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dissent and the dissenting opinion thus became the majority opinion. In doing so, this justice said:

> "On motion for rehearing I have reversed my conclusion and am in accord with the opinion by Associate Justice Looney that the judgment of the trial court should be reversed and cause remanded to the trial court for further proceedings, particularly a determination of the issue as to whether the property in question, under all the facts and circumstances, is not suitably situated to be zoned by the City for apartment usage. Manifestly, if the property is not suitable for the purposes as zoned, such should not be zoned, and in doing so, it is confiscation. Appropriate issue was requested and refused by the trial court to determine whether the property was suitable for apartment usage. I am of the opinion such should have been submitted, and the issue determined along with other pertinent issues as reflected by the record, and recited in the dissenting opinion of Justice Looney."[15]

Marvin L. Skelton.

CONSTITUTIONAL LAW

Picketing and Freedom of Speech

THE Texas Supreme Court held in Ex parte *Henry*[1] that union members' right of free speech had been abridged by an injunction forbidding picketing within 100 feet of railroad spur tracks leading into the Greenville Cotton Oil Company plant, a majority of whose employees were on strike for union recognition, fewer hours, and for overtime. Train crews refused to cross the picket lines and would not move freight in or out of the plant so long as the picket line was maintained across the spur. Henry and Martin, company employees, continued to picket in spite of the injunction and were jailed, along with another union member who did not work for the firm. The Texas Supreme Court ruled

[15] Rosenthal v. City of Dallas, 211 S. W. (2d) 279, 294 (Tex. Civ. App. 1948) *writ of error refused.*

[1] 18 Tex. 38, 215 S.W.(2d) 588 (1948).

in an original habeas corpus proceeding that relators should be discharged from custody.

Citing the *Thornhill*[2] and *Carlson*[3] cases as "squarely in point," the court held that conduct enjoined amounted only to "peaceful picketing, which not only is not unlawful but is protected by the First and Fourteenth Amendments." The court rejected the company's contention that the picketing plus the refusal of the railway employees to cross the line was concerted action in violation of Texas statutes against secondary picketing,[4] secondary boycotting,[5] and conspiracy in restraint of trade.[6] Just because "third parties who come to the area of the dispute may prove sympathetic to one disputant rather than to the other" does not make picketing an offense against these statutes.[7] Indeed, the court asserted that if these statutes were designed to prevent the relators from doing

[2] Thornhill v. Alabama, 310 U. S. 88 (1940).

[3] Carlson v. California, 310 U. S. 106 (1940). In this case and in the *Thornhill* decision the Supreme Court held unconstitutional statutes which prohibited all picketing.

[4] TEX. REV. CIV. STAT. (Vernon, 1948) art. 5154f.

[5] *Ibid.*

[6] TEX. REV. CIV. STAT. (Vernon, 1948) art. 7428.
TEX. PEN. CODE (Vernon, 1948) arts. 1634, 1643, 1644.

[7] In terms of economic realism, one wonders about the connotations of the term "third parties" as used by the court here. (First of all, there is an interesting question concerning the railroad's "duty" to serve such a "struck" customer as the Greenville plant.) Is it the railway "company," as such, which, as the "third party," has proved more "sympathetic" to the striking unionists than to the employer? Is it not more realistic to recognize the fact that union men operating the train simply are observing a union "law" about not crossing a sister union's picket line—and that this is always to be expected in such a situation, regardless of where the "third party's" sympathies actually lie? Can it be that the courts have failed to appreciate the significance of this refusal to cross a sister union's line in a time of increasing unionism? It is well-nigh impossible to overemphasize the implications of this policy today when almost fourteen million of the thirty-five million nonsupervisory and nontechnical employees in private industry are organized into unions. It accounts in large measure for the quick and deadly effects of the secondary "labor" boycott today, as compared with the secondary "consumption" boycotts of *Loewe v. Lawlor* days. 208 U. S. 274 (1908). In a picketing situation today it is not a matter of a "third party" gravely observing the picket line and deciding, after judiciously weighing the issues, that he is "sympathetic to one disputant rather than to the other." Most so-called "third parties" have their "sympathies" automatically determined long before they reach the area of the dispute: a sister union's picket line must be respected. Perhaps the legal concept of the "difference" between "primary" and "secondary" picketing is still grounded in the secondary "consumption" boycott and the embryonic union movement of yesteryear. See note 15 *infra*.

what they did as proved in this case "we would have to hold that the statutes are, to that extent, unconstitutional."

In other words, the court did not consider this a true example of "secondary picketing." The *Ritter's Cafe* case[8] it distinguished. And it cited the *Borden* case[9] as an example of "an act in direct violation" of the Texas anti-trust laws, pointing out that there the teamsters' union in an attempt to bring pressure on the Borden Company peacefully picketed one of Borden's customers with whom it had no labor dispute and all of whose employees were members of the ice handlers' union. The court cautioned that its action in the *Zanes* case[10] was not to be used as authority in a situation like that in Ex parte *Henry*, and added that its decision in the former case "is overruled so far as it may be construed as authority for limiting or suspending picketing which causes railway employees 'not to serve the business of the employer, under facts like those here presented . . .' "

Does its decision in Ex parte *Henry* necessarily mean that the highest Texas court would refuse to apply the "illegal objective" test, which apparently is being followed now by the United States Supreme Court in certain secondary picketing situations,[11] given

[8] Carpenters and Joiners Union v. Ritter's Cafe, 138 S.W.(2d) 223 (Tex. Civ. App. 1940); (injunction made permanent), 149 S.W.(2d) 694 (Tex. Civ. App. 1941); AFFIRMED 315 U. S. 722 (1942). Ritter's cafe was being picketed by union carpenters though the cafe "neither used nor needed carpenters" and in spite of the fact that the union had no "labor dispute" with the cafe. Ritter had contracted with Plaster to put up a building a mile and one-half from the cafe. The record showed no connection between the two buildings. Plaster did not hire union laborers; the picketing of the cafe followed, though the cafe employees were members of a hotel and restaurant employees local union. The Texas courts held this picketing in violation of the state's anti-trust statutes and enjoined it, though it did not forbid picketing of the building Plaster was constructing. The U. S. Supreme Court, in sustaining the injunction, said that Texas, by its anti-trust act, had sought to "localize industrial conflict by prohibiting the exertion of concerted pressure directed at the business, wholly outside the economic context of the real dispute, of a person whose relation to the dispute arises from his business dealings with one of the disputants." For an evaluation of this decision see Botting, *State Decisions on Peaceful Picketing*, 2 SOUTHWESTERN L. J. 54, 63-64 (1948); and see GREGORY, LABOR AND THE LAW, 357-62 (2nd ed. 1949).

[9] Borden Co. v. Local 133, 152 S.W.(2d) 828 (Tex. Civ. App. 1941) *writ of error refused.*

[10] Turner v. Zanes, 206 S.W.(2d) 144 (Tex. Civ. App. 1947) *writ of error refused, n. r. e.*

[11] The *Giboney* case, discussed *infra*, is in point.

facts like those in the *Borden* case?[12] The answer would appear to be negative. Certainly the *Henry* decision does not justify the conclusion that the opinion makes the mere existence of a labor dispute justification for picketing and boycotting without looking at the objectives thereof,[13] or that the decision seems to say that any peaceful picketing is legal, regardless of its objective.[14] Was the Texas Supreme Court taking a novel and unusually narrow view of the term "secondary boycott" (or "secondary picketing," if that term is preferred) in considering the situation at the Greenville Cotton Oil Company plant? Probably not, at least so far as the courts are concerned.[15] Teller writes, in language which seems somewhat question-begging, that "it has never been suggested" that "peaceful primary picketing" is "secondary picketing where, without picketing third parties, [pickets] seek whether through the distribution of literature or otherwise to enlist the support of such third parties."[16] He adds:

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[12] It is submitted that the difference in the factual situations of the *Borden* and Ex parte *Henry* cases must be kept clearly in mind if the significance of the Ex parte *Henry* decision is to be weighed accurately.

[13] This opinion was expressed by an outstanding Texas labor lawyer in the presentation of a paper during the First Annual Institute on Labor Law, Southwestern Legal Foundation, Southern Methodist University Campus, Dallas, April 1-2, 1949.

[14] See note 13, *supra.*

[15] But the *economic* implications of the Ex parte *Henry* fact situation are another matter. So far as the economic effects are concerned, just what difference does it make whether the raiload is prevented from rendering service by a picket line a few feet off the Greenville firm's property or by a line across the rails at a point far from the firm's plant (this last being a "true" secondary picketing situation in the eyes of most courts, as pointed out *infra)*? It makes no difference at all. Indeed, it can be argued from an economic point of view that every so-called "primary" picketing situation actually has "secondary" picketing effects insofar as the line prevents suppliers and customers from doing business with the struck plant. And, when the "third party" is a railroad or a truck line, it seems particularly unrealistic from an economic standpoint for a court to observe, as pointed out *supra*, that just because "third parties who come to the area of the dispute may prove sympathetic to one disputant rather than to the other" picketing is not thereby made an offense against state statutes dealing with secondary picketing and conspiracy in restraint of trade. A railroad or a truck line serving a struck industrial plant does not just casually happen into the area of industrial conflict. The transportation facility's function is comparable with that of an artery leading into the human heart. And the vital effects, on the heart and on the artery, are the same whether the artery is cut near the pump or far removed from it. But, as indicated *infra*, courts generally have not tended to analyze "primary" picketing in these economic terms.

[16] TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING, 456 (1st ed. 1940). Teller

"Secondary picketing is thus generally conceded to mean picketing and not merely persuading of third parties [and] upon the same ground the term secondary boycotting ought to be reserved to describe the case where third parties are actually themselves boycotted and not merely sought to be persuaded."[17]

Thus is does not appear that the Texas Supreme Court was assuming an unusually narrow judicial view in holding that the refusal of the railway employees to cross the line did not constitute secondary picketing by the Greenville Cotton Company pickets. Indeed, it would be difficult to demonstrate convincingly that the United States Supreme Court would have arrived at a different decision under this same set of facts.

Though it has rendered no decision directly in point, language in at least one recent decision indicates that the United States Supreme Court probably would uphold injunctive action taken by a court against "true" secondary picketing under a state statute making the "objective" of such picketing illegal.[18] In *Giboney v.*

says "a number of courts" accept this definition from Truax v. Corrigan, 257 U. S. 312 (1921): "A secondary boycott . . . is where many combine to injure one in his business by coercing third persons against their will to cease patronizing him by threats of similar injury." Teller believes this definition accents the "proper basis of distinction" between primary and secondary boycotts "because the term 'secondary boycott' is then given its natural meaning, viz., a boycott of a person not involved in the primary dispute. Mere attempts at persuasion of third parties should not suffice to characterize such attempts as in the nature of a secondary boycott, since nobody but the person involved in the primary dispute is under such circumstances being boycotted." *Ibid. Cf.* notes 7 and 15, *supra.*

[17] *Ibid.*

[18] And, by the same token, it would seem that the Supreme Court probably will uphold the Taft-Hartley Act prohibition against secondary boycotts (and picketing designed to enforce such boycotts.) At least two United States Circuit Courts of Appeal have held that the freedom of speech guarantee does not protect a union which is peacefully picketing in support of a secondary boycott prohibited by the Labor-Management Relations Act. The court for the Tenth Circuit said in United Brotherhood of Carpenters v. Sperry, 170 F. (2d) 863, 868-9 (1948): ". . . The guaranty of free speech and free press contained in the First Amendment does not compel the United States to tolerate in all places and under all circumstances even peaceful picketing, if it has harmful effect upon interstate commerce. The constitutional right of free speech and free press postulates the authority of Congress to enact legislation reasonably adapted to the protection of interstate commerce against harmful encroachments arising out of secondary boycotts. The . . . picketing of premises as the means of waging a secondary boycott which has the effect of substantially burdening or obstructing interstate commerce is not protected by the First Amendment . . ." In Printing Specialities and Paper Convert. U. v. Le Baron, 171 F. (2d) 331, 334 (C. C. A. 9th 1948), the court said the

Empire Storage and Ice Co.,[19] members of an AFL ice and coal drivers and handlers local union picketed the company's Kansas City, Missouri, plant because it would not agree not to sell ice to nonunion peddlers. Union drivers representing about 85% of the truck drivers working for Empire's customers refused to deliver goods to or from Empire's place of business. Under Missouri's antitrust statute Empire would be subject to criminal prosecution by the state if it agreed to sell ice only to union peddlers, and nonunion peddlers could institute treble-damage suits against it.

In fighting the injunction Empire obtained against the picketing, the union argued that, though the Missouri law could be applied validly to combinations of businessmen who agree not to sell for certain purposes, it could not be so applied to unions in situations like this because of freedom of speech and press considerations grounded in the Fourteenth and First Amendments. But the Court said:

> "... Legislative power to regulate trade and commerce includes the power to determine what groups, if any, shall be regulated. and whether certain regulations will help or injure businessmen, workers, and the public in general.... To exalt all labor union conduct in restraint of trade above all state control would greatly reduce the traditional powers of states over their domestic economy...."[20]

If states cannot, for the reasons asserted by the union, subject union members to such antitrade restraint laws as Missouri's, "neither can Congress." And the Constitution, the Court added, "has not so greatly impaired the states' or nation's power to govern."

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primary objective of the picketing "was to induce the employees of Los Angeles-Seattle and West Coast to engage in a concerted refusal to handle Sealright's goods and thus to force their employers to cease handling or transporting the same . . . The statute [Taft-Hartley] . . . broadly sweeps within its prohibition an entire pattern of industrial warfare deemed by Congress to be harmful to the public interest . . . It is known to all the world that picketing may comprehend something other than a mere expression of views, argument or opinion . . . One must be naive who assumes that its effectiveness resides in its utility as a disseminator of information."

[19] 336 U. S. 490 (1949).

[20] *Id.* at 497.

The Court distinguished the *Thornhill* and *Carlson* decisions,[21] pointing out that in both those cases it had struck down statutes which banned all dissemination of information by people adjacent to certain premises, and emphasizing that those statutes were "so broad" that they could be used not only "to punish conduct plainly illegal but could also be applied to ban all truthful publications of the facts of a labor controversy." The Court pointed to its emphasis in the *Thornhill* case that the states could " 'set the limits of permissible contest open to industrial combatants.' " And it cited its statement in *Bakery Drivers Local v. Wohl*[22] that " '[a] state is not required to tolerate in all places . . . even peaceful picketing by an individual' "; and that picketing may include conduct other than speech—conduct which can be made the subject of restrictive legislation. The Court observed that the union had cited no opinions which "assert a constitutional right in picketers to take advantage of speech or press to violate laws designed to protect important interests of society."

States cannot, of course, constitutionally abridge freedom of speech "to obviate slight inconveniences or annoyances." But "placards used as an essential and inseparable part of a grave offense against an important public law cannot immunize that unlawful conduct from state control." And

> ". . . it has never been deemed an abridgement of freedom of speech . . . to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed."[23]

Such an interpretation

> ". . . would make it practically impossible ever to enforce laws against agreements in restraint of trade, as well as many other agreements and conspiracies deemed injurious to society."[24]

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[21] See notes 2 and 3, *supra.*

[22] 315 U. S. 769 (1942).

[23] 336 U. S. 490, 502 (1949).

[24] *Ibid.*

The Court said the real question was whether Missouri or a labor union "has paramount constitutional power to regulate and govern the manner in which certain trade practices shall be carried on in Kansas City . . ." The power of this union and its allies the Court dubbed "irresistible," pointing out that they were exercising their economic power to compel Empire to abide by union rather than state regulation of trade. It was the Court's significant conclusion that "the state's power to govern in this field is paramount," and that "nothing in the constitutional guarantees of speech or press compels a state to apply or not to apply" its laws against restraint of trade to businessmen, workers, or to other groups.

It would appear that the United States Supreme Court, considering the language it used in the *Giboney Case*, would not find it unduly difficult to sustain a state statute outlawing secondary picketing[25] as a weapon of economic conflict. Indeed, does it not appear that the Court, at least at this time and as now constituted, has strongly qualified the assumption—if ever it actually did embrace it—that peaceful picketing really is constitutionally guaranteed free speech? Does it not now seem that the Court recognizes that picketing is, as Gregory puts it,

> ". . . simply a species of coercion traveling under the guise of speech for the purpose of enjoying constitutional immunity from state [and federal?] regulation"?[26]

And, as indicated *supra*, it does not seem justifiable to conclude from the Texas Supreme Court's decision on the particular facts of the ex parte *Henry* case that it would hold unconstitutional as an interference with freedom of speech an injunction against picketing in a "true" secondary picketing situation of the type it so carefully distinguished in referring to the *Borden* decision.

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[25] The economic consequences of the union's action under a "secondary boycotting" or "secondary picketing" statute would, of course, have been exactly the same as under the Missouri antitrust act.

[26] GREGORY, LABOR AND THE LAW, 360-1 (2nd ed. 1949). Gregory adds, "Any candid labor leader would, in all probability, confess this off the record." *Id.* at 361.

SEGREGATION IN PUBLIC SCHOOLS

In affirming the lower court's denial of the application of Heman Marion Sweatt, a negro, for a writ of mandamus to compel his admission to the University of Texas law school, the Texas Court of Civil Appeals in *Sweatt v. Painter*[27] said the controlling question simply was whether the record showed the state had made available to Sweatt at the time of the trial a first-year law course "the equivalent or substantial equivalent" of that then provided in the state university. It concluded that the record showed

> "... on the part of the State of Texas, an enormous outlay both in funds and in carefully and conscientiously planned and executed endeavor, in a sincere and bona fide effort to afford every reasonable and adequate facility and opportunity guaranteed to relator under the Fourteenth Amendment... the State has effectually accomplished that objective."[28]

The court thus applied the "equal facilities" doctrine which the United States Supreme Court had stated as early as 1878 when it said as dictum in *Hall v. De Cuir*,[29] and enunciated clearly in 1896 in *Plessy v. Ferguson*,[30] that segregation in public schools did not violate the fourteenth amendment if equal facilities were pro-

[27] 210 S.W. (2d) 442 (Tex. Civ. App. 1948) *writ of error refused.* Heman Marion Sweatt's application, in February, 1946, was the first ever made by a negro for admission to the University of Texas law school. No law school for negroes existed in the state. In a mandamus proceding to compel Sweatt's admission, the Travis County District Court issued an interlocutory order that if the state made available to Sweatt by December 17, 1946, a law course "substantially equivalent" to that of the state university the writ of mandamus would be denied; otherwise, it would issue. On December 17, 1946, the trial court entered final judgment denying the writ upon a showing that a first-year law school had been provided to open with the February, 1947, semester as a branch of Pairie View University. The Texas Court of Civil Appeals of Austin set aside this judgment, March 26, 1947, and remanded the cause generally, without prejudice to either party, by agreement of counsel. The lower court again tried the case (May 17-June 17, 1947) and denied the writ upon the specific finding that the state had established a school of law for negroes with "substantially equal facilities . . ." This appeal to the Texas Court of Civil Appeals followed. (This summary is condensed from *id.* at 446.)

[28] *Id.* at 447. TEX. CONST. Art. VII, § 7, reads, "Separate schools shall be provided for the white and colored children, and impartial provisoin shall be made for both."

[29] 95 U. S. 485 (1878). See note 31, *infra.*

[30] 163 U. S. 537 (1896). See note 31, *infra.*

vided. Subsequent decisions of the United States Supreme Court support the validity of this doctrine as applied in the *Sweatt* decision.[31]

But, as Sweatt stated in his brief, the Supreme Court has never met straight-on the question of

"'. . . whether it is possible to have the equality required by the Four-

[31] The latest of these is *Sipuel v. Board of Regents of the University of Oklahoma*, 332 U. S. 631 (1948). Oklahoma's highest court had upheld (180 P. (2d) 135 (1947)) the denial of entry of a negro woman to the University of Oklahoma law school, holding that due process was not denied, where no separate facilities for legal education of colored students are provided, unless and until the student had made his desires known to the proper authorities. A unanimous U. S. Supreme Court ruled that a negro is entitled to secure legal education afforded by a state institution, and that the state must povide it as soon as it does so for any other group. In accordance with the Oklahoma Supreme Court's directive to carry out the mandate of the U. S. Supreme Court, the trial court ordered the Oklahoma regents to (1) enroll plaintiff in the first year class, Oklahoma University law school, or (2) admit no one to that first year class until a separate and substantially equal law school for negroes should be established. If, however, such separate school should be established, then plaintiff was not to be enrolled in the University of Oklahoma. The regents claimed they had set up such a separate school. Instead of attending, plaintiff petitioned the federal Supreme Court for a writ of mandamus to compel compliance with its January 12, 1948, mandate. The Supreme Court denied the petition in *Fisher v. Hurst*, 333 U. S. 147 (1948), holding that the original petition for certiorari did not raise the question whether a state could satisfy due process by establishing a separate law school for negroes. It remanded the petition to the trial court for a determination of any proceedings arising under its order. Justice Rutledge, dissenting, asserted the action of Oklahoma's courts was inconsistent with the mandate on its face. Justice Murphy thought evidence should have been heard as to whether the Oklahoma court's decision was an evasion of the mandate.

Other U. S. Supreme Court decisions in the "unbroken line" referred to by the Texas Court of Civil Appeals in the *Sweatt* opinion include: *Missouri v. Canada*, 305 U. S. 337 (1938), in which the Court held that a state does not discharge its obligation to provide equal educational facilities by offering to pay the tuition of a colored student in an out-of-state law school; *Gong Lum v. Rice*, 275 U. S. 78 (1927), where the Court stated that the equal protection clause was not violated by compelling a full-blooded Chinese school child to attend a negro school under a Mississippi segregation statute; *Plessy v. Ferguson*, 163 U. S. 537 (1896), wherein the Supreme Court reiterated the "equal facilities" doctrine which it had enunciated as dictum in *Hall v. De Cuir*, 95 U. S. 485 (1878) (a case involving a public carrier), to the effect that segregation did not violate the fourteenth amendment if equal facilities were provided.

The Texas Court of Civil Appeals also cited *McCabe v. A. T. & S. F. Ry. Co.*, 235 U. S. 151 (1914) in which the Court, in an action involving Oklahoma's "separate coach law," approved the conclusion of the Circuit Court that the U. S. Supreme Court "had . . . decided . . . so that the question could no longer be considered an open one, that it was not an infraction of the Fourteenth Amendment for a State to require separate, but equal accommodations for the two races." The Texas court also cited *Cummings v. Co. Board of Education*, 175 U. S. 528 (1899), but it does not seem strictly in point; that is, although the Court there was presented with a case arising under the fourteenth amendment and dealing with compulsory segregation of white and negro

> teenth Amendment in a public school system which relegates citizens of a disadvantaged racial minority group to separate schools.' "[32]

That is, the Court has not gone behind the assumption that segregation is constitutional where "equal" facilities are provided. As late as the *Sipuel* decision[33] the Court ignored the question of whether racial segregation *per se* violates the equal protection clause.

The Texas Court of Civil Appeals rejected Sweatt's contention that race segregation in public schools inherently is discriminatory within the meaning of the fourteenth amendment, saying that such an assertion

> ". . . impeaches the soundness of the various decisions of the Federal Supreme Court . . . as being predicated upon a purely . . . theoretical hypothesis, wholly unrelated to reality,"[34]

and,

> "[t]o so hold would convict the great jurists who rendered those decisions of being so far removed from the actualities involved in the race problems of our American life as to render them incapable of evaluating the known facts of contemporaneous and precedent history they relate to those problems."[35]

At least one writer's opinion, however, is (a) that the United States Supreme Court should reexamine its assumption in *Plessy v. Ferguson* that compulsory segregation does "not necessarily imply the inferiority of either race to the other;"[36] (b) that a dual school system, "even if 'equal facilities' were ever in fact provided," does imply social inferiority;[37] (c) that experience in states "in which segregation is compulsory and of long standing

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children in public schools, it refused to consider the question because it was not properly before the Court.

[32] 210 S. W. (2d) 442, 445.

[33] See note 31, *supra*.

[34] 210 S.W.(2d) 442, 445.

[35] *Ibid.*

[36] Comment, 56 YALE L. J. 1509 (1947).

[37] *Id.* at 1060.

. . . indicates that 'equality' of facilities does not, in fact, coexist with segregation";[38] and (d) that "it is to be hoped that the Court will meet the issue head-on by overruling the *Plessy* case and stating . . . unequivocally that compulsory segregation . . . is a denial of 'the equal protection of the laws.' "[39]

Just when or if the Supreme Court will make such a "head-on" examination of the issue is, of course, conjectural. It may be that the Court, cognizant of "the actualities involved in the race problems of our American life," will simply find it necessary to place increasing emphasis on just what constitutes "equality" in educational facilities; but it is also pertinent to observe that

> ". . . a decision that the equal protection clause is not satisfied by equal but separate facilities will bring this field of the law more in accord with the pronounced attitude of the Court in finding racial discrimination unconstitutional in other situations, for example, segregation in interstate transportation, exclusion of Negroes from jury service, differentials in salaries of white and Negro public school teachers, residential segregation prescribed by state legislation or municipal ordinance."[40]

Until, however, the United States Supreme Court does reexamine its long-established acceptance of the "equal facilities" doctrine in the field of education, it would appear that the constitutionality of the Texas Court of Civil Appeals decision in *Sweatt v. Painter* is not to be questioned."[41]

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[38] *Id.* at 1062-64.

[39] *Id.* at 1067. *Cf. Comment*, 46 MICH. L. REV. 639 (1948)

[40] *Comment*, 46 MICH. L. REV. 639, 644 (1948).

[41] A federal district court decision of a few years ago indicates the approach which *might* be made in questioning the basic assumptions of the "equal facilities" doctrine. Mendez v. Westminster School Dist., 64 F. Supp. 544 (S. D. Cal. 1946). In issuing an injunction against the arbitrary assignment of children of Mexican ancestry to separate schools, the District Court said, "The equal protection of the laws pertaining to the public school system in California is not provided by furnishing in separate schools the same technical facilities, text books, and courses of instruction . . . A paramount requisite in the American system of public education is social equality. It must be open to all children by unified school association regardless of lineage." *Id.* at 549. (In affirming on appeal, the Circuit Court of Appeals relied solely on the violation of a California statute restricting segregation and did not deal with the constitutional question. 161 F. (2d) 774 (C. C. A. 9th, 1947).

OBLIGATION OF CONTRACT

In 1922, S. H. Bell executed a deed of trust lien on certain land to secure payment of a loan from the Federal Land Bank of Houston. He had represented himself as a single man, but after his death there appeared one Emma Mae Bell who asserted a common law marriage with Bell and, in 1935, was appointed administratrix. She entered into a compromise, approved by the probate court, of litigation involving the bank's claim, under a 1935 amendment to the Texas statutes;[42] some 243 acres were conveyed to the bank. Later, in a trespass to try title suit by the bank's grantee, Emma Mae and others attacked the 1935 amendment as an impairment of obligation of contract,[43] since it was enacted after Bell had executed the trust lien (1922).

The Texas Court of Civil Appeals held in *Tucker v. Cole*[44] that there was no impairment, for

> "... this statute does not increase the rights of the mortgagor or his estate, at the expense of the creditor, or vice versa, unless all parties to the contract agree to the settlement and the court authorizes and approves the same."[45]

The court pointed out that the probate court prior to the amend-

[42] TEX. REV. CIV. STAT. (Vernon, 1948) art. 3430 reads as follows, the italicized portion having been added by Acts 1935, 44th Leg. p. 662, ch. 277, § 1: "When an executor or administrator deems it for the interest of the estate to purchase or exchange property, or to take any claims or property for the use and benefit of the estate in payment of any debt due or owing to the estate, or to compound bad or doubtful debts due or owing the estate, or to make compromises or settlements in relation to property or claims in dispute or litigation, *or to compromise or pay in full any secured claim which has been allowed and approved as required by law against the estate by conveying the real estate securing the payment of the claim to the holder thereof in full payment, liquidation and satisfaction of such claim and the cancellation of any and all notes, deeds of trust, mortgages or other liens evidencing or securing the payment of such claim,* he shall present an application in writing to the County Court representing the facts; and if the Court is satisfied that it will be to the interest of the estate to grant the same, an order shall be entered showing the authority granted. The executor or administrator may also release mortgages upon payment of the debt secured thereby."

[43] "No state . . . shall pass any law impairing the obligation of contracts." U. S. CONST. Art. I, § 10, cl. 1. "No . . . law impairing the obligation of contracts, shall be made." TEX. CONST. Art I, § 16.

[44] 215 S.W.(2d) 252 (Tex. Civ. App. 1948), *writ of error refused, n. r. e.*

[45] *Id.* at 257.

ment had legal authority under the statute to authorize and approve this settlement, and that the amendment simply provided an "additional remedy for disposing of secured probate claims upon the agreement of the administrator of the estate, the probate court and the mortgage creditor."[46]

The court distinguished *Laubhan v. Peoria Life Ins. Co.*[47] That case concerned a mortgage contract executed in 1929; and under the probate procedure at that time there was no remedy, such as was provided in 1931,[48] whereby, after the death of the mortgagor, the holder of a secured claim could proceed against the specific property securing its payment. That is, under the statute at the time the mortgage was executed in 1929, the mortgage debt would have to take its turn after payment of funeral expenses, court costs and administration expenses, and, under certain conditions, after payment of widow's and children's allowance. The Commission of Appeals felt, in the *Laubhan* case, that this right to have the mortgage contract enforced after these claims, etc., was a

> "... valuable right incorporated into the contract by force of law at the time of its execution (and) to give ... effect to the 1931 procedure provided by the Legislature would take away such right by permitting the (mortgagee) to elect to proceed in probate ... in such manner as to have its claim fixed as a preferred debt and lien against the specific property securing the debt."[49]

This, the Commission said, would be a "violation of contract rights" prohibited by "organic law."

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[46] Texas early followed the common law in holding that an executor or administrator had authority to compromise any debt or claim in regard to the personal effects of the testator or intestate, as indicated by Adriance v. Crews, 38 Tex. 148 (1873). Later cases, however, hold that this common law right of compromise was taken away by the Texas statute requiring court approval of the compromise. Jones v. Gilliam, 199 S. W. 694 (Tex. Civ. App. 1917), judgment affirmed, 109 Tex. 552, 212 S. W. 930 (1919); Scott v. Taylor, 294 S. W. 227 (Tex. Civ. App. 1927). *See also* Duenkel v. Amarillo Bank and Trust Co., 222 S. W. 670 (Tex. Civ. App. 1920). See note, 85 A. L. R. 176, 185, 200.

[47] 129 Tex. 225, 102 S. W. (2d) 399 (Tex. Com. App. 1937).

[48] Acts 1931, 42nd Leg., p. 79, ch. 52; TEX. REV. CIV. STAT. (Vernon, 1948) art. 3515a.

[49] 102 S. W. (2d) 399, 404 (Tex. Com. App. 1937).

The amendment in question in the *Tucker* case, however, "is not subject to the vice discussed in" the *Laubhan* opinion, said the Court of Civil Appeals, adding that the legislature has "undoubted power" to change judicial methods and remedies for the enforcement of contracts, "so long as they do not impair . . . the obligation of contracts."[50]

STATE REGULATON OF SHRIMPING IN THE "MARGINAL SEA"

In 1947, seven Texas citizens, as "resident commercial-fishermen" of the state, filed suit[51] to restrain a number of individuals from operating boats in Texas coastal waters for the "commercial-catching" of shrimp and fish. It was alleged that the boats actually were owned by non-residents of Texas; that the boats had not been registered in Texas for the more than twelve months required by statute;[52] and that only the $3 "resident" boat license, instead of the $2500 "non-resident" license, had been paid. The trial court granted a temporary injunction against all defendants except one Depuglio, who was found to be a resident of Texas of many years' standing, engaged in the use of fishing boats on the Texas coast, "a bona fide owner of said boats . . . [with] a place of residence in the state for more than twelve months, bringing him entitled to a resident fishing license." The Court of Civil Appeals in *Brownsville Shrimp Co. v. Miller*[53] affirmed this decision late in 1947, holding, with very little discussion, that the statute was not unconstitutional as a violation of the privileges and immunities and equal protection clauses of the federal constitution.[54]

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[50] The United States Supreme Court has said in this respect: "The legislature may modify, limit or alter the remedy for enforcement of a contract without impairing its obligation, but in so doing it may not deny all remedy or so circumscribe the existing remedy with conditions and restrictions as seriously to impair the value of the right." Richmond Corp. v. Wachovia Bank, 300 U. S. 124, 128 (1937). And, "the particular remedy existing at the date of the contract may be altogether abrogated if another equally effective for the enforcement of the obligation remains or is substituted for the one taken away." *Id.* at 128-129.

[51] See note 53, *infra.*

[52] TEX. PEN. CODE (Vernon, 1948) art. 934b-1.

[53] 207 S. W. (2d) 911 (Tex. Civ. App. 1947) *writ of error refused, n. r. e.*

[54] In support of this position the court cited many authorities, among them being

In *Dodgen v. Depuglio*[55] the Texas Supreme Court was concerned with the same Depuglio who had been involved in the *Brownsville* case. This time the Game, Fish and Oyster Commission was seeking to collect the $2500 license fee from Depuglio on the basis of the statutory requirement that the fishing boats, to qualify for the $3 license, must have been "continually . . . registered in this State" for more than twelve months. It was admitted that Depuglio was a "resident" and that he had had a bona fide place of business in Texas for more than a year, but the Commission stressed the fact that the boats had not been "continually registered" for any such period. Depuglio filed suit under the Texas Uniform Declaratory Judgment Act,[56] seeking a judgment declaring the licensing unconstitutional and an injunction against the Commission from interfering with his operation of shrimping boats in Texas coastal waters. He contended that Sections 2 and 4[57] of the statute were unconstitutional because they discriminated between residents.

The court rejected his contention, noting that

> "It has been well established since *McCready v. Virginia* that the state, in its sovereign capacity, owns the fish in tidewaters within its jurisdiction."[58]

Having control over fish within its territorial waters, the state is within its police power in regulating fishing and shrimp taking in public waters, and may even prohibit such taking, as a conservation measure, " 'for the ultimate benefit of all the poeple.' "[59] The

McCready v. Virginia, 94 U. S. 391 (1876); Patsone v. Pennsylvania, 232 U. S. 138 (1913); Stephenson v. Wood, 119 Tex. 564, 34 S. W. (2d) 246 (1931); Tuttle v. Wood, 35 S. W. (2d) 1061 (Tex. Civ. App. 1930) *writ of error refused.*

[55] 146 Tex. 538, 209 S. W. (2d) 588 (1948).

[56] TEX. REV. CIV. STAT. (Vernon, 1948) art. 2524-1.

[57] Sec. 2 defines a "Non-resident Commercial Fishing Boat" as one "which has continually been registered" in Texas for more than twelve months. Sec. 4 provides for a $2500 license for a "Non-resident Commercial Fishing Boat. See note 52, *supra.*

[58] 209 S. W. (2d) 588, 592-3 (1948). McCready v. Virginia, 94 U. S. 391 (1876), upheld a Virginia law which prohibited citizens of other states from planting oysters in a Virginia tidewater river. See note 61, *infra.*

[59] Quoting from Tuttle v. Wood, 35 S. W. (2d) 1061, 1063 (Tex. Civ. App. 1930) *writ of error refused.*

state, said the court, may validly require a license and "may make such classifications . . . or exemptions as deemed necessary, so long as such classifications are not unreasonable and arbitrary."[60]

Granted that there was discrimination here against Depuglio, as a resident, such discrimination nevertheless was not unconstitutionally so in view of "the interest sought to be protected." The court noted that if the definition of "Non-resident Commercial Fishing Boat" had been restricted simply to those owned by "non-residents," then the statute could have been evaded easily and its purpose defeated in that a non-resident, merely by transferring his title to the boats to a resident during the fishing season, could thereby escape paying the larger license fee required for non-resident boats.

From the standpoint of the *McCready* case,[61] which held that a state is the proprietor of its tidelands, and that "the citizens of one state are not invested by (the privileges and immunities clause) with any interest in the common property of the citizens of another state,"[62] it would seem that the Texas Court of Civil Appeals in the *Brownsville* decision was blazing no new trail in requiring higher licenses of non-resident than of resident fishermen; nor was the Supreme Court of the state, in the *Depuglio* case, in error in upholding the legislature's attempt to prevent evasion

[60] Citing Hurt v. Cooper, 130 Tex. 433, 110 S. W. (2d) 896 (1937); Beacon Lumber Co. v. Brown, 14 S. W. (2d) 1022 (Tex. Comm. App. 1929); Waid v. City of Fort Worth, 258 S. W. 1114 (Tex. Civ. App. 1923) *writ of error refused.*

[61] The Court said, "The principle has long been settled in this Court, that each state owns the beds of all tide waters within its jurisdiction . . . In like manner, the states own the tide waters themselves, and the fish in them, so far as they are capable of ownership while running. For this purpose the state represents its people, and the ownership is that of the people in their united sovereignty . . . The fisheries . . . remain under the exclusive control of the state, which has consequently the right . . . to appropriate its tide waters and their beds to be used by its people as a common for taking and cultivating fish . . . The right which the people of the state thus acquire comes not from their citizenship alone, but from their citizenship and property combined. It is, in fact, a property right, and not a mere privilege or immunity of citizenship . . . and . . . the citizens of one state are not invested by this clause of the Constitution with any interest in the common property of the citizens of another state." 94 U. S. 391, 394-96 (1876).

[62] See note 61, *supra.*

of the statute by *non*-residents through the requirement that *residents* whose boats have not been "continually" registered for more than twelve months pay higher fees than residents whose boats have been so registered.

But consider the implications, so far as these two Texas decisions are concerned, of three recent United States Supreme Court decisions:

(1) In *United States v. California*[63] the Court held that the state is not the owner of the three-mile marginal belt along its coast nor of the oil contained therein. Was not Federal Circuit Judge Parker whistling in the dark in 1947 when he commented on this decision as follows? He stated that he did "not regard the (California tidelands) decisions as controlling (with reference to regulation of fisheries) in the absence of any assertion of rights by the federal government."[64] He added,

> "The power of the states over such waters and the fishing rights in them is well settled by a long line of decisions, and we do not understand that it was intended by the decision in the California case to overrule these or to question in any respect the law as declared by them.[65] . . . The United States has asserted its paramount authority with respect to oil, but no such authority with respect to fish or fishing; and we see no reason why we should not follow the well settled line of decisions which hold that, in the absence of action by the federal government, the power as to these rests in the several states."[66]

(2) Mr. Justice Black, writing the majority opinion in *Takahashi v. Fish Comm'n*,[67] said:

> "It is true that this Court did long ago say that the citizens of a state collectively own 'the tide-waters . . . and the fish in them, so far as they are capable of ownership . . .' [but] to whatever extent the fish in the three-mile belt off California may be 'capable of ownership' by

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[63] 332 U. S. 19 (1947).

[64] Judge John J. Parker in Toomer v. Witsell, 73 F. Supp. 371, 374 (E. D. S. C. 1947). See the discussion, *infra*, of this case in the United States Supreme Court.

[65] *Id.* at 374-75.

[66] *Id.* at 376.

[67] 334 U. S. 410 (1948).

> California, we think that 'ownership' is inadequate to justify California in excluding any or all aliens who are lawful residents of the State from making a living by fishing in the ocean off its shores while permitting all others to do so."[68]

(3) In *Toomer v. Witsell*[69] the majority of the federal Supreme Court held that the privileges and immunities clause of the constitution was violated by a South Carolina statute requiring non-residents of that state to pay a $2,500 license fee for each shrimp boat and residents to pay a fee of only $25. The Court found no justification for the difference in these licenses and observed:

> "We would be closing our eyes to reality . . . if we concluded that there was a reasonable relationship between the danger represented by non-citizens, as a class, and the severe discrimination practiced upon them."[70]

It added that the record did not show that non-residents use "larger boats or different fishing methods than residents," or "that the cost of enforcing the laws against them is appreciably greater," or that "any substantial amount of the State's general funds is devoted to shrimp conservation." And even if such were the facts, "they would not necessarily support a remedy so drastic as to be a near equivalent of total exclusion."

The Court rejected the argument that fish and game are the "common property of all citizens of the government," that "each government owned . . . the beds of its . . . tidewaters and the waters themselves." It was stated that in only one case, *McCready v. Virginia*,[71] has the Court

> ". . . actually upheld State action discriminating against commercial fishing or hunting by citizens of other States where there were advanced no persuasive independent reasons justifying the discrimination."[72]

The Supreme Court distinguished the *McCready* case by emphasiz-

[68] *Id.* at 421.
[69] 334 U. S. 385 (1948).
[70] *Id.* at 399.
[71] See note 61, *supra*.
[72] 334 U. S. 385, 400 (1948).

ing (a) that it involved oysters, which would "remain in Virginia until removed by man," whereas the South Carolina statute dealt with free-swimming fish; and (b) that the *McCready* decision involved regulation of "inland water fishing, while this statute is aimed at regulation of shrimping in the marginal sea."

The Court stated that while *United States v. California, supra,*

> "... does not preclude all State regulation of activity in the marginal sea, the case does hold that neither the thirteen original Colonies nor their successor States separately acquired 'ownership' of the three-mile belt."[73]

Finally,

> "[t]he whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource. And there is no necessary conflict between that vital policy consideration and the constitutional command that the State exercise that power, like its other powers, so as not to discriminate without reason against citizens of other states."[74]

The Court then concluded that "the *McCready* exception to the privileges and immunities clause, if such it be, should not be expanded to cover this case," and held that "commercial shrimping in the marginal sea, like other common callings, is within the purview of the privileges and immunities clause."

In a concurring opinion, Justices Frankfurter and Jackson felt that the statute should have been struck down on the basis of the commerce clause, and that the Court had misapplied the privileges and immunities clause. Mr. Justice Frankfurter stated:

> "The *McCready* case is not an isolated decision to be looked at askance. It is the symbol of one of the weightiest doctrines in our law. It expressed the momentum of legal history that preceded it, and around it in turn has clustered a voluminous body of rulings. Not only has a host of State cases applied the *McCready* doctrine as to the power of States

[73] *Id.* at 402.
[74] *Ibid.*

> to control their game and fisheries for the benefit of their own citizens, but in our own day this court formulated the amplitude of the *McCready* doctrine by referring to 'the regulation or distribution of the public domain or of the common property or resources of the people of the State, the enjoyment of which may be limited to its citizens as against both aliens and the citizens of other States.' "[75]

Furthermore,

> "[a] State may care for its own in utilizing the bounties of nature within her borders because it has technical ownership of such bounties or, when ownership is in no one, because the State may for the common good exercise all the authority that technical ownership ordinarily confers."[76]

But South Carolina was trying here to provide that "only its citizens shall be engaged in" interstate commerce, and "that is not the exercise of the basic right of a State to feed and maintain and give enjoyment to its own people." Hence, according to Mr. Justice Frankfurter and Mr. Justice Jackson, the statute should have been held unconstitutional as having "exceeded the restrictions of the Commerce Clause."

Where, then, in the light of these three recent federal Supreme Court decisions, do the Texas courts' holdings in the *Brownsville* and *Depuglio* cases stand? Perhaps three very tentative and general observations are justifiable: (a) it may be, under these Supreme Court rulings and in view of the tendency toward increasing federal control, that the national government may "assert" its "paramount" authority over fishing and shrimp-taking and set up its own regulations in the "marginal sea;" (b) certainly it would appear that the "proprietorship' 'theory cannot now be relied upon to preclude the application of the privileges and immunities clause, and that under that clause the disparity of treatment between non-residents and residents (and residents and residents?) must be "reasonable" and not "one hundred times" more severe for the one than for the other; (c) at least a part of the Supreme

[75] *Id.* at 408-09.
[76] *Id.* at 408.

Court, though still paying a certain amount of respect to the *McCready* doctrine, appears willing to strike down shrimp-taking statutes as drastic as South Carolina's (and that of Texas?) on the basis of the commerce clause.

RIGHT TO COUNSEL

The Texas Court of Criminal Appeals held in *Stanfield v. State*[77] that the lower court did not deny one Stanfield due process in trying him on a non-capital felony charge,[78] without counsel, following its refusal of his request for a postponement of the trial until he could obtain counsel. The Court of Criminal Appeals emphasized (a) that defendant was a grown man; (b) that the record did not indicate that he was "inexperienced and incapable of representing himself;" (c) that his cross-examination of witnesses and the general conduct of the trial indicated his "capability of conducting" his own defense; (d) that he made no request that the trial court appoint counsel to represent him; (e) that he made no claim that he was too poor to employ counsel, or (f) that "any contingency existed whereby he could not, himself, provide counsel;" (g) that he knew there was a case pending against him and that "ordinary diligence" required that he provide himself with counsel "if he wanted such representation."[79]

This opinion appears to be in line with the view of the majority of the United States Supreme Court as emphasized in recent decisions. That view appears to be (a) that, in general, the sixth amendment to the federal constitution applies only to federal court trials,[80] and (b) that the due process clause of the fourteenth amendment does not incorporate the specific guarantees found in the sixth; but (c) nevertheless the "totality of facts" in a given

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[77] 212 S. W. (2d) 516 (Tex. Crim. App. 1948).

[78] Theft of personal property over $50, for which he received a two-year penitentiary sentence.

[79] The court concluded that its decision rested "upon the proposition of waiver, by appellant, of his right to representation by counsel." 212 S. W. (2d) 516, 519 (Tex. Crim. App. 1948).

[80] Betts v. Brady, 316 U. S. 455 (1942); Palko v. Connectitcut, 302 U. S. 319 (1937).

case may show a denial of due process of law. Each case must be considered individually, and

> "[t]hat which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial."[81]

The Supreme Court has held, for example, that representation by counsel in a state court was not necessary under the due process clause (a) where the record showed that, following his request for appointment of counsel, an indigent, forty-three year old convict "of ordinary intelligence, and ability to take care of his own interests," and "not wholly unfamiliar with criminal procedure," was convicted of robbery, the "simple issue" in the case being an alibi;[82] (b) where the record did not show that an offer of counsel had been made, but did show that the defendants, convicted of robbery some eleven years before, were "mature" men, and that they were advised by the court, before accepting their pleas of guilty, of their " 'rights of trial' " and of the consequences of their plea of guilty;[83] (c) where, in proceedings in-

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[81] Betts v. Brady, 316 U. S. 455, 462 (1942). See note 86, *infra.*

[82] *Ibid.* Mr. Justice Black, with Justices Douglas and Murphy, dissented, saying that the petitioner was "too poor to hire a lawyer," that he so informed the court and requested that counsel be appointed to defend him. Mr. Justice Black said, "I believe that the Fourteenth Amendment made the Sixth applicable to the state."

[83] Foster v. Ill., 332 U. S. 134 (1947). Justice Black, joined by Justices Douglas, Murphy, and Rutledge, disagreed: "The Court seems to fear that protecting these defendants' right to counsel to the full extent defined in the Bill of Rights would furnish 'opportunities hitherto uncontemplated for opening wide the prison doors of the land,' because, presumably, there are many people like (these defendants) behind those doors after trials without having had the benefit of counsel. I do not believe that such a reason is even relevant to a determination that we should decline to enforce the Bill of Rights." *Id.* at 140. Mr. Justice Rutledge also wrote a dissenting opinion, Justices Black, Douglas, and Murphy concurring: ". . . Petitioners were charged with . . . burglary and larceny, handed a copy of the indictment, and arraigned. Every lawyer knows the difficulties of pleading to such charges, including the technicalities of the applicable statutes and especially of the practice relating to included or lesser offenses. The crimes involved penalties of imprisonment for from one year to life, the penalty actually imposed upon these petitioners." *Id.* at 142. ". . . When men appear in court for trial or plea, obviously without counsel or so far as appears the means of securing such aid, under serious charges . . . it is altogether inconsistent with their federal constitutional right for the court to shut its eyes to their apparently helpless condition without so

volving a fourth offender who did not request counsel and who was sentenced to life imprisonment by a Pennsylvania state court, the only question of fact before the Court was whether defendant, a man about thirty-eight, was the same person convicted in four previous cases, which he admitted, and where "no exceptional circumstances" were disclosed in the record.[84]

On the other hand, the Supreme Court has ruled that appointment of counsel by a state court was necessary under the due process clause (a) where an ignorant Indian, who made no request for counsel, was charged with robbery and there was involved a jurisdictional question, "posing a problem . . . obviously beyond the capacity of even an educated layman, and which clearly demands the counsel of experience and skill";[85] (b) where an eight-

much as an inquiry concerning its cause." *Ibid.* "A 'presumption of regularity' to sustain what has thus been done makes a mockery of judicial proceedings . . . and a snare and a delusion of constitutional rights for all unable to pay the cost of securing their observance." *Id.* at 145.

[84] Gryger v. Burke, 334 U. S. 728 (1948) The majority felt that "it rather overstrains our credulity to believe that one who had been a defendant eight times and for whom counsel had twice waged defenses, albeit unsuccessful ones, did not know of his right to engage counsel." Id. at 730.

It was asserted in a dissenting opinion by Justice Rutledge, Justices Black, Douglas, and Murphy concurring, that the defendant was sentenced to life imprisonment by a court "working under the misconception that a life term was mandatory, not discretionary, under the Pennsylvania Habitual Criminal Act [when] exactly the opposite is true." *Id.* at 733. And even if it could be assumed "that he knew of his right to counsel from his frequent prior appearances in court, still it cannot be assumed, indeed the record substantially disproves, that he knew the exact terms of the Habitual Criminal Act." *Id.* at 735. Justice Rutledge argued that if counsel had been appointed he "could have taken steps to see that the sentence was not predicated on misconception or misreading of the controlling statute, a requirement of fair play which absence of counsel withheld from this prisoner." *Id.* at 735-36. The dissenting justices could not distinguish this situation from that in the *Townsend* case, *infra*, in which the Court, in the same term, found that "Townsend was prejudiced by the trial court's action in sentencing him on the basis of misinformation submitted to it concerning his prior criminal record or by its misreading of the record and carelessness in that respect." *Id.* at 733. The minority felt that Gryger's sentence was invalid on the same basis.

[85] Rice v. Olsen, 324 U. S. 786, 789 (1945).

With reference to *capital* offenses, the federal Supreme Court held in Powell v. Alabama, 287 U. S. 45, 71 (1932), that ". . . where the defendant is unable to employ counsel, and is incapable of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the Court, whether requested to or not, to assign counsel for him as a necessary requirement of due process." Williams v. Kaiser, 323 U. S. 471 (1945), involved a trial for robbery by means of a deadly weapon, a capital offense in the Missouri trial court. The federal Supreme Court held there was a deprivation of due process by the failure to appoint counsel for a defendant who was

een-year-old youth, whose request for appointment of counsel was denied by the trial court, was "imprisoned under a Florida state court conviction of the non-capital offenses of breaking and entering," and who "though not wholly a stranger to the Court Room," having been convicted of earlier offenses, "was still an inexperienced youth unfamiliar with Court procedure . . . incapable of adequately representing himself," even where "no complicated legal questions" apparently were involved;[86] (c) where defendant, who made no request for counsel, was convicted of a non-capital offense in a Pennsylvania court and the record showed that, while the court was considering the sentence to be imposed, the defend-

"without funds" and "incapable adequately of making his own defense." The same result was reached in DeMeerler v. Michigan, 329 U. S. 663 (1947), when a seventeen-year old defendant was sentenced to life imprisonment on a murder charge after being "hurried through unfamiliar legal proceedings" without being advised of his right to counsel.

[86] Wade v. Mayo, 334 U. S. 672 (1948). One Texas lawyer interpreted this decision to mean that ". . . from now on, in the trial of every felony case, non-capital as well as capital, the trial court will be obliged to furnish the defendant with counsel. *if the defendant* asks for it." (Italics added.) James, *Right of Counsel for Defendants Charged by Non-Capital Felonies in State Courts*, 11 TEX. BAR JOURNAL 575, 576 (1948). This interpretation that the *request* for counsel is of crucial importance seems questionable. In the first place, the language of the *Wade* opinion appears to embody as its primary point the basic position the majority of the Court has been stressing in its decisions on this subject (both before and after the *Wade* case), namely, that the "totality of facts" in a given non-capital case may show a denial of due process and that each case must be considered individually on the basis of this "totality." The key passage in the *Wade* decision appears to be this: "There are some individuals who, by reason of age, ignorance or mental incapacity, are incapable of representing themselves adequately in a prosecution of a relatively simple nature. This incapacity is purely personal and can be determined only by an examination and observation of the individual. Where such incapacity is present, the refusal to appoint counsel is a denial of due process of law under the Fourteenth Amendment." *Id.* at 684. Secondly, the majority opinion in the most recent Supreme Court pronouncement on this subject reads, "Where the gravity of the crime and other factors—such as the age and education of the defendant, the conduct of the court or the prosecuting officials, and the complicated nature of the offense charged and the possible defenses thereto—render criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair, the [majority] group holds that the accused must have legal assistance under the Fourteenth Amendment whether he pleads guilty or elects to stand trial, *whether he requests counsel or not.*" (Italics added.) Uveges v. Pa., 335 U. S. 437, 441. Finally, with the language of the *Uveges* decision freshly in mind, it may be in point to recall that the Court, in Betts v. Brady, 316 U. S. 455 (1942), had before it a non-capital case where a request for counsel had been made and had been denied. The Court, in upholding the state court's action, seems not to have attributed significance to the fact that counsel had been requested. See notes 81 and 82, *supra*, and the discussion in connection with which they are cited.

ant was prejudiced, either by the prosecution's submission of misinformation regarding his prior criminal record or by the court's careless misreading of that record;[87] (d) where a Pennsylvania state court did not attempt to make a seventeen-year-old defendant, who did not ask for counsel, understand the consequences of his plea of guilty when charged with four separate burglaries for which he could have been given maximum sentences totalling eighty years, and for which he was sentenced to from five or ten years on each indictment, the sentences to run consecutively.[88]

A persistent minority in the Supreme Court insists that the sixth amendment's absolute guarantee of counsel in federal courts should be extended to state court trials.[89] As Mr. Justice Reed summed up the controversy between the two groups in the latest case involving this issue,

> "[s]ome members of the Court think that where serious offenses are charged . . . the services of counsel to protect the accused are guaranteed by the Constitution in every such instance . . . Only when the accused refuses counsel with an understanding of his rights can the Court dispense with counsel. Others of us think that when a crime subject to capital punishment is not involved, each case depends on its own facts . . ."[90]

Perhaps the embattled minority will prevail in future decisions in this field, and Justices Murphy, Black, Douglas, and Rutledge may, indeed, succeed in their "attempt . . . to read the entire Bill of Rights, procedural and substantive, into the Fourteenth Amendment."[91]

Walter E. Boles, Jr.

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[87] Townsend v. Burke, 334 U. S. 736 (1948).

[88] Uveges v. Pa., 335 U. S. 437 (1948).

[89] See the reference to dissents in notes 82, 83, 84, *supra.*

[90] Uveges v. Pa., 335 U. S. 437, 441 (1948).

[91] Cahill, *The United States Supreme Court 1947-48*, 28 ORE. L. REV. 26, 39, note 62 (1948).