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COMMENTS ON THE SUPREME COURT'S TREATMENT OF THE BILL OF RIGHTS IN THE OCTOBER 1956 TERM

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DURING the past year the decisions of the Supreme Court often provided front-page news. Everyone in the country, from private citizen to the President himself, lawyer and layman, had a definite opinion on the correctness of the Court's results. Hidden away between the fuss and the fury following these decisions, lie significant treatments of the Bill of Rights.

The general attitude toward the Court has been that it took an overly protective attitude toward individual liberty. The trouble with the present Court, however, is that it has not protected individual liberty enough; the fact is that it has protected individual liberty too little. Its record at the October 1956 Term leaves a great deal to be desired. The Bill of Rights has been dealt many a foul blow, and if the Court persists many of these blows will be fatal to certain provisions in that document.

Worse, the positions of certain individual Justices of the Court are the subject of considerable concern. Some are inconsistent with themselves; some, instead of doing their job of decision, pride themselves on evading decision. Nor does the Court as a whole have a clear or consistent position with respect to the application of the Bill of Rights. There is an element of prestidigitation in it. Now it applies; now it does not.

In all the Court decided about thirty cases involving the Bill of Rights. Space will not permit discussion of all. Thus, for this article those have been selected that are regarded as the most interesting for critical examination.

FREEDOM OF SPEECH

Free speech is specifically protected by the First Amendment to the United States Constitution which provides:

"Congress shall make no law . . . abridging the freedom of speech or of the press. . . ."¹

The Fourteenth Amendment, on the other hand, does not mention freedom of speech or any of the other specific guarantees of the Bill of Rights. It forbids a state to "abridge the privileges or immunities" of a citizen and to deprive "any person of life, liberty, or property, without due process of law" or "the equal protection of the laws."

If the protections of the First Amendment, therefore, are to carry against the states it must be under these three clauses of the Fourteenth

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1. U.S. Const. amend I.

Amendment. This at once raises the question of the legislative background not only of the First Amendment but of all the first ten amendments and the Fourteenth Amendment as well.

It is paradoxical, but the Supreme Court has more consistently applied the First Amendment against the states to protect freedom of speech and religion than perhaps any other provision of the Bill of Rights. Paradoxical it is, that the one amendment of the first ten with respect to which there is more evidence in its legislative history to conclude it was not intended to be applied against the states is the one amendment most consistently used to strike down state laws.²

*Butler v. Michigan*³

In this case, the Court unanimously declared unconstitutional a Michigan statute that forbade a bookseller to sell a book "not too rugged for grown men and women in order to shield juvenile innocence." Justice Frankfurter wrote for the unanimous Court but Justice Black concurred only in the result. As Justice Frankfurter saw it, the Michigan statute would reduce the adult population of Michigan to reading only what was fit for children. "Surely, this is to burn the house to roast the pig," said he. The Frankfurter opinion in the *Butler* case concludes that the Michigan statute is unconstitutional because it:

". . . curtails one of those liberties of the individual, now enshrined in the Due Process Clause of the Fourteenth Amendment, that history has attested as the indispensable conditions for the maintenance and progress of a free society."⁴

Justice Black does not tell us why he could not join in this opinion but from his dissent in the *Adamson*⁵ case, we know he believes that the First Amendment applies to the State of Michigan through the Fourteenth Amendment. The vague, high sounding but meaningless language in the Court's opinion does not say what he would have said.

It is the magnificent thesis of Justice Black in his *Adamson* dissent that the Fourteenth Amendment was designed to carry all the specific protections of the first ten amendments against the states. Thereby,

2. Paradoxical this is because there is definite historical evidence that the First Amendment was re-drafted to make it apply to "the Congress." As originally drafted by Madison the First Amendment provided: "No State shall violate the equal rights of conscience or the freedom of the press or the trial by jury in criminal cases." The Madison draft was rejected and after considerable debate, the First Amendment was adopted in form to apply to "The Congress" and not to the states. Of course there was then good reason for this since in 1789 several states had established churches which were financed out of state treasuries. 2 Crosskey, *Politics and the Constitution in the History of the United States 1073-75* (1953).

3. 352 U.S. 380 (1957).

4. *Id.* at 384.

5. *Adamson v. California*, 332 U.S. 46 (1947).

Justice Black says, contrary decisions by Marshall,⁶ Bushrod Washington,⁷ and Taney⁸ were reversed. The Fourteenth Amendment thus ceases to be vague, and no longer depends upon what a particular Justice (be he conservative or liberal) has had for dinner. As Justice Benjamin Curtis once did with "due process," it compels the Court to "examine the Constitution itself," namely, the Bill of Rights and all other parts of the document.⁹ If, as Justice Black argues in the *Adamson* case, the Fourteenth Amendment in its "due process," "privileges and immunities," and "equal protection" clauses applied the first ten amendments against the states, then the job of the Court is to judge the legality of state action just as it does federal by the method of reading the Constitution. With this simple constitutional interpretation, the absurdity of reading only the First or any other one amendment as against the states ends. Every one of the first ten amendments, every part of the Constitution from beginning to end must be read by the Court and applied as written against state and federal governments.

When the Fourteenth Amendment, following the War Between the States, came before the Supreme Court of the Nineteenth Century, it was read as making no change¹⁰ in the dreadful decisions of Marshall in *Barron v. Baltimore*,¹¹ Bushrod Washington in *Corfield v. Coryell*¹² and Taney in *Scott v. Sandford*.¹³ The Supreme Court also rejected this view of the Fourteenth Amendment in *Twining v. New Jersey*¹⁴ during the Twentieth Century. Justice Black in his *Adamson* dissent has what appears to be the correct explanation for the rejection of the Fourteenth Amendment in these cases. He attributes it to the failure of counsel to present to the Court the legislative history of the Fourteenth Amendment. The soundness of his dissent therefore depends upon the true legislative history of the Fourteenth Amendment. Justice Black's position has been both attacked¹⁵ and defended.¹⁶

6. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

7. *Corfield v. Coryell*, 6 Fed. Cas. 546, No. 3230 (E.D. Pa. 1823).

8. *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

9. *Murray v. Hoboken Land and Improvement Co.*, 59 U.S. (18 How.) 272 (1856).

10. *Slaughter House Case*, 83 U.S. (16 Wall.) 36 (1873); *Hurtado v. California*, 110 U.S. 516 (1884).

11. 32 U.S. (7 Pet.) 243 (1833).

12. 6 Fed. Cas. 546, No. 3230 (E.D. Pa. 1823).

13. 60 U.S. (19 How.) 393 (1856).

14. 211 U.S. 78 (1908).

15. Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 *Stan. L. Rev.* 5 (1949).

16. Guilfoyle, *Church-State Relations in Welfare*, 3 *Catholic Law*. 112 (1957); Snee, *Religious Disestablishment and the Fourteenth Amendment*, 1 *Catholic Law*. 301 (1955). Whether Justice Black's position be right or wrong depends upon an examination

The dissent of Justice Black in the *Adamson* case was written in part to an opinion of Justice Frankfurter in which he said that the decisions in the *Slaughter House*, *Hurtado* and *Twining* cases were sound, and that not all, but only such undefined parts of the first ten amendments as offend civilized standards of justice should be applied to the states. The *Adamson* case involved the constitutionality of a California law under which the district attorney in a murder case was permitted to comment adversely on the failure of the defendant to take the stand. The Court assumed that the statute violated the Fifth Amendment. Thus, the question was squarely presented whether the Fifth Amendment applied to the State of California.

One must suspect that Justice Black concurred in the result of the *Butler* case for much the same reason as he dissented in the *Adamson* case. There is this difference. In the *Adamson* case the California law was upheld; in the *Butler* case the Michigan statute was declared unconstitutional. But the reason Justice Frankfurter gives in the *Butler* case—the Michigan statute “curtails one of those liberties of the individuals, now enshrined in the Due Process Clause of the Fourteenth Amendment”—bears marked similarity to the airy persiflage he employed in the *Adamson* case to reach the remarkable conclusion that the Fifth Amendment does not apply to California.

In the *Adamson* case, it will be recalled that Justice Frankfurter, to Justice Black's annoyance, heaped praise upon the brilliant Justices who decided the *Slaughter House*, *Hurtado* and *Twining* cases and went to the extreme of dismissing the Nineteenth Century John Marshall Harlan who had dissented in the *Hurtado* and *Twining* cases as an “eccentric exception.”

No wonder then that Justice Black could not approve Justice Frankfurter's opinion in the *Butler* case. There is a gulf bigger than Suez between Justice Black and Justice Frankfurter. Justice Black stands in the Twentieth Century for what John Marshall Harlan and Stephen Field stood for in the Nineteenth—the application of the Constitution lock, stock and barrel, Bill of Rights included, to the states.

But the battle between Justices Black and Frankfurter that blazed in the *Adamson* case is a thing of the past. What view will obtain in the future? No one is likely now to change Justice Frankfurter's view. It is the view of the new members of the Court that matters. Indications are that the Chief Justice and Justice Brennan may ultimately embrace the Black view and of course Justice Douglas joined the Black dissent in the *Adamson* case. Justice Whittaker has yet to make up his mind; Justice Burton and Clark seem prone to follow Justice Frank-

of original sources, a project beyond the scope of this article, but one which the Court should schedule for exhaustive argument.

furter. But what about Justice Harlan? In this battle between Justices Black and Frankfurter, would one not expect that Justice Harlan would support Justice Black and his own grandfather? Curiously enough, in his opinions at the October 1956 Term, Justice John Marshall Harlan seems to accept the Frankfurter view and thereby reject not only Justice Black's view but the view of his grandfather, that "eccentric exception" on the Supreme Court bench in the Nineteenth Century.

In the *Twining* case, as in the *Adamson* case, the question was whether New Jersey could pass a law permitting a district attorney to comment adversely on a defendant's failure to take the stand. Dissenting from the Court's judgment that the New Jersey law was valid because the Fifth Amendment to the Constitution did not apply to the States, the Nineteenth Century John Marshall Harlan said:

"The court, in its consideration of the relative rights of the United States and of the several States, holds, in this case, that, *without violating the Constitution of the United States*, a State can *compel* a person accused of crime to testify against himself."¹⁷

Justice Harlan reasoned:

"The Fourteenth Amendment would have been disapproved by every State in the Union if it had saved or recognized the right of a State to compel one accused of crime, in its courts, to be a witness against himself. We state the matter this way because it is common knowledge that the compelling of a person to criminate himself shocks or ought to shock the sense of right and justice of every one who loves liberty. Indeed, this court has not hesitated thus to characterize the Star Chamber method of compelling an accused to be a witness against himself."¹⁸

The greatness of the this John Marshall Harlan was never more apparent than in his *Twining* dissent, when he foresaw that the Supreme Court would uphold violations of the Bill of Rights in this state or that. He would not tolerate in a state a violation of the Bill of Rights any more than in the federal government. And he was right then and now, historically, legally and, what's even more important, morally. Said he:

"I am of opinion that as immunity from self-incrimination was recognized in the Fifth Amendment of the Constitution and placed beyond violation by any Federal agency, it should be deemed one of the immunities of citizens of the United States which the Fourteenth Amendment in express terms forbids any State from abridging—as much so, for instance, as the right of free speech (Amdt II) [sic], or the exemption from cruel or unusual punishments (Amdt VIII) or the exemption from being twice put in jeopardy of life or limb for the same offense (Amdt V), or the exemption from unreasonable searches and seizures of one's person, house, papers or effects (Amdt IV)."¹⁹

17. 211 U.S. at 117 (dissenting opinion).

18. *Id.* at 123.

19. *Id.* at 124.

It was the Nineteenth Century Harlan that Justice Black echoed in his *Adamson* dissent. Listen:

"I cannot consider the Bill of Rights to be an outworn 18th Century 'strait jacket' as the *Twining* opinion did. Its provisions may be thought outdated abstractions by some. And it is true that they were designed to meet ancient evils. But they are the same kind of human evils that have emerged from century to century wherever excessive power is sought by the few at the expense of the many. In my judgment the people of no nation can lose their liberty so long as a Bill of Rights like ours survives and its basic purposes are conscientiously interpreted, enforced and respected so as to afford continuous protection against old, as well as new, devices and practices which might thwart those purposes."²⁰

Said Justice Black:

"I fear to see the consequences of the Court's practice of substituting its own concepts of decency and fundamental justice for the language of the Bill of Rights as its point of departure in interpreting and enforcing that Bill of Rights. . . . I would follow what I believe was the original purpose of the Fourteenth Amendment—to extend to all the people of the nation the complete protection of the Bill of Rights."²¹

Pointing out the obvious dangers of another course, Justice Black said, as Justice Harlan before him:

"To hold that this Court can determine what, if any, provisions of the Bill of Rights will be enforced, and if so to what degree, is to frustrate the great design of a written Constitution."²²

From this we can see that whether the Nineteenth Century Justice Harlan was an "eccentric exception," the Twentieth Century has brought to the bench of the Supreme Court in Hugo Black from Alabama another.

The issue that the Court faces today remains as yesterday, whether in deciding state cases the Fourteenth Amendment compels it to apply the Constitution and its amendments in *haec verbae* or whether it is permitted to apply only so much of the document as it thinks should be applied.

Of course, the notion that the Bill of Rights should not apply as against the states was probably the mistake of Marshall in *Barron v. Baltimore*, where he said the City of Baltimore could take a wharf without just compensation. As an original proposition, it seems absurd to apply the main body of the Constitution to the states and not the amendments in the absence of express provision otherwise. And there is historical evidence to support the view that the first ten amendments were intended to apply against the states.²³ However that may be, the legis-

20. 332 U.S. at 89 (dissenting opinion).

21. *Ibid.*

22. *Ibid.*

23. See note 2 *supra*.

lative history of the Fourteenth Amendment presented by Justice Black as an appendix to his *Adamson* dissent would seem conclusive that the draftsmen of the amendment intended to apply the protections of the Bill of Rights to the states.

As the first Harlan pointed out in the *Twining* case and Justice Black in the *Adamson* case, it has come to pass that the Court applies against the states certain provisions of the Bill of Rights such as freedom of speech and religion, freedom of assembly, the right to counsel in criminal cases, just compensation when property is taken for public use, and others. But there is no guarantee that this pick and choose method may not result in the Court's denying any or all these fundamental rights when violated by a state if its conscience be not shocked by the denial.

As between giving latitude to the Court to apply or not apply such of these fundamental guarantees as it wishes, it would seem better to do as Justice Black suggests today and as John Marshall Harlan did yesterday and apply all the provisions of the Bill of Rights to the states as written. Moreover, since ours is a government of laws, not men, it would seem illegal to apply some of the Bill of Rights and not all. Either the whole of it is applicable through the Fourteenth Amendment or none of it. The Court cannot arrogate to itself a right to pick and choose.

The time has come when the Court should order argument as to the legislative background of both the Bill of Rights and the Fourteenth Amendment and resolve once and for all this controversy. The Court's present rulings are intellectually indefensible.

Roth v. United States;²⁴ *Alberts v. California*²⁵

In these two cases, we have a simple but insoluble problem. It is well and briefly stated by Justice Brennan who wrote for the Court affirming both convictions, thus:

"The constitutionality of a criminal obscenity statute is the question in each of these cases. In *Roth*, the primary constitutional question is whether the federal obscenity statute violates the provision of the First Amendment that 'Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .' In *Alberts*, the primary constitutional question is whether the obscenity provisions of the California Penal Code invade the freedoms of speech and press *as they may be incorporated in the liberty protected from state action by the Due Process Clause of the Fourteenth Amendment.*"²⁶

Roth conducted his business in the City of New York and was convicted by a jury of "mailing obscene circulars and advertising an obscene book" in violation of the United States Code. Alberts ran a mail order

24. 354 U.S. 476 (1957).

25. *Ibid.*

26. 354 U.S. at 479. (Emphasis added.)

business from Los Angeles and a judge of a municipal court (after a jury trial had been waived) convicted him of "lewdly keeping for sale obscene and indecent books and with writing, composing and publishing an obscene advertisement of them in violation of the California Penal Code."

Holding that obscenity is not protected as free speech under either the First or the Fourteenth Amendments and speaking for Justices Frankfurter, Burton, Clark, Whittaker and himself, Justice Brennan wrote the opinion of the Court that affirmed both convictions on this broad ground. Said he:

"... it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance. . . . At the time of the adoption of the First Amendment, obscenity law was not as fully developed as libel law, but there is sufficiently contemporaneous evidence to show that obscenity, too, was outside the protection intended for speech and press. . . . All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 States, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956."²⁷

Even though the convictions were had without proof that the obscene material "will perceptibly create a clear and present danger of antisocial conduct," Justice Brennan declared they would have to be affirmed "in the light of our holding that obscenity is not protected speech." The proper standard was said to be "whether, to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest" and the opinion says both courts below approved this proper standard.

In condemning obscenity, care must be exercised to protect legitimate free speech.

"The fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack: necessary to prevent encroachment upon more important interests. It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest."²⁸

The broad sweep of the Brennan opinion does not analyze the peculiar

27. *Id.* at 483.

28. *Id.* at 488.

facts that made up the obscenity in either of the cases. Rather, the Court contents itself with an examination of the trial court's charge in each case. Finding the standard applied in the charge proper, and the right to trial by a jury of the vicinage accorded, the judgment is accepted.

For this reason, the Chief Justice, while concurring in the affirmance of the convictions said he "would limit" the "decision to the facts" and "to the validity of the statutes" in the two cases before the Court. In justification of his view, Chief Justice Warren said:

"The history of the application of laws designed to suppress the obscene demonstrates convincingly that the power of government can be invoked under them against great art or literature, scientific treatises, or works exciting social controversy. Mistakes of the past prove that there is a strong countervailing interest to be considered in the freedoms guaranteed by the First and Fourteenth Amendments.

"The line dividing the salacious or pornographic from literature or science is not straight and unwavering. Present laws depend largely upon the effect that the materials may have upon those who receive them. It is manifest that the same object may have a different impact, varying according to the part of the community it reached. But there is more to these cases. It is not the book that is on trial; it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture. The nature of the materials is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character. A wholly different result might be reached in a different setting."²⁹

As between the two, the opinion of Chief Justice Warren seems the better. As good as Justice Brennan's is, there is danger that some contrary state might take the majority opinion as justification for convicting honest book dealers of selling "obscene" books. The application of proper instructions and the conviction of a local jury should not be allowed to defeat the protections that the First Amendment, through the Fourteenth, give to free speech and religion. A jury in Nevada does not judge obscenity the way jurors in Utah or Mississippi or Rhode Island do.

In an opinion, the sweep of which in certain paragraphs is magnificent, Justice Douglas writes in dissent. Justice Black joins him. His point is simple and clear:

"When we sustain these convictions, we make the legality of a publication turn on the purity of thought which a book or tract instills in the mind of the reader. I do not think we can approve that standard and be faithful to the command of the First Amendment which by its terms is a restraint on Congress and which by the Fourteenth is a restraint on the States."³⁰

Note well that this dissent is bottomed on the point that the First Amendment is a restraint on the states by virtue of the Fourteenth. Justice Douglas would apply the clear and present danger test to obscenity.

29. *Id.* at 495 (concurring opinion).

30. *Id.* at 508 (dissenting opinion).

"By these standards punishment is inflicted for thoughts provoked, not for overt acts nor anti-social conduct. This test cannot be squared with our decisions under the First Amendment. Even the ill-starred *Dennis* case conceded that speech to be punishable must have some relation to action which could be penalized by government."³¹

The dissenting opinion played down the danger that obscene books and pamphlets caused impure sex thoughts. Citing sociological authority, the dissenting opinion stated:

"The absence of dependable information on the effect of obscene literature on human conduct should make us wary. It should put us on the side of protecting society's interest in literature, except and unless it can be said that the particular publication has an impact that the government can control."³²

Turning to the so-called community standard, Justice Douglas was at his best, saying:

"The standard of what offends 'the common conscience of the community' conflicts, in my judgment, with the command of the First Amendment that 'Congress shall make no law . . . abridging the freedom of speech, or of the press.' Certainly that standard would not be an acceptable one if religion, economics, politics or philosophy were involved. How does it become a constitutional standard when literature treating with sex is concerned?

"Any test that turns on what is offensive to the community's standards is too loose, too capricious, too destructive of freedom of expression to be squared with the First Amendment. Under that test, juries can censor, suppress, and punish what they don't like provided the matter relates to 'sexual impurity' or has a tendency 'to excite lustful thoughts.' This is a community censorship in one of its worst forms. It creates a regime where in the battle between the literati and the Philistines, the Philistines are certain to win. If experience in this field teaches anything, it is that 'censorship of obscenity has almost always been both irrational and indiscriminate.' The test adopted here accentuates that trend."³³

Thus, the opposition of Justices Douglas and Black was that the test in the Brennan opinion "that suppresses a cheap tract today can suppress a literary gem tomorrow." Under the majority opinion all the book or pamphlet need do "is to incite a lascivious thought or arouse a lustful desire." Since "the list of books that judges and juries can place in that category is endless," Justices Douglas and Black would reverse the convictions and declare the statutes unconstitutional. Said Justice Douglas:

"I have the same confidence in the ability of our people to reject noxious literature as I have in their capacity to sort out the true from the false in theology, economics, politics, or any other field."³⁴

31. *Id.* at 509 (dissenting opinion).

32. *Id.* at 511 (dissenting opinion). For a definitely contrary view, see Schmidt, A Justification of Statutes Barring Pornography From the Mails, 26 *Fordham L. Rev.* 70, 74-82 (1957).

33. 354 U.S. at 511 (dissenting opinion).

34. *Id.* at 514 (dissenting opinion).

But in the *Roth* and *Alberts* cases, the most revealing opinion is that of Justice Harlan. Alone of all the Court, he would affirm the conviction of *Alberts* but reverse the conviction of *Roth*. Why? The answer is revealing. Embracing the constitutional philosophy of Justice Frankfurter and rejecting his grandfather's and Justice Black's has led Justice Harlan into intellectual difficulties. He feels obliged to treat state review different from federal, no matter to what absurd lengths this position drives him.

Make no mistake about it, this Harlan opinion has a deal of merit. His points are three. First, that the Brennan opinion:

"... paints with such a broad brush that I fear it may result in a loosening of the tight reigns which state and federal courts hold upon the enforcement of obscenity statutes."³⁵

In this point as we have seen not only the Chief Justice but also Justices Douglas and Black agree with Justice Harlan.

Indeed, it is impossible to see how anyone can disagree with this passage:

"I do not think that reviewing courts can escape this responsibility by saying that the trier of the facts, be it jury or a judge, has labeled the questioned matter as 'obscene,' for, if 'obscenity' is to be suppressed, the question whether a particular work is of that character involves not really an issue of fact but a question of constitutional *judgment* of the most sensitive and delicate kind. Many juries might find that Joyce's 'Ulysses' or Boccaccio's 'Decameron' was obscene, and yet the conviction of a defendant for selling either book would raise, for me, the gravest constitutional problems, for no such verdict could convince me, without more, that these books are 'utterly without redeeming social importance.' *In short, I do not understand how the Court can resolve the constitutional problems now before it without making its own independent judgment upon the character of the material upon which these convictions were based.* I am very much afraid that the broad manner in which the Court has decided these cases will tend to obscure the peculiar responsibilities resting on state and federal courts in this field and encourage them to rely on easy labeling and jury verdicts as a substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case."³⁶

The second point of Justice Harlan's dissent is that:

"... the Court fails to discriminate between the different factors which, in my opinion, are involved in the constitutional adjudication of state and federal obscenity cases."³⁷

35. *Id.* at 496 (concurring opinion).

36. *Id.* at 497 (concurring opinion). (Emphasis added.)

37. *Id.* at 496 (concurring opinion). Instead of dealing with the validity of the constitutional sources cited by Justice Black in his *Adamson* dissent, or calling for oral argument of the validity of the Crosskey research that supports the constitutional philosophy of Justice Black and his grandfather, Justice Harlan cites in n.6, Hart, *The Relations Between State and Federal Law*, 54 *Colum. L. Rev.* 489 (1954). Hart and other scholars contend the Crosskey research is not sound. What they forget is that Crosskey contends that the

This is the Achilles heel of the Harlan opinion in the *Roth* and *Alberts* cases. It comes as the discussion of the *Butler* case indicates from the undocumented and unargued assumption of Justice Frankfurter that the Supreme Court can pick and choose among the Bill of Rights. Without indicating in any manner that the reading material disseminated by Alberts in California was one whit less obscene than the material disseminated by Roth in New York, Justice Harlan would let Alberts rot in jail but "spring" Roth.

When I was a high school debater, I was wont to argue as Justice Harlan does that the states are places to experiment. I'm a big boy now and laugh when I hear that old crumb today. My sides split to read it in justification of Justice Harlan's unsound second point. He thinks one state can ban *Lady Chatterley's Lover* that another allows sold. You see "different states will have different attitudes toward the same work of literature." They have a "prerogative" to "differ on their ideas of morality" and if we do not allow it "the ability of the states to experiment will be stunted." What? Must we have more free love in Nevada and bring polygamy back to Utah? They are both "experiments."

When a thing is neither "wise nor desirable" the time has come to examine the Constitution to see if that document in any of its parts prohibits the act in question. As demonstrated in our discussion of the *Butler* case, state and federal action is judged by the First and Fourteenth Amendments, and the Supreme Court in a long line of cases has rightly or wrongly applied the First Amendment to the states. There is no basis upon which Justice Harlan can read the First Amendment one way against the states. Obscenity is either within or without the protection of the First Amendment whether in the states or in the federal government.

Unlike his second point, Justice Harlan's third point has merit:

"Thirdly, the Court has not been bothered by the fact that the two cases involve different statutes. In California the book must have a 'tendency to deprave or corrupt readers'; under the federal statute it must tend 'to stir sexual impulses and lead to sexually impure thoughts.' The two statutes do not seem to me to present the same problems. Yet the Court compounds confusion when it superimposes on these two statutory definitions a third, drawn from the American Law Institute's Model Penal Code, Tentative Draft No. 6: 'A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest.' The bland assurance that this definition is the same as the ones with which we deal flies in the face of the authors' express rejection of the 'deprave and corrupt' and 'sexual thoughts' tests. . . ."³⁸

quality of the scholarship of the so-called leading constitutional scholars has been of a very poor grade. I could not agree with him more in this. But before the Court cites Hart or others who differ with Crosskey even in a footnote it should order argument.

38. 354 U.S. at 498 (concurring opinion).

There is not much doubt but that Justice Harlan is right when he says: "there is a significant distinction between the definitions used in the prosecutions before us [the federal and California Statutory definitions], and the American Law Institute formula."³⁹

And Justice Harlan is moreover correct in saying that if Justice Brennan in the *Kingsley Books* case⁴⁰ accepts the American Law Institute test as the correct one, he is inconsistent in that his opinion in the *Roth* and *Alberts* cases "merely assimilates the various tests into one indiscriminate potpourri."

But having made this excellent argument, Justice Harlan proceeds to affirm the *Alberts* conviction, bad instructional definition of obscenity notwithstanding.

On the whole case, granted the material was obscene, the position of the Chief Justice seems the most sound. Apparently by any test the material was "obscene" and limiting decision to the facts has more to commend it than anything else, especially when the field is free speech in which the dangers to all of us are so great. Extending the clear and present danger test to obscenity is logical but impractical in that it gives license to the wicked to flood our book stalls and newstands with French postcards, rotten books and indecent films. The rule urged by the Chief Justice in the *Roth* and *Alberts* cases both protects First Amendment rights and rids the world of slimy peddlers of pornographic films and books of all kinds.

*Watkins v. United States*⁴¹

Without much doubt the *Watkins* case was one of the most important and surprising decisions of the October 1956 Term. Reduced to simplest terms the case was this. *Watkins* asserted the right to refuse to testify about persons who were associated with him in communist activities "but who to [his] . . . best knowledge and information and belief have long since removed themselves from the Communist movement." He did not plead the Fifth Amendment; rather he contended the questions were not "relevant to the work of this committee." And he said he did not "believe that the Committee has the right to undertake the public exposure of persons, because of their past activities."

Writing for the Court and calling attention to the fact that the governing statute on contempt of Congress is section 192 of Title 2, United

39. *Id.* at 500 (concurring opinion).

40. *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957).

41. 354 U.S. 178 (1957). The Chief Justice wrote for the Court, Justices Black, Douglas, Harlan and Brennan joining him. Justice Frankfurter wrote a concurring opinion. Justice Clark dissented. Justices Burton and Whittaker took no part in the consideration of the case.

States Code,⁴² the Chief Justice said:

"this raises a special problem in that the statute defines the crime as refusal to answer any question pertinent to the question under inquiry. Part of the standard of criminality, therefore, is the pertinency of the questions propounded to the witness."⁴³

Since the witness must determine at his peril the relevancy of the questions propounded to the particular hearing the Congressional Committee is authorized to conduct, not only the authorizing resolution under which the Committee operates but also the instructions of the Committee or Subcommittee Chairman to the witness becomes important.

After setting out this authorizing resolution, the Chief Justice comments that "it would be difficult to imagine a less explicit authorizing resolution." Considering the resolution was drawn in 1938 for a Select Committee of which Martin Dies was Chairman and that the Committee became a standing one in the Seventy-Ninth Congress, I wonder. Is there anyone in the United States that does not know that this Committee under Dies was dedicated to exposing the communist conspiracy? It is difficult to accept at face value the argument of the Chief Justice that this authorizing resolution is vague. Nor can his statement that the speech of the Chairman at the opening of the hearings merely paraphrased the resolution be accepted. Among other things the Chairman said the Congress set up the Committee because it realized ". . . there are individuals and elements in this country whose aim it is to subvert our Constitutional form of government." He said, "As a result of this committee's investigations and hearings the Internal Security Act of 1950 was enacted." As a whole this preliminary statement of the Chairman makes clear the Committee and its staff were bent on exposing Communists.⁴⁴

Since he objected to the pertinency of the Committee's questions, and he was at his peril in determining whether he was obligated to answer,

42. The historical parts of the Chief Justice's opinion are very well done indeed. He says, for instance, that 2 U.S.C.A. § 192 was passed in 1857 to permit the Congress to inflict for contempt a greater penalty than "the historical procedure of summoning the recalcitrant witness before the bar of either House of Congress and ordering him held in custody until he agreed to testify." You see "such imprisonment is valid only so long as the House remains in session." In court trials for contempt, the Congress gave the witness every right a defendant in a federal criminal case has. Watkins "waived his right to jury trial and was found guilty on all counts" by a United States District Judge in the District of Columbia. His sentence was \$100 fine, and a year in jail but it was suspended and Watkins was put on probation. Interestingly enough, when an appeal was taken to the Court of Appeals of the District of Columbia, a three-judge panel reversed the conviction, one judge dissenting. The Government moved for a re-hearing en banc by the full court. Its motion was granted and sitting en banc the conviction was affirmed.

43. 354 U.S. at 208.

44. 354 U.S. at 210, n.49.

the Chief Justice held Watkins did not have to answer. "The subject matter" had not "been made to appear with indisputable clarity." The Committee, upon the objection of Watkins "on grounds of pertinency," had neglected "to state for the record the subject under inquiry at that time and the manner in which the propounded questions are pertinent thereto." Said Chief Justice Warren, "To be meaningful, the explanation must describe what the topic under inquiry is, and the connective reasoning whereby the precise questions asked relate to it." And said he, "The statement of the Committee Chairman in this case, in response to petitioner's protest, was woefully inadequate." Therefore, concludes the Chief Justice for the Court, Watkin's "conviction is necessarily invalid under the Due Process Clause of the Fifth Amendment."

Observe that the ground of decision is the Due Process Clause of the Fifth Amendment and that, though the case is classified here as one involving free speech, there is not a mention of the First Amendment by Chief Justice Warren or Watkins. As a case involving a lack of procedural due process under the Fifth Amendment, it is a joke. Every cab driver knows this is the congressional Committee that searches for Communists. This was the Committee that discovered the alleged communist connections of Alger Hiss. It is utterly impossible to believe that Watkins was in any doubt whatsoever as to its aims.

Moreover, the Chief Justice relates that the Chairman of the Committee reported to the House the refusal of Watkins to answer and the House directed the Speaker to certify the report to the Attorney General for criminal prosecution. Whatever doubt there was in the authorizing resolution or in Watkin's mind ought to have been completely removed by this specific action.

The issue, therefore, is not one of procedure at all. It is whether Watkins can refuse to tell a House Committee devoted to searching out Communists the names of associates who were Communists or affiliated with them along with him, even though he believes they have now seen the error of their ways and long since severed their communist connections.

It is difficult, in face of the danger to the nation from communist infiltration, to believe that Congress does not have the right to this information. I suspect the Chief Justice feels they have and that is why his opinion is so occupied with history and the technicalities of the authorizing resolution and the Chairman's statements. He seems ready to discuss everything but whether the Congress is entitled to know from Watkins who these so-called reformed Communists are.

And one wonders why Justice Frankfurter wrote a concurrence. It merely echoes the Warren opinion. The "relevance" of the questions to the inquiry of the Committee "must be shown to have been luminous at

the time when asked and not left in cloudiness," says Justice Frankfurter. "The circumstances of this case were wanting in these essentials."

The fundamental fallacy of the Warren opinion is the preposterous assumption that the Congress can only investigate to legislate. That is silly. Applied technically as the Chief Justice does in the *Watkins* case, Congress would never have unearthed the Teapot Dome or Dixon-Yates scandals. This opinion will rise to haunt its author. It offers a substantial argument to the clever witness who wants to avoid the stigma of claiming the Fifth Amendment but still refrain from answering legitimate questions. The dissent of Justice Clark is right.

Cripple the power of the Congress to expose wrong-doing and this country may well be destroyed. It may be the House Un-American Activities Committee unduly exaggerated the danger from the communist conspiracy. But it must not be shackled. Shackling it shackles every congressional committee.

As Jeremy Bentham long ago pointed out, an exclusionary rule that blocks out any evidence does incalculable damage. It does more than win a point for a day. It prevents any consideration of the merits. So the *Watkins* case blots out a great area of information. If the Congress must establish that every inquiry as to wrong-doing has a legislative purpose, minutely and specifically spelled out in its resolutions authorizing its many committees, then the country will rue the day the *Watkins* case came on the books.

*Sweezy v. New Hampshire*⁴⁵

When *Watkins* testified as to his own communist activities and as to those of his associates that he believed still were Communists, refusing only to name reformed Communists, he was on the weakest ground. Permitting him, rather than the congressional Committee, to make such a decision required the questionable decision of the Court that the legislative purpose of the Committee had not been technically spelled out by the Congress. *Sweezy* presented no such difficulty. He was a professor at the University of New Hampshire, and the state under legislation that made the attorney general a one-man investigating committee asked *Sweezy* to testify. On two occasions, *Sweezy* did so. But he refused to answer questions about what he knew of the Progressive Party, and of the persons associated with that organization. However, unlike *Watkins*, *Sweezy* placed his refusal to testify on the First Amendment. Moreover, except for an isolated question as to whether he believed in Communism that he refused to answer, *Sweezy* fully and frankly answered questions as to communist connections. He insisted he was a Socialist and a

45. 354 U.S. 234 (1957).

believer in peaceful change and had no knowledge of Communists or their influence in the Progressive Party.

In reversing Sweezy's conviction for contempt by the state courts of New Hampshire, Chief Justice Warren did not place his ground for reversal on the First Amendment at all but rather held that the use of the attorney general as a one-man investigating committee by New Hampshire made it uncertain whether the legislature approved the questions asked. This method was said to deprive Sweezy of procedural due process under the Fifth Amendment.

After laying emphasis on the fact that the Supreme Court of New Hampshire conceded that under its decision Sweezy was being forced to give up "constitutionally protected freedoms" for the state's good, the Chief Justice said:

"In our view, the answer is clear. No one would deny that the infringement of constitutional rights of individuals would violate the guarantee of due process where no state interest underlies the state action. Thus, if the Attorney General's interrogation of petitioner were in fact wholly unrelated to the object of the legislature in authorizing the inquiry, the Due Process Clause would preclude the endangering of constitutional liberties. We believe that an equivalent situation is presented in this case. The lack of any indications that the legislature wanted the information the Attorney General attempted to elicit from petitioner must be treated as the absence of authority. It follows that the use of the contempt power, notwithstanding the interference with constitutional rights, was not in accordance with the due process requirements of the Fourteenth Amendment."⁴⁶

It must be confessed this reasoning of the Chief Justice is difficult to follow. He specifically rejects any contention that the state's appointment of its chief prosecutor as its one-man committee was an improper delegation under the doctrine of separation of powers. In fact, he goes even further and says that "concept of separation of powers embodied in the United States Constitution is not mandatory in state governments." Rather, as in the *Watkins* case the Chief Justice's point is that the Legislature of New Hampshire might not have wanted the attorney general to ask the questions he did. This argument is hard to buy. It must have been a matter of public knowledge in New Hampshire. The legislature directed the attorney general to investigate subversives just as the House of Representatives did its Un-American Activities Committee that questioned *Watkins*. It does not seem to me that the reason the Chief Justice gives for his decision can stand analysis.

In contrast to the opinion of the Chief Justice, the concurring opinion of Justice Frankfurter is refreshing. He declares the New Hampshire Legislature is free to delegate investigatory power to its attorney general, a point the Chief Justice does not discuss and one about which many

46. *Id.* at 254.

doubts can be raised. Treating the questions asked as ones asked by the Legislature of New Hampshire, Justice Frankfurter holds that *Sweezy* has a constitutional right under the First Amendment to refuse to answer. As to questions about *Sweezy's* lectures at the University of New Hampshire, Justice Frankfurter said:

"When weighed against the grave harm resulting from governmental intrusion into the intellectual life of a university, such justification for compelling a witness to discuss the contents of his lecture appears grossly inadequate. Particularly is this so where the witness has sworn that neither in the lecture nor at any other time did he ever advocate overthrowing the Government by force and violence."⁴⁷

As to questions about the Progressive Party:

"The implications of the United States Constitution for national elections and 'the concept of ordered liberty' implicit in the Due Process Clause of the Fourteenth Amendment as against the States . . . were not frozen as of 1789 or 1868, respectively. While the language of the Constitution does not change, the changing circumstances of a progressive society for which it was designed yield new and fuller import to its meaning. Whatever, on the basis of massive proof and in the light of history, of which this Court may well take judicial notice, be the justification for not regarding the Communist Party as a conventional political party, no such justification has been afforded in regard to the Progressive Party. A foundation in fact and reason would have to be established far weightier than the intimations that appear in the record to warrant such a view of the Progressive Party. This precludes the questioning that petitioner resisted in regard to that Party."⁴⁸

Except for his constitutional theory that permits him to apply or not apply the Bill of Rights to the states and his approval of decisions so fundamentally unjust and so directly contrary to the Bill of Rights as the *Palko* case⁴⁹ and the *Hurtado* case, this opinion of Justice Frankfurter is superb. It puts the ground of decision where it should be—on the First Amendment, made applicable to New Hampshire by the Fourteenth Amendment. In comparison, the opinion of the Chief Justice is very weak indeed. It is in opinions such as *Watkins* and *Sweezy* that a lack of prior judicial experience becomes evident in the writing of the Chief Justice. His heart is magnificent but his hand simply is not up to that big heart when he comes to pen opinions that call for the craftsmanship of the *Sweezy* case.

The dissent of Justice Clark in the *Sweezy* case makes no attempt to distinguish the Communist Party from the Progressive Party. Apparently, he'd lump the two together. Then he'd throw all professors into the same pot with Communists and Progressives. This seems dead wrong to me.

The Chief Justice and Justices Black, Douglas and Brennan reversed

47. *Id.* at 261 (concurring opinion).

48. *Id.* at 266 (concurring opinion).

49. *Palko v. Connecticut*, 302 U.S. 319 (1937).

because they thought it a "denial of due process" for New Hampshire's Legislature to lodge its power of investigation in its attorney general resulting in a separation of its power to investigate from its "responsibility to direct the use of that power." Only Justice Frankfurter and Justice Harlan reverse "on the ground that Sweezy's rights under the First Amendment have been violated." Justice Clark in his dissent sheds crocodile tears about this. Because the opinion of the Chief Justice carries but four votes there is no opinion by "the Court." It is not the majority or "the Court's" opinion but only "the principal opinion." Said Justice Clark:

"Since the conclusion of a majority of those reversing is not predicated on the First Amendment questions presented, I see no necessity for discussing them. But since the principal opinion devotes itself largely to these issues I believe it fair to ask why they have been given such an elaborate treatment when the case is decided on an entirely different ground. It is of no avail to quarrel with a straw man. My view on First Amendment problems in this type of case is expressed in my dissent in *Watkins*, decided today. Since a majority of the Court has not passed on these problems here, and since I am not convinced that the State's interest in investigating subversive activities for the protection of its citizens is outweighed by any necessity for the protection of Sweezy I would affirm the judgment of the New Hampshire Supreme Court."⁵⁰

Implicit in the reasoning of the Chief Justice is that New Hampshire violated the First Amendment as made applicable by the Fourteenth. The real difference between the four Justices who stand on the Warren opinion and the two that stand on the Frankfurter, is the right of New Hampshire to have a procedure under which its legislature abdicates and its attorney general investigates. Had Chief Justice Warren attacked this as fundamentally unfair and unjust, his opinion would have a great deal to commend it. But this difference of opinion does not excuse Justice Clark from reconciling his dissent in such a different case as *Watkins* from his dissent here. The "straw man" in the *Sweezy* case dissent is the suggestion that because there is no "Court" opinion, there is no need to discuss whether New Hampshire in questioning Sweezy violated his First Amendment rights.

*Yates v. United States*⁵¹

For every minority group in America a reading of the *Yates* case opinions and a rereading of the *Dennis*⁵² case opinions should be made compulsory. This is a test of the First Amendment that tries men's souls. The *Dennis* case was the famous communist prosecution under the

50. 354 U.S. at 270 (dissenting opinion).

51. 354 U.S. 298 (1957).

52. *Dennis v. United States*, 341 U.S. 494 (1951).

Smith Act.⁵³ By a limited grant of certiorari after the convictions had been affirmed by the Court of Appeals for the Second Circuit, the Supreme Court took the case. Its review "removed" from "consideration any question as to the sufficiency of the evidence to support the jury's determination that petitioners are guilty of the offense charged."

Before the *Dennis* case, in a series of well known First Amendment cases⁵⁴ that were contrary to others,⁵⁵ equally well known, the Court came to say:

"The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."⁵⁶

The question that the Court faced in the *Dennis* case was whether there was such a clear and present danger from Communism that the Smith Act was constitutional. In holding the Smith Act was constitutional the late Chief Justice Vinson rejected the contention that the Smith Act "prohibits academic discussion of the merits of Marxism-Leninism," and said "it is directed at advocacy, not discussion." He noted that Judge Medina charged the jury that they could not convict if they found petitioners did "no more than pursue peaceful studies and discussions or teaching and advocacy in the realm of ideas." As to the clear and present danger test, the late Chief Justice said:

". . . the words cannot mean that before the Government may act, it must wait until the putsch is about to be executed, the plans have been laid and the signal is awaited."⁵⁷

And:

"The formation by petitioners of such a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders . . . felt that the time had come for action . . . convince us that their convictions were justified on this score."⁵⁸

Turning to the sufficiency of Judge Medina's charge to the jury, Chief Justice Vinson pointed out that the trial judge had reserved the question

53. 18 U.S.C.A. § 2385. Under the Smith Act, it is unlawful to advocate or teach the overthrow of the Government "by force or violence," or with similar intent to distribute any printed matter or "organize or help to organize" any "assembly of persons who teach, advocate or encourage the overthrow" of the Government, or to conspire to commit any of these acts.

54. *DeJonge v. Oregon*, 299 U.S. 353 (1937); *Whitney v. California*, 274 U.S. 357 (1927); *Shenck v. United States*, 249 U.S. 47 (1919).

55. See *Gitlow v. United States*, 268 U.S. 652 (1925), and cases cited therein. Justice Harlan in the *Yates* case, speaking of the *Gitlow* case, says that the New York Statute involved there was nearly identical with the Smith Act.

56. *Holmes, C. J.*, in *Shenck v. United States*, 249 U.S. 47, 52 (1919).

57. 341 U.S. at 509.

58. *Id.* at 510-11.

of the existence of the danger for his own determination. This the late Chief Justice held was proper. He said this was a question of law for the court not one of fact for the jury.

In the absence of a clear and present danger, both Justices Black and Douglas in their dissents argued that advocating the violent overthrow of the Government was free speech protected by the First Amendment. Said Justice Black:

"These petitioners were not charged with an attempt to overthrow the Government . . . They were not even charged with saying anything or writing anything designed to overthrow the Government. The charge was that they agreed to assemble and to talk and publish certain ideas at a later date. The indictment is that they conspired to organize the Communist Party and to use speech or newspapers and other publications in the future to teach and advocate the forcible overthrow of the Government. No matter how it is worded, this is a virulent form of prior censorship of speech and press, which I believe the First Amendment forbids. I would hold section 3 of the Smith Act authorizing this prior restraint unconstitutional on its face and as applied."⁵⁹

In his dissent, Justice Douglas said that what the petitioners did was to teach the Marxist-Leninist doctrine from four historical and theoretical books. It was not, he said,

". . . a case where those who claimed protection under the First Amendment were teaching the techniques of sabotage, the assassination of the President, the filching of documents from public files, the planting of bombs, the art of street warfare and the like. . . ."⁶⁰

Granted that world Communism "is no bogeyman," Justice Douglas argued it was on the American scene, that it had few followers, had never made substantial headway and never would. "In America," he said, "they are miserable merchants of unwanted ideas; their wares remain unsold." Both Justice Black and Justice Douglas objected to the trial court deciding there was no clear and present danger. This they said was a question of fact for the jury. Concluding his dissent, Justice Black remarked:

"Public opinion being what it now is, few will protest the conviction of these Communist petitioners. There is hope, however, that in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society."⁶¹

Such was the *Dennis* case. It holds merely that the Smith Act was constitutional and that there was a clear and present danger from the defendant communist leaders who organized the party in America and taught the violent overthrow of our Government. Since the evidence was

59. Id. at 579 (dissenting opinion).

60. Id. at 581 (dissenting opinion).

61. Ibid.

not reviewed in the Supreme Court, but assumed to be sufficient to convict if the Smith Act was constitutional and properly charged, the decision leaves much to be desired.

The basic trouble in the *Yates* case is the same the Court faced in the *Dennis* decision. There was no overt act that could serve as a clear and present danger except the teaching of the communist doctrine. It is disturbing that Congress can, despite the First Amendment, pass a law making it a crime to teach or believe what a congressional majority despise.

There are striking differences and similarities in the *Yates* case. The defendants were tried and convicted of violating the Smith Act. As in the *Dennis* case, the indictment, returned in 1951, charged that, starting in 1940, they conspired: (1) to "advocate and teach" the duty and necessity of overthrowing the Government by force and violence; and (2) to "organize" as the Communist Party of the United States, a society of persons who so advocate and teach. The indictment laid the conspiracy under the Smith Act for the period 1940 to 1948 and for the period 1948 to 1951 under the general federal conspiracy section.⁶² This has a three year statute of limitations.

Justice Harlan wrote what Justice Clark would call "the principal opinion," as it speaks only for the Chief Justice, Justice Frankfurter and himself. It takes up four aspects of the case.

First, the third section of the Smith Act reads:

"Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—
"Shall be fined not more than \$10,000 or imprisoned not more than ten years, or both, . . ."

Going back to Marshall in the *Wiltberger*⁶³ case, Justice Harlan recalled that our great Chief Justice said there:

"To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which it would be unsafe to consider as precedents forming a general rule for other cases."⁶⁴

Following Marshall, Justice Harlan held that the word "organize"

62. 18 U.S.C.A. § 371.

63. *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76 (1820).

64. *Id.* at 95.

must be strictly confined to "acts entering into the creation of a new organization." Since the Communist Party of the United States "came into being in 1945 and the indictment was not returned until 1951, the three-year statute had run on the 'organizing charge' and required the withdrawal of that part of the indictment from the jury's consideration."

From this narrow interpretation of the word "organize," Justice Clark dissented. His argument is:

"The Court concludes that the plain words of the Act, 'Whoever organizes or *helps or attempts* to organize any society, group, or assembly of persons' (emphasis added) embodies only those 'acts entering into the creation of a new organization.' As applied to the Communist Party, the Court holds that it refers only to the reconstitution of the Party in 1945 and a part of the prosecution here is, therefore, barred by the three-year statute of limitations. This construction frustrates the purpose of the Congress for the Act was passed in 1940 primarily to curb the growing strength and activity of the Party. Under such an interpretation all prosecution would have been barred at the very time of the adoption of the Act for the Party was formed in 1919. If the Congress had been concerned with the initial establishment of the Party it would not have used the word 'helps or attempts,' nor the phrase 'group, or assembly of persons.' It was concerned with the new Communist fronts, cells, schools, and other groups, as well as assemblies of persons, which were being created nearly every day under the aegis of the Party to carry on its purposes. This is what the indictment here charges and the proof shows beyond doubt was in fact done. The decision today prevents for all time any prosecution of Party members under this subparagraph of the Act."⁶⁵

One must confess that if all there were to this case was the meaning of "organize," Justice Clark has a much more powerful argument than Justice Harlan. Although he concurs in result, Justice Burton notes agreement on this point with Justice Clark. It is a difficult point. Justice Harlan found the legislative history:

". . . no more revealing as to what Congress meant by '*organize*' than is in the statute itself.

". . . [T]he congressional hearings indicate that it was the '*advocating and teaching*' provision of the Act rather than the '*organizing*' provision which was especially thought to reach Communist activities."⁶⁶

Second, Justice Harlan held that the instructions to the jury were erroneous. In the *Dennis* case, it will be recalled the trial court charged that the defendants could not be convicted unless the jury found they:

". . . conspired to organize a society, group and assembly of persons who teach and advocate the overthrow or destruction of the Government of the United States by force and violence . . . that such teaching and advocacy be of a rule of principle of action, . . . all with the intent to cause the overthrow or destruction of the Gov-

65. 354 U.S. at 348 (dissenting opinion).

66. *Id.* at 307-08.

ernment of the United States by force and violence as speedily as circumstances would permit."⁶⁷

In the *Yates* case, though requested by both the defense and the Government, the trial judge refused to give the *Dennis* charge, and instead charged:

"The kind of advocacy and teaching which is charged and upon which your verdict must be reached is not merely a desirability but a necessity that the Government of the United States be overthrown and destroyed by force and violence and not merely a propriety but a duty to overthrow and destroy the Government of the United States by force and violence."⁶⁸

Justice Harlan tells us:

"The court made it clear in colloquy with counsel that in its view the illegal advocacy was made out simply by showing that what was said dealt with forcible overthrow and that it was uttered with a specific intent to accomplish that purpose, insisting that all such advocacy was punishable 'whether it is language of incitement or not.'"⁶⁹

He then went on to say:

"In failing to distinguish between advocacy of forcible overthrow as an abstract doctrine and advocacy of action to that end, the District Court appears to have been led astray by the holding in *Dennis* that advocacy of violent action to be taken at some future time was enough. It seems to have considered that, since 'inciting' speech is usually thought of as something calculated to induce immediate action, and since *Dennis* held advocacy of action for future overthrow sufficient, this meant that advocacy, irrespective of its tendency to generate action, is punishable, provided only that it is uttered with a specific intent to accomplish overthrow. In other words, the District Court apparently thought that *Dennis* obliterated the traditional dividing line between advocacy of abstract doctrine and advocacy of action."⁷⁰

In his dissent, Justice Clark rather feebly, it seems, argues these charges are "without material difference" and "the distinctions are too 'subtle and difficult to grasp,'" quoting Justice Harlan. But with an honesty, characteristic of the man, he lets the cat out of the bag by saying the obvious:

"However, in view of the fact that the case must be retried, regardless of the disposition made here on the charges, I see no reason to engage in what becomes nothing more than an exercise in semantics with the majority about this phase of the case. Certainly if I had been sitting at the trial I would have given the *Dennis* charge, not because I consider it any more correct, but simply because it had the stamp of approval of this Court. Perhaps this approach is too practical. But I am sure the trial judge realizes now that practicality often pays."⁷¹

In the third part of his opinion, Justice Harlan reviews the evidence.

67. 341 U.S. at 512.

68. 354 U.S. at 314-15.

69. *Id.* at 317-18.

70. *Id.* at 320.

71. *Id.* at 350 (dissenting opinion).

In this, the case differs markedly from the *Dennis* case where certiorari was limited to the constitutionality of the Smith Act and it was assumed that the evidence was sufficient to convict. Analyzing the evidence, Justice Harlan found it manifestly insufficient as to five of the fourteen defendants and of doubtful sufficiency as to the remaining nine. As he put it:

"In short, while the record contains evidence of little more than a general program of educational activity by the Communist Party which included advocacy of violence as a theoretical matter, we are not prepared to say, at this stage of the case, that it would be impossible for a jury, resolving all conflicts in favor of the Government and giving the evidence as to these San Francisco and Los Angeles episodes its utmost sweep, to find that advocacy of action was also engaged in when the group involved was thought particularly trustworthy, dedicated, and suited for violent tasks."⁷²

Instead of dismissing the indictment as to these nine as he did for the five, Justice Harlan directed that they be re-tried. For this action, he was taken to task by Justice Clark who in his dissent commented:

"In its long history, I find no case in which an acquittal has been ordered by this Court solely on the *facts*."⁷³

Justice Black in his dissent was even more sharp. Quoting the passage above from the Harlan opinion as to lack of evidence against the nine, Justice Black said:

"It seems unjust to compel these nine defendants, who have just been through one four-month trial, to go through the ordeal of another trial on the basis of such flimsy evidence. As the Court's summary demonstrates, the evidence introduced during the trial against these defendants was insufficient to support their conviction. Under such circumstances, it was the duty of the trial judge to direct a verdict of acquittal. If the jury had been discharged so that the Government could gather additional evidence in an attempt to convict, such a discharge would have been a sound basis for a plea of former jeopardy in a second trial. . . . I cannot agree that 'justice' requires this Court to send these cases back to put these defendants in jeopardy again in violation of the spirit if not the letter of the Fifth Amendment's provision against double jeopardy."⁷⁴

The point taken by Justice Black appears to have great merit and may well cause the Government not to attempt a new trial. If the evidence was so weak as to these nine, then reversal to allow the Government to gather better evidence is certainly double jeopardy denounced by the Bill of Rights in the Fifth Amendment.

The fourth part of the Harlan opinion relates to the defendant Schneiderman. In a denaturalization proceeding, it was determined that prior to 1927 he had not "adopted an interpretation of the Communist Party's

72. *Id.* at 332.

73. *Id.* at 346 (dissenting opinion).

74. *Id.* at 341-42 (dissenting opinion).

teachings featuring 'agitation and exhortation calling for present violent action.'” Even though this was a judgment of the Supreme Court.⁷⁵ Harlan said it could not be *res judicata* as to Schneiderman's acts in California from 1948 to 1951.

One comes away from the *Yates* decision with the conviction that the prophecy of Justice Black in his *Dennis* dissent has come to pass. These are “calmer times.” Either our “pressures, passions and fears” of Communism have subsided a bit, or because of the atom bomb, and “sputnik” of the Russians, we have decided to live in the world with them.

Whatever the reason, the *Yates* case is different from the *Dennis* case. Justices Vinson, Reed and Minton are gone. Neither Justice Frankfurter nor Justice Jackson were enthusiastic in their concurrences in the *Dennis* case. In the *Yates* decision, neither Justice Brennan nor Justice Whitaker voted. Their future attitude remains in doubt. It is safe to say, however, that unlike the Vinson Court, this Warren Court will insist in Smith Act cases on proof of an overt act that shows incitement to action. And unless proof in future cases be better than the Government had in this *Yates* case there will be no more convictions under the Smith Act.

Justice Black in his partial dissent in *Yates* said:

“The kind of trials conducted here are wholly dissimilar to normal criminal trials. Ordinarily these ‘Smith Act’ trials are prolonged affairs lasting for months. In part this is attributable to the routine introduction in evidence of massive collections of books, tracts, pamphlets, newspapers, and manifestoes discussing Communism, Socialism, Capitalism, Feudalism and governmental institutions in general, which, it is not too much to say, are turgid, diffuse, abstruse, and just plain dull. Of course, no juror can or is expected to plow his way through this jungle of verbiage. The testimony of witnesses is comparatively insignificant. Guilt or innocence may turn on what Marx or Engels or someone else wrote or advocated as much as a hundred or more years ago. Elaborate, refined distinctions are drawn between ‘Communism,’ ‘Marxism,’ ‘Leninism,’ ‘Trotskyism,’ and ‘Stalinism.’ When the propriety of obnoxious or unorthodox views about government is in reality made the crucial issue, as it must be in cases of this kind, prejudice makes conviction inevitable except in the rarest circumstances.”⁷⁶

The man is right. There, but for the grace of God, goes every minority group. The First Amendment rightly demands that we let rascals talk. It is the danger of action only that the Congress can condemn. Otherwise, we'll let the Smith Act bring us back to the Alien and Sedition Acts and, as under John Adams, men will go to jail for writing editorials that adversely criticize President Eisenhower. Free speech to the draftsmen of the Bill of Rights was not speech with which they agreed. To be free, it must be any speech which is not filthy or obscene as in the *Roth* and *Alberts* cases and from which there is not a clear and present danger to our country.

75. *Schneiderman v. United States*, 320 U.S. 118 (1942).

76. 354 U.S. at 339 (dissenting opinion).

INVESTIGATION OF CRIME

Under this heading are grouped those cases which present a conflict between the people's interest in suppressing crime and an individual's constitutional rights.

*Fikes v. Alabama*⁷⁷

When the defendant, Fikes, was found wandering about a neighborhood late one night, the city police arrested him on suspicion of rape. Two women, one a victim, identified him as the rapist. For some ten days after he was picked up, Fikes was questioned by the Selma police in the city and at Kilby State Prison, fifty-five miles from the locus of the crime and eighty miles from his home in Marion, Alabama. On Thursday his father came to the prison to see him but was refused admittance. That very evening, a confession was obtained from the defendant on a tape recording in response to questions from a local policeman, some of which "were quite leading or suggestive." On the second Tuesday a second confession was taken down by the prison stenographer, again in the form of responses to the policeman's questions. The only contact Fikes had with family or friend was on the second Sunday when his father was allowed to visit him. Three psychiatrists testified that the defendant was a "schizophrenic," age 27, who started school at 8 and left at 16 "while still in the third grade."

As the federal government and most states, Alabama has a statute requiring its police after arrest to bring an accused promptly before a judge for a hearing.⁷⁸ Obviously this statute was violated, but the Alabama court that convicted Fikes admitted his confessions, and the Supreme Court of Alabama affirmed. The Supreme Court of the United States reversed the conviction, holding that "the use of the confessions . . . was a denial of due process."⁷⁹

But by what a narrow margin the victory for the Bill of Rights came. Chief Justice Warren spoke for four; himself, and Justices Black, Douglas, and Clark.

Reversal therefore depended on the votes of Justices Frankfurter and Brennan. Though they both joined the Court's opinion, Justice Frankfurter wrote a concurrence in which Justice Brennan joined.⁸⁰ He said

77. 352 U.S. 191 (1957).

78. Ala. Code Ann. tit. 15, § 160 (1940).

79. 352 U.S. at 197.

80. Attention should be called to the fact that in his concurring opinion, Justice Frankfurter states that he joins in the opinion of the Chief Justice. Justice Brennan who concurred with Justice Frankfurter also concurred with Chief Justice Warren. The opinion of the Chief Justice rests on the Due Process Clause of the Fourteenth Amendment and applies it to the state as written, but as the text discussion indicates the Frankfurter view of when and how the Fourteenth Amendment applies to Alabama is vastly

the record showed no physical brutality but rather a sapping of the prisoner's will through detention incommunicado over a long period, a failure to arraign, and detention of the accused at the intermittent pleasure of the police until the confession was obtained. On the whole record this was said to have brought the case "below the Plimsoll line of 'due process.'"⁸¹

Those familiar with Justice Frankfurter's philosophy can read into this case the fact that the procedures used to obtain the confession shocked his conscience in that they offended "the civilized standards of the Anglo-American world" (whatever they may be).

Were the *Fikes* conviction a federal one, we know that under the *McNabb*⁸² rule reversal would result because of the failure of the police to arraign the prisoner promptly before a judge. The *Fikes* case in one sense can be viewed as an extension of the *McNabb* rule to the states when a prisoner has been held incommunicado without arraignment ten days or more.

Justice Frankfurter was the author of the *McNabb* opinion. One could, rightly then, expect him to be the first to vote to exclude the two confessions obtained from *Fikes*. But in his concurring opinion in the *Fikes* case, the Justice says:

"Flouting of the requirement of prompt arraignment prevailing in most states is in and of itself not a denial of due process."⁸³

The *McNabb* rule is a rule of federal law for the proper administration of criminal justice. It does not purport to be an application of constitutional law. Yet a coerced confession violates the Fifth Amendment in that it unlawfully compels a defendant to incriminate himself. Also when a criminal defendant is detained ten days and a statement is taken from him without counsel, there would appear to be a clear violation of the Sixth Amendment that guarantees a prompt trial, information as to the accusation and assistance of counsel. Within the meaning of "due process" in the Fifth, Sixth and Fourteenth Amendments, police procedures such as those employed by the Alabama police ought to be unconstitutional even though the *McNabb* case rule does not stand on this basis.

One can look at the Constitution from one end to the other and not find in that document a single sentence conferring on the Supreme Court the power to supervise police procedures, federal or state. The rationale which Justice Frankfurter employed for the Court in the *McNabb* case

different. How Justice Frankfurter could join the Warren opinion or how Justice Brennan could join both defies intelligent explanation.

81. 352 U.S. at 199.

82. *McNabb v. United States*, 318 U.S. 332 (1943).

83. 352 U.S. at 199, n.1.

is fallacious, a figment of his judicial imagination. It must have been invented so as to permit its application only to federal convictions. This would explain why Justice Frankfurter states he would not reverse in the *Fikes* case if a ten-day delay between arrest and arraignment were the only evidence of improper procedure presented, as contrasted with only thirty hours in the *McNabb* case.

The first point in the Frankfurter concurrence results in this paradoxical conclusion: state convictions achieved with the aid of confessions obtained during delay of arraignment are to be affirmed but identical federal convictions are to be reversed. The Court is to apply a double standard of decency. Both the *McNabb* and *Fikes* cases must rationally rest on "due process" and since the clause is the same in both the Fifth and the Fourteenth Amendments, the application by the Court should be the same with respect to federal and state convictions. It is on this point that the opinion of the Chief Justice in the *Fikes* case correctly rests.

There is an even more disturbing second point in the Frankfurter concurrence. He voted to reverse the conviction, not for the failure of the police to arraign the defendant promptly nor for any "single one of these circumstances," but because all the facts in "combination" led him to believe that the Plimsoll line of due process under the Fourteenth Amendment had been passed. This is a puzzlement. The Plimsoll line on a ship you can see. The one on the Frankfurter conscience cannot even be X-rayed. His rule of decision is bound to cause uncertainty and confusion to bench and bar.

But much more disconcerting than the opinion of Justice Frankfurter in the *Fikes* case is the dissent of Justice Harlan in which Justices Reed and Burton join. It is evident that the dissenters were all for affirming despite what appear to be improper police procedures. The excuse that such improper methods were common in Alabama ought to lead to reversal all the more, but the dissenters reason reversely.

Does not the Bill of Rights prohibit the use of confessions thus obtained from a prospective defendant? Why should the Supreme Court exclude such confessions in federal criminal trials but approve their use in state criminal trials? How can good lawyers such as Justices Harlan, Burton and Reed argue that state courts can use confessions that the Constitution in its Bill of Rights forbids?

*Mallory v. United States*⁸⁴

The inconsistency and invalidity of reading the Bill of Rights against the federal government one way and against the states another, is nowhere made better evident than in the *Mallory* decision.

Again the conviction was for rape. The defendant, Mallory, was ap-

84. 354 U.S. 449 (1957).

prehended between 2 and 2:30 p.m. He was taken to police headquarters, where four officers questioned him "for thirty to forty-five minutes." Later, Mallory was examined alone and after one hour and a half of steady interrogation, he began to break down. At 10 p.m., when Mallory had repeated his confession before other police officers, for the first time a United States commissioner was sought. The deputy coroner then examined him and "noted no indicia of physical or psychological coercion." Thereafter, the defendant was confronted by the complaining witness and "practically every man in the Sex Squad." In response to questions of three officers, Mallory repeated his confession, and at about midnight dictated it to a typist. The next morning, he was finally brought before the United States commissioner.

The Supreme Court reversed. Justice Frankfurter, the author of the *McNabb* decision, wrote in the *Mallory* case for a unanimous court. His opinion rested on Rule 5(a) of the Federal Rules of Criminal Procedure which directs the police to take an "arrested person without unnecessary delay before the nearest available commissioner," and upon the *McNabb* case. There is not in the opinion a single reference to the Constitution.

Significantly, Justice Frankfurter refers to the *Upshaw*⁸⁵ case which came to the Supreme Court after Rule 5(a) of the Federal Criminal Rules was adopted, and which held that the provision requiring arraignment without unnecessary delay "implied no relaxation of the *McNabb* doctrine."

Summarizing the *McNabb* rule, the Justice said:

"Since such unwarranted detention led to tempting utilization of intensive interrogation, easily gliding into the evils of 'the third degree,' the Court held that police detention of defendants beyond the time when a committing magistrate was readily accessible constituted 'wilful disobedience of law.' In order adequately to enforce the congressional requirement of prompt arraignment, it was deemed necessary to render inadmissible incriminating statements elicited from defendants during a period of unlawful detention."⁸⁶

Speaking of what the police may do, Justice Frankfurter said:

"The scheme for initiating a federal prosecution is plainly defined. The police may not arrest upon mere suspicion but only on 'probable cause.' The next step in the proceeding is to arraign the arrested person before a judicial officer as quickly as possible so that he may be advised of his rights so that the issue of probable cause can be promptly determined. The arrested person may, of course, be 'booked' by the police. *But he is not to be taken to police headquarters in order to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support the arrest and ultimately his guilt.*"⁸⁷

85. *Upshaw v. United States*, 335 U.S. 410 (1948).

86. 354 U.S. at 453.

87. *Id.* at 454. (Emphasis added.)

Having said this, Justice Frankfurter said that "the command does not call for mechanical or automatic obedience" but:

"Circumstances may justify a *brief delay* between arrest and arraignment, as for instance, where the story volunteered by the accused is susceptible of quick verification through third parties. *But the delay must not be of a nature to give opportunity for the extraction of a confession.*"⁸⁸

Commenting on the police procedures used with the defendant, Justice Frankfurter emphasized that they "preclude a holding that arraignment was without unnecessary delay." His detention was "at headquarters within the vicinity of numerous committing magistrates." With "ample evidences from other sources" than Mallory that he was "the chief suspect," nevertheless, they "first questioned him for approximately a half hour." Then, "when this inquiry of a nineteen-year-old lad of limited intelligence produced no confession," the police asked him to submit to the lie detector. But, comments Justice Frankfurter, the defendant

". . . was not told of his rights to counsel or to a preliminary examination before a magistrate, nor was he warned that he might keep silent and 'that any statement made by him might be used against him.'"

"Not until he had confessed, when any judicial caution had lost its purpose, did the police arraign him."⁸⁹

Under these circumstances a unanimous Court declared that there was no way it could approve what the police did

". . . without subordinating the general rule of prompt arraignment to the discretion of arresting officers in finding exceptional circumstances for its disregard."⁹⁰

And the Court pointed out that "in every case" the police "may well claim, and quite sincerely, that they were merely trying to check on the information given by him."

Recognizing the importance and difficulty of the problem, the Court by Justice Frankfurter concluded:

"Against such a claim and the evil potentialities of the practice for which it is urged, stands 5(a) as a barrier."⁹¹

I wonder if Rule 5(a) is the *real* "barrier"? Mallory was not warned of his constitutional rights and his mentality seems to have been such that any warning would have been useless. Despite the command of the Sixth Amendment that a defendant be given the assistance of counsel, none was provided.

One cannot deny that it is in the public interest to apprehend and

88. *Id.* at 455. (Emphasis added.)

89. *Ibid.*

90. *Ibid.*

91. *Id.* at 456.

incarcerate a rapist, but not if the price of his conviction is the approval of a vile police practice—the “third degree.” Holding an American citizen at police headquarters incommunicado from family and friends without counsel, and denying him a prompt hearing before a judicial officer is outrageous.

Observe that the police did all this questioning of the defendant, Mallory, before they put him in a line-up and asked the complaining witness to identify him. It is always easier for policemen to grill a nervous suspect first, then to gather evidence. If they can get away with such procedures, one can be sure they will. It is the line of least resistance.⁹²

A proper understanding of the *McNabb*, *Fikes* and *Mallory* cases is that policemen when they arrest a person must take him without delay before a judge who will warn him of his rights and allow him to call counsel to assist him. With or without a federal or state statute, such as Rules 4 and 5 of the Federal Rules of Criminal Procedure, any other procedure is unconstitutional in the federal government under the Fifth and Sixth Amendments and in the states under the same two amendments made applicable by the Fourteenth Amendment. The Bill of Rights is the “barrier” to improper police methods.

*In the Matter of Groban*⁹³

Here, an Ohio State fire marshal called the Grobans before him to testify in an investigation. The governing statute authorized the exclusion of such persons as the marshal wished. The Grobans agreed to testify but asked for counsel. This the fire marshal denied. When the Grobans would not testify the fire marshal jailed them for contempt. They immediately applied for a writ of habeas corpus, and, after it was denied by the Supreme Court of Ohio, appealed to the Supreme Court of the United States.

Where counsel has been denied in a criminal case, the Supreme Court under the Due Process Clause of the Fourteenth Amendment has not hesitated to strike down state criminal court procedures.⁹⁴ But a secret

92. During the first session of the 85th Congress, bills were introduced to reverse the Mallory decision by Congressman Keating and others. See H.R. 8600, 8521, 8624 and 8596. A Special Committee of the House Judiciary Committee, consisting of Chairman Willis, Congressmen Rogers, Cramer, Chudoff and Moore, held hearings in July and August of 1957. Study of the testimony confirms that without the “grilling” or arrest of Mallory, the police might have legally obtained the evidence they needed. The hearings are chiefly significant for what they do not reveal. Why was Mallory’s trial so delayed that, although arrested April 7, 1954, his case did not reach the Supreme Court until 1957? Justice Frankfurter tells us it was “because of doubt about the prisoner’s capacity to understand.” Was his release due to this as much as the McNabb rule?

93. 352 U.S. 330 (1957).

94. *Powell v. Alabama*, 287 U.S. 45 (1932).

investigation by the Ohio fire marshal apparently is different. Said Justice Reed for the Court in an opinion in which only Justices Clark and Burton would join:

"The fact that appellants were under a legal duty to speak and that their testimony might provide a basis for criminal charges against them does not mean that they had a constitutional right to the assistance of their counsel."⁹⁵

And to support this view, Justice Reed said:

"A witness before a grand jury cannot insist, as a matter of constitutional right, on being represented by his counsel, nor can a witness before other investigatory bodies."⁹⁶

This statement is all the more remarkable in that the grand jury is an investigative body of citizens from twelve to twenty-three in number and different from one state fire marshal in that, as Justice Black puts it in his dissent, "They have no axes to grind."

Whatever has in the past been decided, there is no reason to deny to a prospective criminal defendant the assistance of his counsel before the grand jury or before a congressional committee or any other investigatory body. Fairness, if not constitutional due process, would seem to require it. In a ringing opinion, not too long ago, the Court struck down as unconstitutional Michigan's one judge grand jury system.⁹⁷ It must be that one judge fire marshals are different.

Justice Reed could not carry the Court with the votes of Justices Clark and Burton, so the concurring opinion of Justice Frankfurter in which Justice Harlan joins is of special significance. In it, he says that:

"To whatever extent history may confirm Lord Acton's dictum that power tends to corrupt, such a doctrine of fear can hardly serve as a test under the Due Process Clause of the Fourteenth Amendment, of a *particular* exercise of a State's legislative power."⁹⁸

To Justice Frankfurter, this Ohio statute is "expressive of a State's view of desirable policy." And he assures us (though one can be pardoned for asking how he knows) that "this is not a statute directed to the examination of suspects." Rather its "aim" is "the expeditious and expert ascertainment of the causes of fires." Since the fire marshal "is not a prosecutor," we must not lay down "as a constitutional principle that no administrative inquiry can be had *in camera* unless a lawyer be allowed to attend." Without a lawyer, the privilege against

95. 352 U.S. at 332.

96. *Id.* at 333.

97. In the Matter of Murchison, 349 U.S. 133 (1955). See also Justice Black's dissent in the Groban case, especially 352 U.S. at 346, n.21.

98. 352 U.S. at 335. (Emphasis added.)

self-incrimination can be claimed because it "has attained the familiarity of the comic strips."

There is one hopeful thing in this concurrence. Justice Frankfurter tells us that while this statute "relating to a general administrative, non-prosecutorial inquiry into the causes of fires" is constitutional, we must not suppose:

"... that secret inquisitorial powers given to a District Attorney would also have to be sustained. The *Due Process Clause* does not disregard vital differences. If it be said these are all differences of degree, the decisive answer is that *recognition of differences of degree is inherent in due regard for due process.*"⁹⁹

As in the *Fikes* case, once more we see that the Frankfurter-Harlan votes vacillate when state action is reviewed. It apparently does not shock their consciences that a state fire marshal examines a suspect in secret as to the cause of a fire and jails him when he won't testify without his lawyer. They might not let a federal fire marshal nor a state district attorney do the same thing. Yet the fire marshal can be the state district attorney's witness as to any statements made to him.

Their philosophy breeds litigation. Until the point is litigated who can say what state officials other than state fire marshals can do? Why give the Court power under certiorari to reject so many worth-while cases, when it takes a case like *Groban* and limits the rule of the case to "State Fire Marshals"?

The dissent in the *Groban* case was written by Justice Black, and in it the Chief Justice, and Justices Douglas and Brennan joined. Perhaps to be sure that both the Chief Justice and Justice Brennan would concur in his dissent, Justice Black speaks only of the Due Process Clause of the Fourteenth Amendment. Under the better view "due process" ought to mean procedure, so there is no difference in a *Groban* case between "due process" in the Fifth or Fourteenth Amendments.

It must be remembered, however, that the Sixth Amendment provides:

"In *all criminal* prosecutions, the accused shall enjoy . . . the assistance of Counsel for his defence."¹⁰⁰

As a matter of common sense, if not law, since the Grobans went to jail, the proceeding before the Ohio fire marshal was, in this respect at least, a "criminal prosecution."

If the Fourteenth Amendment, as Justices Black and Douglas believe, carries the protections of the Sixth Amendment into the states, then the dissent should be bottomed on it. But that too presents difficulties. The secret investigation of a state fire marshal would have to be called a "criminal prosecution" and it does resemble a grand jury investigation

99. *Id.* at 337. (Emphasis added.)

100. U.S. Const. amend VI. (Emphasis added.)

where in the past the assistance of counsel has not been customarily given prospective criminal defendants even though they may be constitutionally entitled to it.

Very cleverly and perhaps wisely, considering that neither the Chief Justice nor Justice Brennan has as yet accepted the proposition that the Bill of Rights applies in *haec verbae* to the states, Justice Black rests his dissent on the Due Process Clause of the Fourteenth Amendment. Said Justice Black:

"A secret examination such as the deputy proposed to conduct is fraught with dangers of the highest degree to a witness who may be prosecuted on charges related to or resulting from his interrogation."¹⁰¹

"[W]hen the public, or even the suspect's counsel, is present the hazards to the suspect from the officer's misunderstanding or twisting of his statements or conduct are greatly reduced."¹⁰²

From this Justice Black reasons:

"I also firmly believe that the Due Process Clause requires that a person interrogated be allowed to use legal counsel whenever he is compelled to give testimony to law-enforcement officers which may be instrumental in his prosecution and conviction for a criminal offense. . . . The right to use counsel at the formal trial is a very hollow thing when, for all practical purposes, the conviction is already assured by pretrial examination."¹⁰³

Reading this literally, one must conclude that Justice Black believes a prospective criminal defendant, convinced of his innocence and the fairness of an investigatory body (be it a grand jury or congressional committee or any other) should have the "Assistance of Counsel" which the Sixth Amendment provides. Giving such a privilege would no doubt prevent unjust criminal prosecutions. State statutes sometimes, and justice always, compel all investigators to hear prospective defendants on demand and in hearing them to give them the "Assistance of Counsel."

Replying to the suggestion in the Court's opinion (also repeated in the Frankfurter concurrence) that somehow the investigation of fires is different, Justice Black was at his best:

"But is the public's interest in fire prevention so weighty that it requires denying the person interrogated the basic procedural safeguards essential to justice? Suppose that Ohio authorized the Chief of State Police and his deputies to inquire into the causes and circumstances of crime generally and gave them power to compel witnesses or persons suspected of crime to appear and give testimony in secret. Since the public's interest in crime prevention is at least as great as its interest in fire prevention, the reasoning used in the majority's opinion would lead to the approval of such means of 'law enforcement.' *In fact, the opinion could readily be applied to sanction a grant of similar power to every state trooper, policeman, sheriff, marshal,*

101. 352 U.S. at 340 (dissenting opinion).

102. *Id.* at 341 (dissenting opinion).

103. *Id.* at 344 (dissenting opinion).

constable, F.B.I. agent, prosecuting attorney, immigration official, narcotics agent, health officer, sanitation inspector, building inspector, tax collector, customs officer and to all the other countless state and federal officials who have authority to investigate violations of the Law. I believe that the majority opinion offers a completely novel and extremely dangerous precedent—one that could be used to destroy a society of liberty under law and to establish in its place authoritarian government.”¹⁰⁴

How in the face of this dissent could the opinions of Justices Reed and Frankfurter have been accepted by the majority of the Court?

The greater problem lies in attempting to distinguish this *Groban* case from the *Mallory* decision in principle. Ignoring the failure to arraign Mallory promptly Justice Frankfurter emphasized that the police did not apprise Mallory of his right to counsel and examined him alone. In the *Fikes* case, too, Justice Frankfurter emphasized that the police detained Fikes incommunicado without counsel. If it was wrong for federal police to do this to Mallory and for state police to Fikes, why was it right for a state fire marshal in Ohio to deny counsel to Groban?

In the *Fikes*, *McNabb*, and *Mallory* cases there is involved the right of counsel demanded in vain by the Grobans. It would seem that under the Sixth Amendment the constitutional guaranty of the assistance of counsel to defend a criminal prosecution, to quote Justice Frankfurter in the *Mallory* case, has “lost its purpose” and to quote Justice Black in the *Groban* case “is a very hollow thing when, for all practical purposes, the conviction is already assured by pretrial examination.”

*Grunewald v. United States*¹⁰⁵

With the *Fikes*, *Mallory* and *Groban* cases, we must read the *Grunewald* case. There the Government prosecuted the defendants under section 371 of title 18 of the United States Code for having defrauded the United States with respect to “fixing” the tax liability of two New York firms. In 1952, Halperin, one of the defendants, had been subpoenaed before a grand jury and he refused to testify with respect to the tax investigation. He claimed the Fifth Amendment. Yet on the trial, Halperin elected to take the stand in self-defense. When he did, it was brought out that he refused to testify before the grand jury. The Court reversed the conviction. It is this phase of the *Grunewald* case that bears on the *Fikes*, *Mallory* and *Groban* cases.

Pointing out that before the grand jury, Halperin repeatedly insisted that he was innocent and pleaded the Fifth Amendment on the advice of counsel, Justice Harlan said:

“ . . . the Fifth Amendment claim was made *before a grand jury* where Halperin was

104. Id. at 350-51 (dissenting opinion). (Emphasis added.)

105. 353 U.S. 391 (1957).

a compelled, not a voluntary witness; *where he was not represented by counsel*; where he could summon no witnesses; and where he had no opportunity to cross-examine witnesses testifying against him."¹⁰⁶

From this the conclusion of Justice Harlan for the Court was:

"We are not unmindful that the question whether a prior statement is sufficiently inconsistent to be allowed to go to the jury on the question of credibility is usually within the discretion of the trial judge. But where such evidentiary matter *has grave constitutional overtones*, as it does here, we feel justified *in exercising this Court's supervisory control to pass on such a question*. This is particularly so because in this case the dangers of impermissible use of this evidence far outweighed whatever advantage the Government might have derived from it if properly used."¹⁰⁷

Observe that Justice Harlan does not say that there was a deprivation of procedural due process under the Fifth Amendment. His conclusion is a bit muddly. He remarks that where there are constitutional "overtones," then the Court may exercise its "supervisory control" to review the point. Are we rude to inquire where in the United States Constitution the Supreme Court has "supervisory control"? Or to ask a very imprudent question, by what standard does the Court judge "constitutional overtones"? Some of us are tone deaf. Perhaps some judges are too. How can lawyers tell why the *Grunewald* case presents a "grave" constitutional "overtone"?

No wonder Justice Black refused to accept such nonsense. Said he for himself, the Chief Justice, Justices Douglas and Brennan:

"I agree with the Court that use of this claim of constitutional privilege to reflect upon Halperin's credibility was error, but I do not, like the Court, rest my conclusion on the special circumstances of this case. I can think of no special circumstances that would justify use of a constitutional privilege to discredit or convict a person who asserts it. The value of these constitutional privileges is largely destroyed if persons can be penalized for relying on them. It seems peculiarly incongruous and indefensible for courts which exist and act only under the Constitution to draw inferences of lack of honesty from invocation of a privilege deemed worthy of enshrinement in the Constitution."¹⁰⁸

This opinion of Justice Black is right in every line. It follows the reasoning of the dissent in *Groban* and it foreshadows a different approach to grand jury procedures. Quite correctly, Justice Black rests his case for reversal on the Fifth Amendment and deplors an inference of dishonesty from Halperin's exercising a constitutional right. This position makes sense and has the merit of certainty.

Nevertheless, while deeply regretting the decision in the *Groban* case and the fallacious and dangerous reasoning of Justices Frankfurter and Harlan in the *Fikes*, *Mallory* and *Grunewald* cases, we can rejoice in the

106. *Id.* at 422. (Emphasis added.)

107. *Id.* at 423. (Emphasis added.)

108. *Id.* at 425-26.

correct results of the last three cases. They represent a victory for the Bill of Rights. And in the *Mallory* and *Grumewald* cases, the Court is unanimous.

CONCLUSION

Yesterday, it was the "nine old men"; today, it's the "nine wild men." In its decisions of this term the Court has incorrectly denied the protection of the Bill of Rights in some cases; in others it has disregarded the constitutional issues presented, leaving the amendments to wither. In all too few cases have the constitutional rights of citizens been recognized and upheld.

In the opinions there is no clarity, no certainty, no consistency. In contrast to the lucid and compact document which the Justices seek to interpret, their opinions are clouded with disorder and confusion. Bobbing and weaving between facts and fiction, the opinions hide the obscure constitutional philosophy of the Court.

Certainly the country deserves better from its highest Court. It is not too much to ask that the Court be sufficiently realistic to recognize infringements of constitutional rights. A clear and definite stand on the problems of the Bill of Rights and the related questions of the Fourteenth Amendment would restore the Court to the position of leadership for which it was intended.