SMU | Dedman School of Law

SMU Law Review

Volume 22 | Issue 3 Article 13

January 1968

Recent Decisions

RECENT DECISIONS

Constitutional Law — Criminal Law — Habeas Corpus Relief Available Where Prisoner Serving Consecutive Sentences

Rowe was imprisoned in the Virginia State Penitentiary after being convicted and sentenced to consecutive terms of thirty and twenty years. While serving the first sentence, which he did not contest, Rowe petitioned the Virginia Supreme Court of Appeals for state habeas corpus relief, but the petition was denied. Rowe then unsuccessfully applied to the federal district court, again contending that the second conviction was unconstitutional.[1] The district court's refusal was based on an application of *McNally v. Hill*,[2] which had held that habeas corpus is not available unless a prisoner is in custody under the actual sentence which he alleges to be unlawful. The Fourth Circuit Court of Appeals reversed and remanded, holding that it would no longer follow *McNally*.[3] *Held*, *affirmed*: Habeas corpus relief is available even though a prisoner, serving consecutive sentences, has not yet begun to serve the sentence which constitutes the alleged unlawful restraint. *Peyton v. Rowe*, 36 U.S.L.W. 4462 (U.S. May 20, 1968).

The habeas corpus jurisdiction of the federal courts is set forth in 28 U.S.C. section 2241.[4] This statute is similar to that which was controlling at the time *McNally* was decided[5] in that it requires a person to be "in custody" before a writ of habeas corpus may issue. In *McNally* the Court interpreted "in custody" to mean that where habeas corpus relief is sought, the prisoner must be serving the actual sentence which constitutes the alleged unlawful restraint.

In *Rowe* the Supreme Court, speaking through Chief Justice Warren, overturned *McNally* on two general grounds: (1) there had been no clear precedent for the rule in the first place, and (2) its "premature attack rule" did not effectuate the true purposes of the writ of habeas corpus.

In concluding that there was no historical precedent for the *McNally* rule, the Court pointed out that the decision had relied upon the history of the writ in England prior to 1789. The Court in *McNally* had been unable to discover any instance where the writ had been used to secure a judicial determination where a favorable decision could not have resulted in the prisoner's immediate release. In *Rowe* the Court observed that such an historical search had necessarily proved futile in light of the fact that

[1] Rowe's contention was fourfold: (1) that he had been subjected to double jeopardy; (2) that his plea of guilty had been involuntary; (3) that the indictment had failed to state an offense; and (4) that his trial counsel had been inadequate.

[2] 293 U.S. 131 (1934).

[3] Rowe v. Peyton, 383 F.2d 709 (1967). The Fourth Circuit consolidated Rowe's appeal with another case involving dismissal, on the basis of *McNally*, of a petition attacking later, consecutive sentences.

[4] 28 U.S.C. § 2241(c)(3) (1965) provides: "The writ of habeas corpus shall not extend to a prisoner unless . . . he is in custody in violation of the Constitution or laws or treaties of the United States."

[5] Rev. Stat. § 753 (1875).

prior to 1789 English judges had no power to hand down cumulative sentences in felony cases. The Court further observed that the *McNally* decision had not been compelled by statute. The Court pointed out that the holding had rested partially on the premise that actual physical release from custody is the only relief available in a habeas corpus proceeding. Since 1875, however, the habeas corpus statute[6] has granted the federal courts power to provide for relief other than immediate release, such as a determination of the facts and a disposition of the case as the interests of justice may require. The Court's decision also touched upon the ambiguous meaning of the word "custody" in 28 U.S.C. section 2241(c)(3). The Court remarked that "in common understanding 'custody' comprehends . . . the entire duration of imprisonment."[7] Practically speaking, and for purposes of parole eligibility under Virginia law,[8] Rowe is in custody for fifty years, or for the aggregate of his thirty- and twenty-year sentences. The practical consideration of earlier parole eligibility[9] is compelling and becomes significant with respect to the Court's reasoning that immediate physical release is not the only remedy under the statute.

In examining *McNally* against the purposes of the writ of habeas corpus, the Court emphasized its three major characteristics: (1) providing *post*-conviction relief; (2) *prompt* adjudication of the validity of the challenged restraint; and (3) a determination *on the merits* of alleged deprivation of constitutional rights.[10] The Court felt that *McNally* had an undermining effect on all three purposes. It pointed out that McNally's challenge to the legality of his detention had been directed at the face of the indictment and that any postponement of adjudication of his claim probably would not have resulted in the loss of any important evidence. Rowe's situation is thus clearly distinguishable. Any lengthy lapse of time could seriously hinder his ability to prove facts and call witnesses in support of his contentions, and could hinder the state in prosecuting, should a new trial be necessary. The Court concluded that, in order to provide for swift judicial review of alleged unlawful restraints, the writ must be available "at the earliest practical time."[11]

By overruling *McNally* the Supreme Court has responded to the inequities inherent in the old rule. Where parole is available to a prisoner at an earlier date, the practical consequences of *Rowe* will relieve the harsh results obtained in the past.

S.R.S.

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[6] Rev. Stat. § 761 (1875), *superseded by* 28 U.S.C. 2243 (1965).

[7] 36 U.S.L.W. at 4465.

[8] VA. CODE ANN. § 53-251 (1967).

[9] The Court points out that under the two sentences Rowe will be eligible for parole in 1974. If relieved of the twenty-year term, however, Rowe would be eligible for parole four years sooner, in 1970.

[10] The Court pointed out that it had recognized in Moore v. Dempsey, 261 U.S. 86 (1963), that "a district court was authorized to look behind the bare record of a trial proceeding and conduct a factual hearing to determine the merits of alleged deprivations of constitutional rights—a procedure that reached full flowering in Johnson v. Zerbst, 304 U.S. 458 (1938)." 36 U.S.L.W. at 4464.

[11] 36 U.S.L.W. at 4465.

Constitutional Law — Federal Abstention — Refusal To Enjoin State Prosecutions

Plaintiffs were participants in a three-day riot in 1967 in Nashville, Tennessee, which began after two policemen ejected a Negro soldier from a restaurant for disorderly conduct. The police had been called by the Negro operator of the restaurant. Three of the plaintiffs were charged with violation of a disorderly conduct statute,[1] a "dangerous weapons" statute,[2] and the common law offense of inciting to riot. These three and eight others[3] brought suit in federal district court to enjoin the state prosecution and to have a declaratory judgment striking down the criminal statutes. They alleged: (1) that the arrests and prosecutions were not in good faith and would have a "chilling effect" on their federal rights and (2) that the statutes were void for vagueness and overbreadth. *Held, dismissed*: Where there is no evidence that irreparable harm has resulted from state prosecutions or that a state court is unable or unwilling to protect a litigant's constitutional rights, federal courts will not enjoin state proceedings. *Brooks v. Briley*, 274 F. Supp. 538 (M.D. Tenn. 1967).

Although the court's decision was based in part on a finding that this was an improper class action[4] and that certain of the named plaintiffs were without standing to challenge the statutes in question,[5] the court's opinion concentrated on the power of the court to grant the injunction. In *Dombrowski v. Pfister*[6] such an injunction issued because merely defending against the state's criminal prosecution would not have assured adequate vindication of constitutional rights and the state action in itself would have had a "chilling effect" upon the plaintiff's exercise of his constitutional rights.[7] The rioters in the present case primarily relied upon this Supreme Court decision, which had held the Louisiana Subversive Activities and Communist Control Law and the Communist Propaganda Control Law unconstitutional on their face. However, the three-judge panel in *Brooks* determined that the holding of *Dombrowski* would not compel similar relief enjoining prosecution of the three plaintiffs and striking down the Tennessee statutes for several reasons.

First of all, the factual pattern of violence and lawlessness in *Brooks* was

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[1] TENN. CODE ANN. § 39-1213 (Supp. 1967).

[2] TENN. CODE ANN. § 39-4901 (1955).

[3] Of the three plaintiffs who were arrested, all were Negroes, two were field secretaries of the Student Non-Violent Coordinating Committee (SNCC) and one was a student at Tennessee State University in Nashville. Of the eight additional plaintiffs, seven were Negroes and included one priest, six students and Stokely Carmichael, the National Chairman of SNCC, whose speeches at the nearby universities had been made without interference from the defendants. A taped radio program interviewing Carmichael was not played by the Library Board of the metropolitan government because of the riot. The district court found that this decision was made in good faith and in the proper exercise of discretion vested in the local officials. Brooks v. Briley, 274 F. Supp. 538, 545 (M.D. Tenn. 1967).

[4] The class consisted of Negro residents and students of Nashville. The court found no evidence of pending or threatened prosecutions against any persons other than the three plaintiffs and four others. This small number did not meet the requisites of FED. R. CIV. P. 23. 274 F. Supp. at 547.

[5] The court held that the eight plaintiffs who had not been arrested or threatened with arrest were not injured by the operations of the challenged statutes. *Id.*

[6] 380 U.S. 479 (1965).

[7] *Id.* at 485.

a far cry from the constitutionally protected activity of peaceful organization involved in *Dombrowski*. There the Supreme Court found that the peaceful organization had been harassed and threatened by the state authorities in order to dissuade the members from their civil rights activities. In *Brooks* the good faith of the police was demonstrated by the evidence, *i.e.*, the arrests arose out of violence, only restrained force was used to contain the riot, and there was no harassment.

Secondly, the court in *Brooks* rejected the plaintiffs' contention of the "chilling effect" of the prosecutions on their constitutional rights as "wholly self-serving and without justifiable factual support."[8] The court remarked that there had been no showing of irreparable injury and held that if the challenged statutes were indeed void for vagueness or overbreadth, "the state courts are fully capable of so ruling, and there is no reason in this case to suppose that they would not do so."[9] This reasoning is in line with that of *Zwicker v. Boll*.[10] In that case, the plaintiff was being prosecuted in state court for non-violent, but offensive and disorderly conduct during a demonstration. He was denied the injunction he sought in federal court for two reasons: (1) because the state prosecution had already been instituted, and (2) because there was no convincing proof that the state prosecution would have a "chilling effect" on his constitutional rights. The court also stated that "it should be presumed, unless clearly shown to the contrary, that state courts will deal as carefully with federal rights as would we."[11]

Another reason compelled the court in *Brooks* to abstain from enjoining the state prosecution. Arrest and formal charging with an offense were said to constitute "proceedings" within the meaning of 28 U.S.C. § 2283.[12] This statute[13] denies federal courts the power to stay proceedings in a state court except as expressly authorized by acts of Congress. The court considered the contention that the Federal Civil Rights Act[14] constitutes such an "expressly authorized" exception. This contention had also been raised in *Dombrowski* and *Zwicker*, but the Supreme Court in the former case specifically left the question undetermined,[15] and the district court in the latter denied the injunction on other grounds.[16] While acknowledging that there is a split of authority on the question,[17] the district court in *Brooks*

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[8] 274 F. Supp. at 549.

[9] *Id.*

[10] 270 F. Supp. 131 (W.D. Wis. 1967).

[11] *Id.* at 137.

[12] 274 F. Supp. at 553.

[13] 28 U.S.C. 2283 (1965). "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

[14] 42 U.S.C. 1983 (1965).

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof, to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[15] 380 U.S. at 484 n.2.

[16] 270 F. Supp. at 135.

[17] Holding that 42 U.S.C. 1983 (1965) constitutes an expressly authorized exception to 28

held that the Civil Rights Act does not constitute such "express authorization" and that to so hold would "create a vast exception to section 2283 and would do violence to the principles of comity and federalism which underlie it."[18]

Brooks clearly reflects the reluctance of federal courts to interfere with the adjudication of matters in state courts. In light of the evidence of lawlessness and violence which led to the arrest of the three plaintiffs and with no evidence of bad faith on the part of police, the district court gave proper heed to the abstention doctrine.

S.D.B.

Constitutional Law — National Firearms Act — Privilege Against Self-Incrimination Provides Full Defense to Prosecution for Failure To Register or for Possession of an Unregistered Firearm

Haynes was charged in federal district court with violating 26 U.S.C. section 5851 by possessing a sawed-off shotgun which had not been registered with the Secretary of the Treasury, as required by 26 U.S.C. section 5841. Before trial Haynes moved to dismiss, asserting that section 5851 violated his fifth amendment privilege against self-incrimination. The motion was denied, and a judgment of conviction was entered on a plea of guilty. The Fifth Circuit affirmed Haynes' conviction.[1] *Held, reversed*: A conviction under section 5851 is not properly distinguishable from a conviction under section 5841 for failure to register, and the hazards of incrimination created by the statutory requirement that certain firearms be registered are real and appreciable. Therefore, a proper claim of the privilege against self-incrimination provides a full defense to a prosecution under section 5841 for failure to register a firearm and under section 5851 for possession of an unregistered firearm. *Haynes v. United States*, 390 U.S. 85 (1968).

The National Firearms Act[2] is an interrelated statutory system for the taxation of certain classes of firearms.[3] Failure to comply with any of the Act's requirements is made punishable by fines and imprisonment.[4] As

U.S.C. 2283 (1965) are Wojcik v. Palmer, 318 F.2d 171 (7th Cir.), *cert. denied*, 375 U.S. 930 (1963); Sexton v. Barry, 233 F.2d 220 (6th Cir. 1956); Cameron v. Johnson, 262 F. Supp. 873 (S.D. Miss. 1966). *Contra*, Cooper v. Hutchinson, 184 F.2d 119 (3d Cir. 1950); Tribune Review Publishing Co. v. Thomas, 153 F. Supp. 486 (W.D. Pa. 1957).

[18] 274 F. Supp. at 553.

[1] Haynes v. United States, 372 F.2d 651 (5th Cir. 1967).

[2] 26 U.S.C. §§ 5801-49 (1954).

[3] The Act's requirements are applicable only to shotguns with barrels less than 18 inches long; rifles with barrels less than 16 inches long; other weapons made from a rifle or shotgun with an overall length of less than 26 inches; machine guns and other automatic firearms; mufflers and silencers; and other firearms, except pistols and revolvers, if such weapon is capable of being concealed on the person. INT. REV. CODE of 1954, § 5848(1).

[4] 26 U.S.C. § 5861 (1954).

part of the statutory scheme, section 5841 requires every person possessing a firearm subject to the Act to register his possession with the Secretary of the Treasury, unless he made the weapon, or acquired it by transfer or importation in compliance with the Act's requirements. Section 5851 creates a series of offenses. It declares unlawful the possession of any firearm which has at any time been transferred or made in violation of the Act's provisions, or which has not been registered as required by section 5841. Prior to the instant case, in *Russell v. United States*,[5] section 5841 had been declared unconstitutional insofar as its application to the facts required an individual to incriminate himself. However, in subsequent cases brought for illegal possession of an unregistered firearm under section 5851, *Russell* was distinguished on the basis of the Government's contention that the two offenses, despite the similarity of their statutory descriptions, serve entirely different purposes. The Government argued that the registration clause of section 5851 is intended to punish acceptance of the possession of a firearm which, despite the requirements of section 5841, was never registered by any prior possessor, while section 5841 punishes only a present possessor who has failed to register the fact of his own possession.[6] In the present case, the Supreme Court examined for the first time, and in the face of uniform holdings below,[7] the issue of whether enforcement of section 5851 against a defendant is constitutionally permissible if conviction under section 5851 is not meaningfully distinguishable from a conviction under section 5841 and if registration under section 5841 would provide information incriminating to the registrant.

In construing section 5851, the Court observed that the statutory language did not support the Government's contention that the "failure to register" pertinent to a charge under section 5851 must precede the receipt of the firearm by the accused so as to distinguish the two sections.[8] Likewise, the pertinent legislative history did not avail of such an interpretation. Of seemingly controlling significance to the Court was the fact that the offense under section 5851 was defined by incorporating section 5841 which, in turn, unequivocally declared the "failure to register" in question to be that of the possessor.

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[5] 306 F.2d 402 (9th Cir. 1962). *Accord*, Dugan v. United States, 341 F.2d 85 (7th Cir. 1965); McCann v. United States, 217 F. Supp. 751 (D. Colo. 1963); United States v. Fleish, 227 F. Supp. 967 (E.D. Mich. 1964).

[6] *See, e.g.*, Pruitt v. United States, 364 F.2d 826 (6th Cir. 1966); Castellano v. United States, 350 F.2d 852 (10th Cir. 1965); Taylor v. United States, 333 F.2d 721 (10th Cir. 1964); Starks v. United States, 316 F.2d 45 (9th Cir. 1963); Frye v. United States, 315 F.2d 491 (9th Cir. 1963); Capooth v. United States, 238 F. Supp. 583 (S.D. Tex. 1965); Hazelwood v. United States, 208 F. Supp. 622 (N.D. Cal. 1962).

[7] *But see* Lovelace v. United States, 357 F.2d 306 (5th Cir. 1966), holding that an indictment requiring proof not simply that the defendant had a firearm which no one had registered, as in Frye v. United States, 315 F.2d 491 (1963), but also requiring proof that the defendant himself had not registered the gun, had applied § 5851 in an unconstitutional manner.

[8] In construing § 5851, the Court distinguished the "making" and "transfer" clauses of the section from the "failure to register" clause. Therefore, *Haynes* should not affect decisions under § 5851 upholding convictions for receiving or possessing "any firearm which has at any time been transferred . . . or made" in violation of the Act's requirements. *See, e.g.*, Decker v. United States, 378 F.2d 245 (6th Cir. 1967) (transfer); United States v. Forgett, 349 F.2d 601 (6th Cir. 1965) (shipment); Sipes v. United States, 321 F.2d 174 (8th Cir. 1963) (making); Mares v. United States, 319 F.2d 71 (10th Cir. 1963) (making).

For two reasons the hazards of incrimination stemming from the registration requirements of section 5841 were understood to inhere in prosecutions under section 5851: (1) because the possession of a firearm and a failure to register were determined to be equally fundamental ingredients of both offenses, the Court found the Government's propounded distinction between a section 5851 "possession" prosecution and a section 5841 "failure to register" prosecution to be without merit; (2) in addition, the Court failed to accept the theory that section 5841 created a status of unlawful possession which, when voluntarily assumed by an individual, is not subject to the constitutional privilege in a section 5851 prosecution. The Court declared that even the violation of a statute that expressly stated that its violation would constitute a waiver of the constitutional privilege would not suffice to deprive an accused of the privilege's protection.

In determining, in accord with courts below,[9] that registration would compel a defendant to provide information incriminating to himself, the Court considered that the requirement was principally directed at persons who were already in possession of a firearm in violation of other requirements of the Act and would thus be immediately threatened by criminal prosecution.[10] Because convictions would be facilitated by the formal acknowledgment of possession and supplementary information, the hazards of incrimination were termed "real and appreciable."[11]

The Court's logic in piercing the semantic veil and prohibiting the Government from doing indirectly what it could not do directly seems compelling. Furthermore, the effective regulation or taxation by Congress of firearms need not be sacrificed for the sake of this logic. The Court indicated that a provision affording complete immunity against future prosecutions based on the information furnished would suffice to enable registration requirements under the National Firearms Act to function.[12] Thus, only the use of the tax statutes for criminal prosecution is precluded.[13] And, despite the fact that *Haynes* was part of a tripartite attack on registration statutes,[14] the holding should not expose registration require-

[9] *See* note 5 *supra*.

[10] The risks of incrimination created by the registration requirements are not remote. Heike v. United States, 227 U.S. 131, 144 (1913); Brown v. Walker, 161 U.S. 591, 599 (1896). In determining that the registration requirements were principally directed at persons inherently suspect of criminal activities, the Court cited Albertson v. SACB, 382 U.S. 70, 79 (1965) (registration requirements directed at highly selective group inherently suspect of criminal activities) and noted that the types of weapons covered (*see* note 3 *supra*) and the type of information requested, *e.g.*, whether the registrant had ever been convicted of a felony, made the application of sections 5841 and 5851 very pointed.

[11] Haynes v. United States, 390 U.S. 85 (1968).

[12] As a guide in this area, the Court cited Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964); Adams v. Maryland, 347 U.S. 179 (1954); Counselman v. Hitchcock, 142 U.S. 547, 585 (1892). The Court thought the "required records" doctrine of Shapiro v. United States, 335 U.S. 1 (1948), inapposite because, *inter alia*, records of a kind which the regulated party has customarily kept were not involved.

[13] The Court declined to permit continued enforcement of §§ 5841 and 5851 by imposing restrictions upon the use by state and federal authorities of information obtained. Since Congress had provided that 26 U.S.C. § 6107, requiring the keeping of a list for public inspection of the names of all persons paying particular taxes, should apply, at least in part, to taxes paid under the National Firearms Act, the Court decided to leave it to Congress to strike a balance between federal treasury considerations and prosecutory considerations.

[14] *See* Marchetti v. United States, 390 U.S. 39 (1968) and Grosso v. United States, 390 U.S. 62 (1968), both decided on the same day as *Haynes*.

ments in general to challenge because the facts limit its application to acts which are principally directed to a highly select group and requiring admission of past or current statutory violations.[15]

C.D.T.

Constitutional Law — "One Man, One Vote" Applied to Units of Local Government

In Texas the "general governing body of the county"[1] is the commissioners court. These courts are empowered, among other things, to appoint minor local officials, administer the county's public welfare services, set the county tax rate, adopt the county budget, build roads, bridges,[2] and hospitals[3] within the county, and to determine the districts for the election of their own members.[4] In Midland County, the five-member commissioners court had established the following districting plan: one member was elected at large from the entire county; the other four members were chosen from four districts having populations of 67,906, 852, 414, and 828. This tremendous imbalance was created because virtually the entire city of Midland, the county's only urban center, was placed in a single district.

Petitioner Avery, a resident and taxpayer of Midland County, sued the commissioners court in a Texas district court, contending that the district imbalance violated the equal protection clause of the fourteenth amendment of the United States Constitution. Although the district court ruled in favor of Avery, it did not mention the fourteenth amendment. Instead, the court found that the districting plan was not "for the convenience of the people,"[5] as required by the Texas Constitution. The court of civil appeals reversed this judgment,[6] but the Texas Supreme Court reversed the appellate court,[7] holding that under the Texas and United States Constitutions the districting plan was not allowable "for the reasons stated by the trial court."[8] However, the Texas Supreme Court further ruled that the districts did not have to have substantially equal populations and noted that other factors[9] could be considered in determining the size of the various districts. Avery petitioned the United States Supreme Court for

[15] The Court distinguished United States v. Sullivan, 274 U.S. 259 (1927) as pertaining to information obtained in connection with regulatory programs of general application. However, as to the time factor, the Court declared in *Marchetti* that the force of the constitutional prohibition is not diminished "merely because confession of a guilty purpose precedes the act which it is subsequently employed to evidence." 390 U.S. at 54.

[1] Interpretive Commentary, TEX. CONST. ANN. art. V, § 18.
[2] *Id.*
[3] TEX. REV. CIV. STAT. ANN. art. 4492, § 1 (1966).
[4] TEX. CONST. art. V, § 18.
[5] *Id.*
[6] Avery v. Midland County, 397 S.W.2d 919 (Tex. Civ. App. 1965).
[7] Avery v. Midland County, 406 S.W.2d 422 (Tex. 1966).
[8] *Id.* at 425.
[9] *I.e.*, number of qualified voters, land areas, geography, miles of county roads, and taxable values.

certiorari. *Held, reversed*: Avery had a right to a vote for the commissioners court of substantially equal weight to the vote of every other county resident, and the districting plan, with its unequally populated districts, violated the equal protection clause of the fourteenth amendment of the United States Constitution. *Avery v. Midland County*, 88 S. Ct. 1114 (1968).

In the landmark 1964 case of *Reynolds v. Sims*[10] the Supreme Court determined that the equal protection clause requires state legislatures to be apportioned on the basis of population. However, in 1967 in *Sailors v. Board of Education*[11] the Court refused to apply this "one man, one vote" rule to a procedure for choosing a county school board that placed the selection of the county board's members with school boards of towns within the county, even though the component boards had equal votes and served unequal populations. In *Sailors* the Court based its decision in part on the "nonlegislative character" of the school board's functions, but a far more important facet of the decision was the Court's finding that the school board selection procedure was "basically appointive rather than elective." Thus, *Sailors* in fact dealt with the question of whether a state must in every instance provide for the election of local officials, rather than whether the requirements of *Reynolds v. Sims* must be met *when* a state provides for the election of a local government agency. Nevertheless, *Sailors'* language in regard to the administrative nature of the school board cast doubt upon the applicability of the "one man, one vote" principle to local governmental bodies which combine both legislative and administrative functions.[12] Ostensibly, *Avery v. Midland County* removes these doubts.

In *Avery* the respondent county contended that unequal districts should be permitted for the commissioners court because the court was not "sufficiently legislative" in its functions. However, the Supreme Court firmly rejected this argument. Noting that Texas commissioners courts perform legislative, administrative, and judicial functions, the *Avery* majority set out the test for determining whether the "one man, one vote" rule applies to local governmental bodies: districts for units of local government having "*general governmental powers* over the entire geographic area served by the body"[13] must be apportioned on the basis of population. In rejecting the county's argument that the apportionment plan should be sustained because the commissioners court was primarily concerned with county government, the majority reserved for future determination the question of whether local legislative bodies may be apportioned so as to give greater influence to the persons most affected by their functions.

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[10] 377 U.S. 533 (1964).

[11] 387 U.S. 105 (1967).

[12] However, with the exceptions of *Avery* and Brouwer v. Bronkema, 377 Mich. 616, 141 N.W.2d 98 (1966), state courts have held the principles of *Reynolds v. Sims* applicable to units of local government. *See* Miller v. Board of Supervisors, 63 Cal. 2d 343, 405 P.2d 857 (1965); Montgomery County Council v. Garrott, 243 Md. 634, 222 A.2d 164 (1966); Hanlon v. Towey, 274 Minn. 187, 142 N.W.2d 741 (1966); Armentrout v. Schooler, 409 S.W.2d 138 (Mo. 1966); Seaman v. Fedourich, 16 N.Y.2d 94, 209 N.E.2d 778, 262 N.Y.S.2d 444 (1965); Bailey v. Jones, 81 S.D. 617, 139 N.W.2d 385 (1966); State *ex rel.* Sonneborn v. Sylvester, 26 Wis. 2d 43, 132 N.W.2d 249 (1965).

[13] Avery v. Midland County, 88 S. Ct. 1114, 1120 (1968).

Whether the *Avery* test is a viable one remains to be seen. Strong dissents[14] criticized the majority's failure to take cognizance of the need for flexibility in the selection of local governmental units. However, with *Sailors* still on the books some experimentation is still permitted, because states will be required to meet the "one man, one vote" requirement *only* when they provide for the election of local government units and *only* when a single-member districting process is involved in the election procedure.[15] "Basically appointive" means of selection should continue to be allowed.[16] Although the ambiguity of the term "general governmental powers" may cause the courts some problems, the term appears broad enough to include virtually every form of local government.[17]

L.D.S.

Criminal Law — Death Penalty Imposed by Jury, but Not by Judge, Unconstitutional

Defendants were indicted by a federal grand jury for violating the Federal Kidnapping Act.[1] The Act provides that a person who knowingly transports in interstate commerce any unlawfully kidnapped person, shall be punished by death if the victim is not released unharmed and if the verdict of the jury shall so recommend. The trial court dismissed the indictment, holding the entire statute unconstitutional because it impaired the constitutional right to a jury trial as guaranteed by the sixth amendment to the United States Constitution.[2] The government appealed directly to the Supreme Court.[3] *Held, reversed*: The provision of the Federal Kidnapping Act, imposing a death penalty only upon the defendant who asserts his right to trial by jury, violates the fifth and sixth amendments because it discourages the defendant from exercising his constitutional right to demand a jury trial and to plead innocent; but since the death penalty is severable, the entire statute is not unconstitutional, and the indictment need not be dismissed even though the death penalty cannot be imposed. *United States v. Jackson*, 36 U.S.L.W. 4277 (U. S. Apr. 8, 1968).

In reaching its conclusion that the death penalty provision of the Federal Kidnapping Act is unconstitutional, the Court found that a defendant

[14] Justices Stewart, Fortas, and Harlan each wrote a dissenting opinion.

[15] In a 1967 case, Dusch v. Davis, 387 U.S. 112 (1967), the Supreme Court upheld a city council election procedure which included at large voting for the candidates, some of whom had to reside in particular districts.

[16] *But see* Bianchi v. Griffing, 393 F.2d 457 (2d Cir. 1968), where the Second Circuit concluded that a selection procedure similar to that of *Sailors* was elective rather than appointive.

[17] Indeed, the *Avery* majority opinion refers to school boards, city councils, and county governing boards and specifically notes that the Midland County Commissioners Court is typical of most local governing units.

[1] 18 U.S.C. § 1201(a) (1965).

[2] United States v. Jackson, 262 F. Supp. 716 (D. Conn. 1967).

[3] 18 U.S.C. § 3731 (1965).

who elects trial by jury is subjected to a potentially greater punishment than a defendant who pleads guilty or waives jury trial.[4] Since, indirectly, the statute encourages guilty pleas and discourages the desire for trial by jury, the defendant's fifth and sixth amendment rights are needlessly impaired. The government had argued that the statute does not subject a defendant in a jury trial to any greater risk, first of all because the judge, as final arbiter of the sentence, is not bound by the recommendation of the jury.[5] In answer, the Court noted that not once since the inception of the Act has a judge disregarded the jury's death penalty recommendation.[6] In addition, the Court construed the language of the statute as a clear congressional mandate removing the judge's discretion to disregard the jury's recommendation.[7] A second argument posed by the government was similarly rejected. The government contended that any greater risk accompanying a jury trial was negated by the fact that the trial judge could find a defendant guilty or accept a guilty plea and subsequently empanel a special jury solely for the purpose of prescribing sentence.[8] The Court, however, concluded that the statute does not authorize empanelling a special jury.[9]

The statute, merely by encouraging a defendant to plead guilty and thereby to escape any possibility of a death sentence, infringed upon the defendant's fifth amendment right not to plead guilty. The Court reasoned that a guilty plea, pursuant to the statutory inducement, is coercive and violative of due process.[10] The government urged that federal judges may reject guilty pleas and involuntary waivers of jury trial. But, the consequences of such a rejection would "force all defendants to submit to trial, however clear their guilt and however strong their desire to acknowledge it in order to spare themselves and their families the spectacle and expense of protracted courtroom proceedings."[11] In his dissenting opinion, Justice White stated that the Court could have properly interpreted the statute so as to avoid constitutional questions by simply requiring the trial judge to examine carefully all guilty pleas and waivers of jury before accepting them in order to determine whether the death penalty power was a relevant factor in the defendant's decision.[12]

The Court departed from its traditional avoidance of constitutional issues and stretched far to strike down the death penalty provision. The Court's departure may have been a result of a continuing effort to abolish

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[4] 37 U.S.L.W. at 4281.

[5] *Id.* at 4278.

[6] *Id.*

[7] *Id.* at 4279. The Court reasoned that the wording of the statute, "if the verdict of the jury shall so recommend," was an imperative and the judge was without authorization to disregard the recommendation.

[8] *Id.*

[9] The Court interpreted "the verdict of the jury" as excluding any other jury but the trial jury to designate sentence. The Seventh Circuit has construed the same part of the statute to mean "a jury" including a jury convened solely to determine sentence. Seadlund v. United States, 97 F.2d 742, 748 (7th Cir. 1938). *See also* Robinson v. United States, 264 F. Supp. 146, 153 (W.D. Ky. 1967).

[10] 37 U.S.L.W. at 4281 n.20.

[11] *Id.* at 4281.

[12] *Id.* at 4284.

the death penalty altogether.[13] But it may nevertheless be justified in *Jackson* because the kidnapping statute can be easily amended to prevent any impairment of constitutional rights by either requiring a jury determination of sentence regardless of how guilt is determined or by authorizing the judge as well as the jury to assess the death penalty.

S.R.H.

Estate Tax — Community Property and Life Insurance Proceeds — What, Again?

Mortimer was named as primary beneficiary of an insurance policy on the life of Margaret, his wife. The policy, which was taken out during marriage, contained a blank to be signed by the person designated as owner of all "benefits, values, rights and privileges." Mortimer signed in the designated blank. Premiums were paid with community funds. At Margaret's death, Mortimer did not include any of the proceeds of the policy in his wife's estate tax return, but the Commissioner objected. Mortimer and the Commissioner agreed that, under section 2042 of the Code, proceeds of an insurance policy are subject to estate tax to the extent of ownership retained by the person whose life is insured. But they disagreed as to the ownership retained by Margaret in the instant policy. Claiming that Margaret had made a gift of the property to him, Mortimer paid the asserted deficiency and sued for a refund, but it was denied by the district court. Mortimer appealed to the Fifth Circuit. *Held, affirmed*: Where community funds are used to pay premiums on a policy of life insurance taken out during marriage, thereby causing its characterization as community property under Texas law, a gift will not be found from the fact that the insured wife designated her beneficiary husband as "owner," for such designation is assumed to be merely for the purpose of acting as the agent of the community. *Freedman v. United States*, 382 F.2d 742 (5th Cir. 1967).

Under section 2042 of the Code[1] the test for determining the includability of life insurance proceeds in the estate of an insured is whether "the decedent possessed at his death any of the incidents of ownership" such as "the power to change the beneficiary, to surrender or cancel the policy, to assign the policy, to revoke an assignment, to pledge the policy for a loan,

[13] *See* Witherspoon v. Illinois, 36 U.S.L.W. 4504 (U.S. Apr. 4, 1968), where the Court voided a death penalty imposed by a jury because the jury did not contain a person who was opposed to the death penalty.

[1] INT. REV. CODE of 1954, § 2042 (proceeds of life insurance):
The value of the gross estate shall include the value of all property—

. . . .

(2) Receivable by other beneficiaries.—To the extent of the amount receivable by all . . . beneficiaries [other than the executor] as insurance under policies on the life of the decedent with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person.

or to obtain from the insurer a loan against the surrender value of the policy, etc."[2] The regulations further provide that, "As an additional step in determining whether or not a decedent possessed any incidents of ownership in a policy or any part of a policy, regard must be given to the effect of the State or other applicable law upon the terms of the policy."[3] In looking to state law, the Commissioner in the instant case determined, correctly, that life insurance policies purchased during marriage, and paid for with community funds, are community property in Texas.

Mortimer's main contention was that Margaret had made a gift of her portion of the community policy to him when she "gave" him the ownership of the benefits of the policy. The court, assuming that in Texas the wife is capable of making a gift of her community interest,[4] did not find the requisite donative intent necessary to make an *inter vivos* gift. Mortimer's wife had not performed an affirmative act, such as an instrument of assignment or deed of trust, which would clearly reflect such an intent. The court pointed out that mere non-interference is insufficient evidence of a gift. Moreover, there was no express clause purporting to transfer the policy to Mortimer's separate estate.

After Mortimer's case, it appears doubtful whether estate taxes can be avoided on benefits of life insurance policies taken out during marriage and paid for with community funds. The court assumed the real question in the case: If the insured is the wife, does she have the power to make a gift of community property to her husband?[5] A conveyance of the interest of the insured to the other spouse, clearly indicating donative intent, would be effective if the insured was the husband, if the insured survived the conveyance by more than three years,[6] and if the insured had some interest to convey at the time of the conveyance. A partition of commun-

[2] Treas. Reg. § 20.2042-1(2) (1958).

[3] *Id.* § 2042-1(5).

[4] In looking to state law the Commissioner had found no guarantees that such gifts were possible. Although dicta in King v. Bruce, 145 Tex. 647, 201 S.W.2d 803 (1947), suggested that either spouse may give to the other as separate property any part of the community property, it was questionable whether the wife, at the time of the *Freeman* case, could do so. TEX. REV. CIV. STAT. ANN. art. 4621 (Supp. 1967), effective January 1, 1968, gives joint management rights to the spouses over non-special community property. Whether this new statute will permit a wife to make a gift of community property to her husband will be a crucial question in future estate planning. Mortimer also claimed that TEX. REV. CIV. STAT. ANN. art. 4619, § 6 (repealed 1968), which gave the wife the power to control, manage, and dispose of any insurance policy, conferred on her the clear right to make a gift to him of her community interest in the policy. And, by virtue of having been allowed to sign as owner, Mortimer concluded that he was the owner of the entire property interest. The Fifth Circuit, however, was of a different opinion because art. 4619 did not expressly state that the wife could make a gift of a community interest. At any rate, the statute was inapplicable because Mortimer, not his wife, had the management rights under the policy. TEX. INS. CODE ANN. art. 3.49-3 (Supp. 1967), effective January 1, 1968, is the continuation of TEX. REV. CIV. STAT. ANN. art. 4619, § 6 (repealed 1968). It states that: "A spouse shall have right, control and disposition of any contract of life insurance or annuity heretofore or hereafter issued in his or her name or to the extent provided by the contract or any assignment thereof without the joinder or consent of the other spouse."

[5] *See* note 4 *supra.*

[6] INT. REV. CODE of 1954, § 2035(b), which reads:

> If the decedent within a period of 3 years ending with the date of his death (except in the case of a bona fide sale for an adequate and full consideration in money or money's worth) transferred an interest in property, relinquished a power, or exercised or released a general power of appointment, such transfer, relinquishment, exercise, or release shall, unless shown to the contrary, be deemed to have been made in contemplation of death.

ity property, with the wife paying for the policy from her separate funds, could be effective to vest absolute ownership of the policy in the husband.[7] In the absence of a partition, the only other effective means would seem to be a gift by the husband to the wife of his one-half of community property, from which she could then purchase the policy, and make a gift back to the husband (valid because the property would be separate). Gift tax, of course, would be due on both transactions. But a "Dear Marty" letter, expressing a gift transaction, would of itself probably not be effective.

Mortimer's final argument that the Commissioner's position, if affirmed, would frustrate the national policy of tax equalization was thoroughly rejected by the court. The decision makes it quite clear that by virtue of the nature of their ownership, community property residents are not to be treated the same as are the residents of common law jurisdictions when it comes to the estate taxation of life insurance policies.

W.R.J.

Estate Taxation — Determination of the Marital Deduction After a Statutory Renunciation

At testator's death the widow's interest in the deceased's estate as provided by the will qualified for the marital deduction under section 2056(a) of the 1954 Internal Revenue Code. With "callous disregard" for estate tax consequences the widow elected to renounce the will and take her dower in lands and her share in the personal estate.[1] However, after the renunciation was filed within the statutory period, the attorney for the executors advised them that he was uncertain of the widow's rights under Montana law. Therefore, an agreement was reached between the executors and the widow, under which she was to receive certain real estate in fee, and the probate court entered a decree of distribution based on the agreement. The marital deduction was calculated by the executors (plaintiffs in this suit) on the basis of the decree, *i.e.*, on the basis of the property actually received by the widow. The Commissioner assessed a deficiency, contending that the widow's interest should be determined on the basis of the rights given her upon the renunciation under Montana law, which included a life estate in the lands and thus a terminable, non-qualifying interest under section 2056(b)(1) of the 1954 Internal Revenue Code. To support its position, the Commissioner argued that the deduction is allowable only as to interests passing from the decedent. It was asserted that the election to renounce by operation of law occurs at death; hence as of the date of death the widow had a terminable interest in the real estate and the non-terminable interest passed to her not from the decedent but from the other heirs as a trade of assets. The executors paid the deficiency and filed for refund. *Held*: The

[7] TEX. REV. CIV. STAT. ANN. art. 4624(a) (1968).

[1] MONT. REV. CODES ANN. § 22-107 (1967).

marital deduction is to be computed on the basis of the interest actually distributed to the widow. The agreement and decree of distribution are the measure of rights passing to the widow by virtue of law. *Stephens v. United States*, 270 F. Supp. 968 (D. Mont. 1967).

The court regarded the language of section 2056 to mean that where a distribution is based upon statutory rights following an election to renounce, the marital deduction is to be based upon the quality and quantity of rights actually received by the widow. With two observations the court refuted the government's contention that once the statutory election was made, her rights were then fixed under Montana law: (1) An election is not necessarily final since it can be withdrawn as a matter of right; (2) there is a possibility that the estate may be converted into cash prior to the distribution of the estate.[2] The court also rejected the government's reasoning that because the renunciation by operation of law occurs on the date of death, the rights of the widow become fixed by the election to renounce. The court found nothing in the law which gives the date of renunciation the same finality as that of the date of death in the ordinary marital deduction case.[3] The court reasoned that if one post-death act could alter the marital deduction there is no reason why another act could not alter the first change.

To support its finding that the agreement which ultimately was the basis of the decree of distribution was to be regarded as a measurement of the rights passing by law to the widow, the court relied upon two cases. In *Dougherty v. United States*[4] a similar situation had arisen when a widow elected to take her dower but the dower was reduced to a sum certain before the distribution. The Sixth Circuit held that the property had passed at the date of death from the decedent to his spouse since the court was more concerned with the interests actually received rather than what she was technically entitled to receive. In an earlier case[5] the United States Supreme Court had expressed a basic thought underlying the determination of the interests passing by virtue of law. In *Dougherty* and in the present case the court had noted that a distinction sought to be made between acquisition through a judgment and acquisition by a compromise agreement in lieu of such a judgment was "too formal to be sound."[6]

In *Stephens* the court correctly applied the existing law in concluding that where a widow elects to renounce a will, her interests are not necessarily determined at the time of death but may be altered and the deduction should be determined on the basis of the rights actually received. To hold otherwise would have produced a tax result unrelated to the economic realities of the situation. *L.J.B.*

[2] The court pointed out that where the land is not susceptible of division without great injury, this may be done under MONT. REV. CODES ANN. §§ 91-2610 to -2612 (1964).

[3] Jackson v. United States, 376 U.S. 503 (1964); Allen v. United States, 359 F.2d 151 (2d Cir. 1966); Commissioner v. Ellis' Estate, 252 F.2d 109 (3d Cir. 1958); Starrett v. Commissioner, 223 F.2d 163 (1st Cir. 1955).

[4] 292 F.2d 331 (6th Cir. 1961).

[5] Lyeth v. Hoey, 305 U.S. 188 (1938) (upon compromise of a will contest, property held to be an inheritance).

[6] *Id.* at 196.