U.S. 557 (1969).

[232] In Wooley v. Maynard, 97 S. Ct. 1428 (1977), discussed in text accompanying notes 175–77 *supra*, the Court struck down the invocation of a statute penalizing the defacing or obstruction of motor vehicle license plates against Jehovah's Witnesses who covered a state slogan because they felt it to conflict with their religious beliefs. In one sense the state may have wished to circulate a motto, but could not force citizens to do so against their personal beliefs.

[233] Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748 (1976); Bigelow v. Virginia, 421 U.S. 809 (1975).

Bates and O'Steen v. State Bar of Arizona,[234] the same principles were held to govern advertising by attorneys.[235] Consumers of legal services have a claim to information about their availability, as long as it is not false, misleading or deceptive. "[T]he flow of such information may not be restrained."[236]

Even a desire to prevent "block-busting," in which whites flee a neighborhood when any members of a minority ethnic group appear (or are rumored to appear), by forbidding "for sale" signs contravenes the first amendment rights of owners and realtors to advertise that premises are available.[237] Under *Virginia Pharmacy Board*, consumers had a claim to needed information even though it was subject to possible misuse.[238]

[234] 97 S. Ct. 2691 (1977).

[235] No Sherman Act violation was found to exist, however. *Id.* at 2698.

[236] *Id.* at 2709.

[237] Linmark Associates v. Willingboro, 97 S. Ct. 1614 (1977).

[238] The Court left open the possibility that a community might carry the burden of showing that some form of restriction was justified for a time in order to prevent panic selling. *Id.* at 1620.

An interesting, though collateral, first amendment ruling is Zacchini v. Scripps-Howard Broadcasting Co., 97 S. Ct. 2849 (1977), in which the Court held a television channel could be civilly liable to a performer (a "human cannon ball") when it telecast his entire fifteen-second act at a time when he was appearing within the broadcast territory. The analogy invoked was that of the broadcast of a copyrighted work without the copyright owner's approval.

VIII

Conclusion

The preceding discussion demonstrates the wide-ranging problems with which the Court dealt. Some of the 1976–1977 decisions confirm the dedication of the Court to certain goals, for example, restrictions upon the numbers of state prisoners who seek federal relief. Many may find those goals unappealing in comparison with those pursued by the Court in the 1960s. In certain other contexts, for example, that of the fourth amendment, the Court seems not to have abandoned its direction toward granting more freedom of action for law enforcement. But there are enough aberrant discussions of doctrine in some of the Term's cases that one can but await the Court's work in the Term just commenced to see whether the Court is simply pausing a while for breath, rather than rethinking the propriety of some of its doctrinal positions expressed since 1971.