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Case Notes

CASE NOTES

Constitutional Law—Establishment Clause of the First Amendment—Free Textbook Loans to Pupils in Private Schools Held Constitutional.—Plaintiffs, members of a local New York board of education, challenged the constitutionality of section 701 of the New York Education Law which requires that textbooks be lent free of charge to students attending private schools.[1] The New York Court of Appeals had held by a 4-3 vote that section 701 violated neither article XI, section 3 of the New York Constitution nor the first amendment to the Federal Constitution.[2] On appeal the New York decision was affirmed,[3] the Supreme Court holding that section 701 does not violate the Establishment Clause of the first amendment. *Board of Education v. Allen*, 392 U.S. 236 (1968).

In 1965 the New York State Legislature amended section 701 of the Education Law to require boards of education "to purchase and to loan upon individual request, to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law, text-books."[4] These textbooks were to be loaned free of charge and were to be such textbooks as are "designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education, trustees or other school authorities."[5]

In light of the numerous state court decisions concerning state aid to private and parochial schools in recent years,[6] it is surprising to note that the instant case marks the first time in over twenty years that the Supreme Court has directly confronted the problem of the relationship between such aid and the Establishment Clause of the first amendment.[7] As long ago as 1930 the Court was faced with a Louisiana law almost identical to section 701 under which textbooks were loaned free of charge to pupils attending private schools.[8]

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1. N.Y. Educ. Law § 701 (Supp. 1967).

2. Board of Educ. v. Allen, 20 N.Y.2d 109, 228 N.E.2d 791, 281 N.Y.S.2d 799 (1967).

3. There was considerable discussion of appellants' standing to challenge in the lower New York courts. The appellate division found that they lacked standing. 27 App. Div. 2d 69, 276 N.Y.S.2d 234 (3d Dep't 1966). The Court of Appeals, however, reversed, ruling that they did have standing to sue. 20 N.Y.2d 109, 228 N.E.2d 791, 281 N.Y.S.2d 799 (1967). The question was not raised in the Supreme Court. Appellants' problem was that since they had sworn to uphold the Federal Constitution, which they believed the textbook law violated, they had to either not comply with § 701 and risk removal from office, or else violate their oath. 392 U.S. at 241 n.5.

4. N.Y. Educ. Law § 701(3) (Supp. 1967).

5. Id.

6. See note 25 infra.

7. The last time the Supreme Court considered the issue was in Everson v. Board of Educ., 330 U.S. 1 (1947).

8. Cochran v. Louisiana State Bd. of Educ., 281 U.S. 370 (1930).

Although the Court there did not pass upon any first amendment contention,[9] and rejected the argument that the law condoned a public taking for a private purpose in violation of the fifth amendment, the decision relates to the present case inasmuch as the Court adopted what has become known as the "child" or "pupil benefit" theory.[10] This theory construes such aid as inuring to the advantage of the individual student and not as aiding the schools themselves. Mr. Chief Justice Hughes, speaking for that unanimous Court, restated with approval the findings of the Louisiana court: "The appropriations were made for the specific purpose of purchasing school books for the use of the school children of the state, free of cost to them. It was for their benefit and the resulting benefit to the state that the appropriations were made. . . . The schools . . . are not the beneficiaries of these appropriations."[11] The Court made it clear that it considered the state's interest in a student's education to relate to public welfare and not the religious welfare of the student. "Its interest is education, broadly; its method, comprehensive."[12]

This decision, however, did not resolve the constitutionality of such aid, for, as was remarked a few years ago, "[u]ntil the Supreme Court has the establishment clause directly before it in a textbook case, the constitutionality of using public funds to provide textbooks for parochial school students is open to doubt."[13] The instant case seems to have resolved that doubt.

The first comprehensive treatment which applied the Establishment Clause to aid to private and parochial schools appeared in *Everson v. Board of Education*.[14] A New Jersey law authorized local school districts to arrange for the transportation of children to school, including private schools.[15] Pursuant to this law the Ewing Township Board of Education reimbursed parents for their children's use of public transportation to Catholic schools. The majority opinion, written by Mr. Justice Black, upheld the New Jersey law as not violative of the first amendment prohibition against any law "respecting an establishment of religion." All of the justices seemed to be in substantial agreement with Justice Black's language to the effect that neither a state nor the federal government "can set up a church" or "pass laws which aid one religion, aid all religions, or prefer one religion over another";[16] that a state cannot "con-

9. The first amendment was not applied to the states through the fourteenth amendment until Cantwell v. Connecticut, 310 U.S. 296 (1940).

10. This theory seems to have originated with Borden v. Louisiana State Bd. of Educ., 168 La. 1005, 123 So. 655 (1929), which concerned the same statute as Cochran v. Louisiana State Bd. of Educ., 281 U.S. 370 (1930).

11. 281 U.S. at 374-75.

12. Id. at 375.

13. LaNoue, The Child Benefit Theory Revisited: Textbooks, Transportation and Medical Care, 13 J. Pub. Law 76, 81 (1964).

14. 330 U.S. 1 (1947).

15. N.J. Laws 1941, ch. 191.

16. 330 U.S. at 15. The decision, however, was by a close 5-4 margin, with vigorous and lengthy dissents by Mr. Justice Jackson and Mr. Justice Rutledge.

tribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church."[17]

However much in agreement the Court may have been in principle, the application of this principle to a given set of circumstances has resulted in disagreement. The majority in *Everson* realized that in protecting against an establishment of religion they must be careful not to "prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief."[18] In arriving at their decision the majority found that the legislation in question was a public or general welfare measure, no different from the police and fire protection accorded parochial schools. The state is not supporting the schools, but rather "does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools."[19]

The Court observed, however, that the legislation in question does in some manner aid the parochial school. Children are helped to get to such schools to learn, among other things, the teachings of their religion and, without the reimbursement, perhaps their parents could not afford to send them to church-related schools. What then is the test by which the court will determine when aid breaches the wall of separation between church and state?

An answer came in 1963 in the case of *Abington School District v. Schempp*[20] which ruled that Bible reading in the public schools is unconstitutional. Speaking for the Court, Mr. Justice Clark set forth a test concurred in by seven other justices: "[W]hat are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a *secular* legislative purpose and a *primary* effect that neither advances nor inhibits religion."[21] The Court in *Everson*, while recognizing that the school received some support, had found a secular purpose and primary effect which was to enable school children to share in a general welfare measure, irrespective of the school attended.[22]

The *Everson* decision was, however, a close one, and a subsequent development appeared to weaken its authority somewhat. In *Everson* Mr. Justice Douglas was in the five member majority, but a later statement by him indicates that he had some misgivings about his position in 1947. In a concurring opinion

17. Id. at 16.

18. Id.

19. Id. at 18. It is interesting to note the Court's use of the word "accredited" rather than a word such as "parochial." Mr. Justice Black noted that these parochial schools seemed to meet the state's secular educational requirements.

20. 374 U.S. 203 (1963).

21. Id. at 222 (emphasis added).

22. The child benefit theory can be viewed as merely an aspect of this test, i.e., a secular purpose which enables children to share in a general welfare measure and a primary effect which neither advances nor inhibits religion.

in the school prayer decision, *Engel v. Vitale*,[23] he remarked that "[t]he *Everson* case seems in retrospect to be out of line with the First Amendment."[24]

After the decision in *Everson*, a number of state court decisions concerned state aid to parochial schools in the form of providing transportation or textbooks. In most of these decisions such aid was held violative of state constitutions.[25] It should be noted however, that the provisions of most of these state constitutions impose limitations on state aid to private schools in stricter and more specific terms than the United States Constitution.[26] Thus the Court in the instant case rendered its decision against the rather unsure background of *Everson* and numerous state court decisions subsequent to *Everson*.[27]

The Supreme Court in the instant case has reaffirmed the child or pupil benefit theory and upheld the constitutionality of the New York textbook loaning law by a solid 6-3 decision. Mr. Justice White writing for the majority concluded that "we are unable to hold . . . that this statute results in unconstitutional involvement of the State with religious instruction or that section 701, for this or the other reasons urged, is a law respecting the establishment of religion within the meaning of the First Amendment."[28]

The statement of purpose accompanying the law when it was passed by the New York State Legislature reveals the legislative intent: "It is hereby declared to be the public policy of the state that the public welfare and safety require that the state and local communities give assistance to educational programs which are important to our national defense and the general welfare of the state."[29] New York, therefore, characterized its legislation as a general or public welfare measure, much the same construction given to the New Jersey law by the Court in *Everson*. The Supreme Court concurred with the state's construction, and affirmed the child benefit theory. The Court

23. 370 U.S. 421 (1962).

24. Id. at 443.

25. E.g., Matthews v. Quinton, 362 P.2d 932 (Alas. 1961), cert. denied, 368 U.S. 517 (1962); Opinion of the Justices, 216 A.2d 668 (Del. 1966); McVey v. Hawkins, 364 Mo. 44, 258 S.W.2d 927 (1953); Board of Educ. v. Antone, 384 P.2d 911 (Okla. 1963); Dickman v. School Dist., 232 Ore. 328, 366 P.2d 533 (1961), cert. denied, 371 U.S. 823 (1962); State v. Nusbaum, 17 Wis. 2d 148, 115 N.W.2d 761 (1962). Contra, Snyder v. Newtown, 147 Conn. 374, 161 A.2d 770 (1960), appeal dismissed, 365 U.S. 299 (1961); Quinn v. School Comm., 332 Mass. 410, 125 N.E.2d 410 (1955).

26. Note, Church-State Religious Institutions and Values: A Legal Survey, 41 Notre Dame Law. 681 (1966). See, e.g., Del. Const. art. 10, § 3; Okla. Const. art. II, § 5; Wis. Const. art. I, § 18.

27. Most of these state court holdings rejected the child benefit theory. See, e.g., Matthews v. Quinton, 362 P.2d 932 (Alas. 1961), cert. denied, 368 U.S. 517 (1962); Board of Educ. v. Antone, 384 P.2d 911 (Okla. 1963); Dickman v. School Dist., 232 Ore. 328, 366 P.2d 533 (1961), cert. denied, 371 U.S. 823 (1962); Visser v. Nooksack Valley School Dist., 33 Wash. 2d 699, 207 P.2d 198 (1949).

28. 392 U.S. at 248.

29. N.Y. Sess. Laws 1965, ch. 320, § 1.

found that neither books nor funds were furnished to the parochial schools, but rather they inured to the benefit of the parents and children.[30]

Such aid can be considered as a general welfare measure because the courts have long realized that parochial schools fulfill a secular role as well as the obvious religious one.[31] Mr. Justice White remarked that because Americans consider high quality education a sine qua non of our society "the continued willingness to rely on private school systems, . . . strongly suggests that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students."[32] The Court has here implicitly held, then, that there is a secular purpose to the legislation and that that purpose is intended as its primary effect. The legislation, therefore, is a valid exercise of the state's power according to the test.[33]

Although Justice Black wrote the majority opinion in *Everson* and Justice Douglas concurred, both wrote vigorous dissents in the present case. Since they considered books to be the most essential instrumentality of the educational process, they had no difficulty in distinguishing the transportation aid in *Everson* from textbook loaning programs. They feared not only that religious shadings and propaganda would somehow appear in the books selected by the parochial schools, although the textbooks to be lent are secular ones (*i.e.*, those which are suitable for use in public schools as well), but also that this would be the first step in a process that will continue until the church-state wall of separation completely crumbles. Mr. Justice Douglas decried the lack of clear standards by which local school boards are to judge which books are secular and which are religious, and the fact that the initiative in selecting the books rests with the parochial school authorities.

Although the majority did not feel that the "processes of secular and religious learning are so intertwined" that secular textbooks given to parochial school children would be instrumental in propagating religious beliefs,[34] and although they assumed that the books loaned are those "not unsuitable for use in the public schools because of religious content,"[35] the dangers about which

30. 392 U.S. at 243-44. The Court noted in a footnote a remark by then Commissioner of Education Keppel before Senate hearings on the Elementary and Secondary Education Act of 1965 to the effect that nonpublic schools rarely provide free textbooks. Id. at 244 n.6.

31. Id. at 245; Pierce v. Society of Sisters, 268 U.S. 510 (1925).

32. 392 U.S. at 247-48.

33. See text at note 21 supra. In a separate, concurring opinion, Justice Harlan quoted other language from the Abington decision: "I would hold that where the contested governmental activity is calculated to achieve nonreligious purposes otherwise within the competence of the State, and where the activity does not involve the States 'so significantly and directly in the realm of the sectarian as to give rise to . . . divisive influences and inhibitions of freedom,' . . . it is not forbidden by the religious clauses of the First Amendment." 392 U.S. at 249 (citation omitted).

34. Id. at 248.

35. Id. at 245.

Black and Douglas cautioned are certainly not ungrounded.[36] The dissenting opinion of Mr. Justice Fortas might prove acceptable to those apprehensive of the implications of the majority opinion. His dissent seemed to be based entirely on the fact that the books were to be initially selected by the religious authorities and then submited to the public school boards for approval. There seemed to be an implication that he would uphold a textbook loan law if the books were first selected by the public school authorities so that all schools would be using the same material.

Whatever be one's personal views on the subject, and the articles and books written on the subject which set out suggested guidelines and proposed tests of when such aid is constitutional or not are legion, the instant decision is consistent with and a natural extension of the Supreme Court's prior decisions on the subject. Aid in the form of bus transportation for parochial school pupils was upheld in *Everson*; a released time program whereby public school pupils could leave classes early to attend religious instruction was approved in *Zorach v. Clauson*;[37] now textbook loans to parochial schools have been held constitutional by an even greater majority of the Court. Where the Supreme Court has drawn the line and where the church-state wall is definitely breached is where the public school is used as a forum for religious practices. Thus the Court struck down a released time program where the religious instruction was given in the public school classroom,[38] a Bible reading program in the public school classroom,[39] and a non-denominational prayer recited at the beginning of the school day in the public school classroom.[40]

Regardless of the state court opinions,[41] the Court would now appear to have adopted the child benefit theory, whether the aid be bus transportation or textbook loans. Though at least some incidental benefits, obviously, do accrue to the religious institutions receiving such aid, the Court has decided that they are so incidental and indirect that the legislation condoning them, if otherwise valid, is not to be struck down.

Adoption of the child benefit theory, however, does not resolve all uncertainties regarding aid to private schools. It is clear that if a state were to provide for the loaning of religious textbooks, the legislation would be held unconstitutional even though the child might unquestionably be benefitted. The status of other forms of aid, such as the construction of physical plant facilities for private schools, remains problematical.

It appears that there will continue to be disagreement over the basic question—what is a law "respecting an establishment of religion?" The fun-

36. Mr. Justice Douglas, however, goes to great lengths to give illustrations of various textual passages in secular textbooks which agree with the tenets of certain religious faiths, but he does not show or indicate if any of these books ever were or will be approved by any local school boards.

37. 343 U.S. 306 (1952).

38. McCollum v. Board of Educ., 333 U.S. 203 (1948).

39. Abington School Dist. v. Schempp, 374 U.S. 203 (1963).

40. Engel v. Vitale, 370 U.S. 421 (1962).

41. See note 27 supra.

damental theory of the first amendment may very well have been that church and state be totally separate, but, as the Court noted in *Zorach*, "The First Amendment . . . does not say that in every and all respects there shall be a separation of Church and State."[42] Indeed, a workable test or guideline is assuredly the best solution for which one may hope. The test, used by the instant Court, which looks to the primary purpose and effect of the legislation, seems to be a reasonable, if not precise or universally applicable, approach toward such a workable guideline.

Criminal Procedure—Jury Selection—Jury's Imposition of Death Penalty Held Unconstitutional Where Procedure for Choosing Jurors Eliminated Those with Scruples Against Capital Punishment Not Amounting to Absolute Opposition.—The petitioner was convicted and sentenced to death for having murdered a policeman while fleeing arrest. The convicting jury had been selected pursuant to an Illinois statute which read: "In trials for murder it shall be a cause for challenge of any juror who shall, on being examined, state that he has conscientious scruples against capital punishment, or that he is opposed to the same."[1] Before petitioner's jury was empanelled, the state had exercised its option to challenge under this statute[2] forty-seven times.[3] Of the forty-seven potential jurors so excluded, only five stated that they would not vote for capital punishment under any circumstances. The others had merely indicated that to some degree they were opposed to capital punishment generally or that they had moral or religious scruples against the death penalty under certain circumstances. The issue raised on appeal was whether a jury so selected could constitutionally convict and condemn to death a defendant charged with a capital crime. The Supreme Court held that no death penalty could be carried out if the jury that imposed or recommended it was selected by dismissing veniremen, for cause, who expressed general objections to the death penalty or who showed specific conscientious or religious scruples against its infliction. *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

Under federal law, and in the vast majority of state jurisdictions,[4] the expression of doubt as to the morality or advisability of capital punishment has

42. 343 U.S. at 312.

1. Ill. Rev. Stat. ch. 38, § 743 (1959). The express language of this statute was not re-enacted in the 1963 Code of Criminal Procedure, Tit. VI, § 115-4(d). However, in People v. Hobbs, 35 Ill. 2d 263, 220 N.E.2d 469 (1966), the Illinois Supreme Court held that the present statute, Ill. Rev. Stat. ch. 38, § 115-4(d) (1967), incorporates the former.

2. Such challenges for specific cause are unlimited in number and are to be distinguished from the definite number of peremptory challenges, i.e., for no specific cause, allowed in every jurisdiction.

3. This number represents approximately one half of all the veniremen called. Witherspoon v. Illinois, 391 U.S. 510, 513 (1968).

4. See Annot., 48 A.L.R.2d 560 (1956).

been sufficient to justify the immediate dismissal of a venireman. There has been no requirement to investigate further his ability to vote for the death penalty in a particuliar situation where the facts and evidence might so warrant.[5] The practice originated in the era when conviction of a capital crime brought an automatic death sentence. The obvious fear was that one who opposed capital punishment would be quite likely to vote for a verdict of not guilty, no matter how convincing the evidence, to avoid the inevitable taking of the defendant's life.[6] The Supreme Court approved this practice in *Logan v. United States*,[7] reasoning that: "A juror who has conscientious scruples on any subject, which prevent him from standing indifferent between the government and the accused, and from trying the case according to the law and the evidence, is not an impartial juror."[8]

The mandatory death penalty has by now been abolished in the United States.[9] In most of the states, as in the federal courts, the jury is called upon to exercise its discretion as to sentence.[10] In New York,[11] California,[12] and Pennsylvania,[13] a separate argument before the jury is conducted on the issue of the death penalty. This allows the jury to consider more facts concerning the defendant, his background, and the crime, than is possible under the rules of evidence in force during the trial. However, despite the elimination of mandatory death penalties, both federal and state courts have continued to allow challenges for cause of those with scruples against capital punishment,[14] even where

5. Id. at 571.

6. 45 N.C.L. Rev. 1070, 1071 (1967).

7. 144 U.S. 263 (1892).

8. Id. at 298.

9. H. Kalven & H. Zeisel, The American Jury 435 (1966).

10. Id.

11. N.Y. Penal Law §§ 125.30-.35.

12. Cal. Penal Code § 190.1 (West Supp. 1967).

13. Pa. Stat. tit. 18, § 4701 (1963).

14. Federal courts have consistently followed Hardy v. United States, 186 U.S. 224 (1902), which held it no error to dismiss, by challenge for cause, those who stated that they held conscientious scruples or opinions which would preclude their rendering a guilty verdict in a case where the death penalty is prescribed by law. In United States v. Puff, 211 F.2d 171 (2d Cir.), cert. denied, 347 U.S. 1022 (1954), the defendant was convicted of killing an F.B.I. agent who was on duty at the time. The offense was punishable by death or life imprisonment at the discretion of the jury. 18 U.S.C. § 1111(b) (1964). The trial judge questioned all the talesmen as to whether they had any scruples against capital punishment and he dismissed twelve who expressed such scruples. The court rejected the appellant's claim that such dismissal deprived him of his right to a jury balanced on the question of capital punishment. In Turberville v. United States, 303 F.2d 411 (D.C. Cir. 1962), the court held that the dismissal of all prospective jurors who answered the question, "Are you against capital punishment?," affirmatively was not an error. It also refuted the argument that the jury was not balanced or drawn from a fair cross-section of the community. The court reasoned that the defendant did have an impartial jury because the initial at random drawing of names from the voter rolls assured him of an unbiased cross-segment of the community. The defendant, it was said, is entitled to no more. He should not expect a jury

the penalty prescribed by law was not death but rather the possibility of death, depending on whether the jury's verdict was guilty or guilty without capital punishment.[15] Only the courts of Iowa,[16] and South Dakota[17] have specifically denied the prosecution such challenges, although some other states seem to have been moving in that direction.[18]

Mr. Justice Stewart, writing for the majority in the instant case, was careful to point out the narrow scope of the five-to-four decision. The Court in no way called into doubt procedure by which prospective jurors are challenged for cause on the ground that they would automatically vote against the imposition of the death penalty without regard to the facts or evidence produced at the trial. Nor did the Court question the procedure which allows challenge for cause where the prospective juror's scruples concerning the death penalty would prevent him from making an unbiased decision concerning the particular defendant's guilt or innocence. The holding deals only with the sentence, not the conviction, and concerns the sentence only when it is death.

The case declared unconstitutional any infliction of a death penalty, resulting from a jury trial, where the jury has been chosen pursuant to a procedure allowing the prosecution to challenge for cause any prospective juror who shows evidence of general conscientious or religious scruples against capital punishment short of absolute and universal opposition. If such a procedure is used by a state, then the death penalty can no longer be imposed in that state.

The Court did not determine whether a jury devoid of those with scruples against capital punishment would be more likely to convict a defendant on the same evidence than would a jury composed of a cross-section of society, without regard to their feelings toward capital punishment. The theory has been propounded that those with no scruples against the infliction of the death penalty, *i.e.*, the "death qualified," are psychologically more prosecution prone than the rest of society, which has at least some qualms concerning capital punishment.[19] The Court in the instant case was not at all convinced by the petitioner's repetition of this argument and flatly refused to reverse the conviction on this ground.[20]

The holding in the present case may be viewed as a manifestation of one of the fundamental principles of our jurisprudence. Essential to the concept of the jury system, as we know it, is a panel which is representative of a fair cross-

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which might be prejudiced in his favor. The majority of state courts have followed the same practice as the federal courts in allowing challenge for cause of prospective jurors who admit to having scruples against the death penalty. See Annot., 48 A.L.R.2d 562, 582 (1956).

15. Hardy v. United States, 186 U.S. 224 (1902).

16. State v. Lee, 91 Iowa 499, 60 N.W. 119 (1894).

17. State v. Garrington, 11 S.D. 178, 76 N.W. 326 (1898).

18. See State v. Narten, 99 Ariz. 116, 407 P.2d 81 (1965), cert. denied, 384 U.S. 1008 (1966); People v. Bandhauer, 66 Cal. 2d 524, 426 P.2d 900, 58 Cal. Rptr. 332 (1967), cert. denied, 389 U.S. 878 (1968).

19. See, e.g., Oberer, Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?, 39 Texas L. Rev. 545 (1961).

20. 391 U.S. at 516-18.

section of the community.[21] Mr. Justice Black said in *Smith v. Texas*,[22] "[i]t is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community."[23]

Mr. Justice Douglas, whose concurring vote determined the outcome of the instant case, agreed with the basic reasoning of the Court but disagreed with the limited scope of the holding. He reasoned that for a jury to be truly representative it should include even those who are absolutely opposed to capital punishment in any and all cases.[24]

The main thrust of Mr. Justice Black's dissenting opinion was a disapproval of the "fair cross-section" argument. Where Mr. Justice Douglas would have juries include all, no matter what their feelings against capital punishment, and the rest of the majority would include those who could conceivably vote for the death penalty, despite some scruples against it, the dissenters agreed with the traditional reasoning of *Logan v. United States*[25] and the cases that followed it.[26] They contended that the state as well as the defendant was entitled to an impartial jury and that anyone having scruples against capital punishment would be inherently biased against the state.[27]

The immediate effect of the instant case will be to invalidate the sentences of all those, now awaiting execution, who were condemned by juries selected by procedures allowing challenge for cause against those with any anti-capital punishment scruples. In deciding that the holding was to be retroactive, the Court rejected the arguments of the twenty-four states that filed amici curiae briefs on behalf of Illinois. The briefs contended that since the states had relied upon *Logan v. United States*[28] in using this jury selection procedure, and that since the effect of a retroactive holding on criminal justice would be so great, any decision invalidating the procedure should be prospective only. However, the Court reasoned that since the standards of jury selection necessarily undermined "the very integrity of the . . . process" that decided the petitioners' fate, its decision should take effect retroactively.[29]

Another significant ramification of the decision will probably be a widespread change in jury selection procedures in the federal courts and in most state courts. At the very least, prosecutors in capital cases will question prospective jurors

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21. See, e.g., Hernandez v. Texas, 347 U.S. 475 (1954) (those of Mexican descent); Ballard v. United States, 329 U.S. 187 (1946) (women); Thiel v. Southern Pac. Co., 328 U.S. 217 (1946) (daily wage earners); Glasser v. United States, 315 U.S. 60 (1942); Schowgurow v. State, 240 Md. 121, 213 A.2d 475 (1965) (those unwilling to demonstrate a belief in God); Juarez v. State, 102 Tex. Crim. 297, 277 S.W. 1091 (1925) (Roman Catholics).

22. 311 U.S. 128 (1940) (exclusion of Negroes).

23. Id. at 130.

24. 391 U.S. at 528.

25. 144 U.S. 263 (1892).

26. See note 4 supra.

27. 391 U.S. at 535-36: "A person who has conscientious or religious scruples against capital punishment will seldom if ever vote to impose the death penalty."

28. 144 U.S. 263 (1892).

29. 391 U.S. at 523 n.22.

more extensively than in the past. The purpose of the increased effort will be to determine the exact degree of any opposition that the prospective juror might express toward capital punishment. Those who express feelings hostile to the death penalty will no longer be perfunctorily rejected. It is likely that, in some instances, prosecutors will attempt to convince the court that a prospective juror's feelings are so intense that they would prevent him from voting for a death penalty under any circumstances. The success of such an argument, in securing the dismissal of a prospective juror, will differ from case to case and will depend upon the skill of the questioner in eliciting answers that would clearly show the court that the prospective juror involved is absolutely opposed to the death penalty. However, as to the defense counsel, the instant case will not bring about any major change in his efforts during the jury selection process. He will continue his endeavors to discover the pro-capital punishment absolutist during voir dire, since such a person is clearly as unacceptable a juror as his anti-capital punishment counterpart.[30]

It would seem that the present case is a reflection by the Court of the changing attitudes of the American people toward the death penalty.[31] Indeed Mr. Justice White, in his dissent, criticizes the Court for interfering with the legislative decision of the State of Illinois as to what the penalty for murder should be.[32] However, considering the case in a broader scope than did Justice White, the majority decision appears to be not so much a circumlocutory attempt by the Court to impose its will and abolish the death penalty as it is an effort on the Court's part to integrate a growing segment of our population into the process of criminal justice at its most serious level.

Torts—Rescue Doctrine—Vital Organ Donee Has No Cause of Action Against Doctors Whose Negligence Caused Need for Transplant.— The defendant doctors negligently removed all the kidney tissue from the plaintiff's son. As a medical fact the plaintiff's son could not have lived long without the kidney tissue. His life was preserved with a machine which acted as a substitute for his natural kidneys, but his health proceeded to fail and death seemed inevitable. In order to sustain his life it was determined that a transplant of another's kidney would be essential. The plaintiff's kidneys were suitable for such a transplant and she volunteered one of her kidneys. The transplant, performed by other doctors, was a success. As a result of the loss of her kidney, the plaintiff alleged that her health had suffered, and sought damages

30. A recent North Carolina murder conviction was reversed because one of the jurors was a pro-capital punishment absolutist. The court held that since a person with that philosophy was allowed to sit on the jury, while those with the slightest anti-capital punishment scruples could be excluded, due process was inevitably denied. Crawford v. Bounds, 395 F.2d 297 (4th Cir. 1968).

31. See 2 Polls, International Review on Public Opinion 84 (No. 3 1967).

32. 319 U.S. at 541-42.

from the doctors who were negligent in the operation on her son. The instant court concluded that the plaintiff did not allege facts constituting a cause of action and granted the defendants' motion to dismiss, commenting that the court "is called upon . . . to invent a 'brand new cause of action' presently outside our legal concepts of suable tortious wrong." *Sirianni v. Anna,* 55 Misc. 2d 553, 556, 285 N.Y.S.2d 709, 712 (Sup. Ct. 1967).

The facts in the instant case call for application of the theory in tort law commonly referred to as the rescue doctrine,[1] whereby one who is injured while reasonably attempting a necessary rescue may recover from the one whose negligence created the situation necessitating the rescue.[2] "[This doctrine] holds the rescuer in a favored position in the eyes of the law."[3] The elements of the doctrine consist of danger caused by the defendant to the victim, which creates a situation of immediacy and urgency,[4] resulting in injury to the rescuer. Admittedly, the doctors who removed the tissue were negligent, and clearly their negligence was dangerous to the plaintiff's son, and created the requisite "situation." The plaintiff claimed to have sustained injury while "rescuing" her son from the impending harm.

The instant court raised several objections to the application of the rescue doctrine in this case.[5] The court characterized plaintiff's conduct as "premeditated, knowledgeable and purposeful," and noted that it "did not extend or reactivate the consummated negligence of these defendants."[6] But it is well recognized that the doctrine is not limited to spontaneous or instinctive action, but applies even where there is time for thought.[7] In *Wagner v. International Railway Co.*[8] the victim of defendant's negligence was injured after falling to the ground from a moving train. When the plaintiff realized what had happened he proceeded to "rescue." He had time to weigh the situation and to choose his course of action. He made his choice and was injured in the process of rescuing. In *Wagner* the defendant argued that the chain of negligence must stop when action ceases to be instinctive.[9] The court concluded that what the defendant meant by this was "that rescue is at the peril of the rescuer, unless spontaneous and immediate. If there has been time to deliberate, if impulse has given way to judgement, one cause, it is said, has spent its force, and another has

1. W. Prosser, Torts § 51, at 316 (3d ed. 1964); see 3 Okla. L. Rev. 476 (1950).
2. Annot., 4 A.L.R.3d 558 (1965).
3. 3 Okla. L. Rev. 476 (1950) (footnote omitted).
4. Provenzo v. Sam, 27 App. Div. 2d 442, 444, 280 N.Y.S.2d 308, 311 (4th Dep't 1967).
5. Sirianni v. Anna, 55 Misc. 2d 553, 556, 285 N.Y.S.2d 709, 712 (Sup. Ct. 1967).
6. Id.
7. W. Prosser, supra note 1, at 317. In Luce v. Hartman, 5 App. Div. 2d 19, 168 N.Y.S.2d 501 (4th Dep't 1957), the court in holding the plaintiff not to be a "rescuer," decided that an element needed before an "act should be deemed a 'rescue' . . . should be the condition of immediacy and urgency . . . where a life hung in the balance." Id. at 22, 168 N.Y.S.2d at 505. It is true that the instant rescue did not take place at the scene of the negligence, when the emergency first arose, but no less an emergency existed—a life hung in the balance.
8. 232 N.Y. 176, 133 N.E. 437 (1921).
9. Id. at 180, 133 N.E. at 438.

intervened."[10] The court rejected defendants' arguments saying, "[c]ontinuity in such circumstances is not broken by the exercise of volition . . . . The law does not discriminate between the rescuer oblivious of peril and the one who counts the cost."[11] It would seem that the purposeful acts of the plaintiff here are no different in "kind" than the acts in *Wagner*. In the instant case an essentially similar situation existed, the difference being that the emergency and rescue were not situated as closely together in time, and the plaintiff here had a longer period of time to choose her course of action. But the rescuer may weigh and deliberate,[12] and so the fact that this was not a stimulus-response type situation should play no part in defeating plaintiff's claim. The relevant fact is that the victim of defendants' negligence was still in a periled situation when plaintiff acted.

Another objection to utilization of the rescue doctrine raised by the instant court is that "[t]he conduct of the plaintiff herein is a clearly defined, independent, intervening act with full knowledge of the consequences."[13] "[U]nder the 'rescue doctrine,' efforts to protect the personal safety of another have been held not to supersede the liability for the original negligence which has endangered it."[14] Thus, "rescue" is not such an independent, intervening act which cuts off, or supersedes the original negligence. It is difficult to understand the plaintiff's acts being termed "independent." But for the defendants' negligence, there would not have been such an act by the plaintiff; the consequence of defendants' negligence demanded such action by someone, if the plaintiff's son's life was to be saved.[15]

A possible objection not raised by the present court concerns foreseeability.[16] Specifically, could the plaintiff have foreseen the risk of rescue? Professor Prosser writes, regarding the rescuer, "it has been recognized since the early case of the crowd rushing to assist the descending balloonist that he is nothing abnormal."[17] Cardozo said: "The emergency begets the man. The wrongdoer may not have foreseen the coming of a deliverer. He is accountable as if he had."[18] It seems clear that whether we say the rescuer is foreseeable or not the negligent party will be held liable.[19]

Another requirement usually placed on the rescue doctrine plaintiff is a showing that "the end to be gained [was] fairly commensurate with the risks incurred."[20] This is usually a jury question.[21] In the instant case, the plaintiff

10. Id.
11. Id. at 181, 133 N.E. at 438.
12. Id.
13. 55 Misc. 2d at 556, 285 N.Y.S.2d at 712.
14. W. Prosser, supra note 1, at 316.
15. 38 Am. Jur. Negligence § 55 (1941).
16. Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928).
17. W. Prosser, supra note 1, at 316 (footnote omitted).
18. Wagner v. International Ry., 232 N.Y. 176, 180, 133 N.E. 437, 438 (1921).
19. 3 O. Warren, Negligence in the New York Courts § 1, at 284-85 (1941).
20. Wardrop v. Santi Moving & Express Co., 233 N.Y. 227, 229, 135 N.E. 272 (1922); see 38 Am. Jur. Negligence § 228 (1941); Restatement (Second) of Torts § 472 (1965).
21. Wagner v. International Ry., 232 N.Y. 176, 181, 133 N.E. 437, 438 (1921).

gained a life by giving up a kidney. It would seem that the risk taken was commensurate with the result gained.

When the court here considered some of the famous rescue doctrine cases,[22] it concluded that "in each . . . [case], the rescuer acted without knowing his fate."[23] This conclusion is not accurate[24] and even if it were, it would not impose any requirement upon the plaintiff which would deny the application of the "rescue doctrine." The plaintiff did not actually know she would suffer ill health, for this is not a necessary or certain result of losing one kidney. The extent of her knowledge was that she would give up one kidney in order to save a life. This is in essence no different than walking along a trestle for 445 feet to rescue a fallen passenger as was the situation in *Wagner*. In the rescue doctrine cases,[25] each "rescuer" knew of his immediate physical act; none had "full" knowledge of the consequences. But even if such consequences were known, that prior knowledge would not require denial of recovery to the plaintiff. Such a plaintiff can intentionally go to the rescue and yet recover as long as plaintiff's conduct is not wanton and the risk taken is sensible. As Justice Cardozo phrased it, "The risk of rescue, if only it be not wanton, is born of the occasion."[26] It is unlikely that anyone would say that a rescuer in bare feet, who runs to save an infant lying on railroad tracks, knowing fully the consequences of his act (cut feet), could not recover from the negligent party involved simply because the rescuer knew such a result would occur. The rescuer will not be denied relief simply because he "counts the cost"[27] or the consequences of his merciful act.

The answer to the issue raised by the court, "Does a cause of action exist in favor of a donor of a human organ against defendants who removed vital human organs from the donee in a negligent manner?" should be "yes," using negligence as the plaintiff's theory and the rescue doctrine specifically as the grounds on which to predicate relief.

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22. Id.; Gibney v. State, 137 N.Y. 1, 33 N.E. 142 (1893); Eckert v. Long Island R.R., 43 N.Y. 502 (1871).

23. 55 Misc. 2d at 556, 285 N.Y.S.2d at 712.

24. A man leaping in front of an approaching train presumably knows his own fate. Eckert v. Long Island R.R., 43 N.Y. 502 (1871). Likewise, a man jumping from a trestle into a river presumably anticipated his fate. Gibney v. State, 137 N.Y. 1, 33 N.E. 142 (1893). A man walking along a trestle at night presumably knows that he might fall. Wagner v. International Ry., 232 N.Y. 176, 133 N.E. 437 (1921).

25. See supra note 22.

26. Wagner v. International Ry., 232 N.Y. 176, 180, 133 N.E. 437, 438 (1921). The judge in the instant case said that "Judge Cardozo excluded from the rescue doctrine a 'wanton' (wilful) act on the part of the rescuer," 55 Misc. 2d at 556, 285 N.Y.S.2d at 712, and therefore denied recovery because of the 'wilful' act of plaintiff. However, Black's Law Dictionary defines "wanton" as "reckless, heedless, . . . fool hardiness," Black's Law Dictionary 1753 (4th ed. 1951); and Cardozo says "continuity . . . is not broken by the exercise of volition." Wagner v. International Ry., 232 N.Y. 176, 181, 133 N.E. 437, 439 (1921). The conclusion to be drawn is that the instant court did not accurately interpret Cardozo's use of the word "wanton." Cardozo excluded from the rescue doctrine a wanton (foolish) act not a wanton (wilful) act.

27. Wagner v. International Ry., 232 N.Y. 176, 181, 133 N.E. 437, 438 (1921).