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In a two year period the Congress enacted a series of laws which had a profound effect on the Negro revolution. Discussed in this document are the cases which were brought to the Supreme Court to either challenge the constitutionality of these laws or to appeal for reversal of lower court decisions on the basis of the laws. Cited are cases based on the Civil Rights Act of 1964, the Voting Rights Act of 1965, and various constitutional amendments. (NH)

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Shaping The Negro Revolution Through Court Decisions, 1964-1966

By Robert L. Gill

So extensive and profound has the revolutionary character of the American Negro's struggle for human dignity and equality of opportunity become in the relatively short period since the enactment of the Civil Rights Act of 1964, that it may well be a decade or more before the dust of this continuing battle settles enough for sociologists and historians to assess accurately the quality and dimensions of change in the lives and institutions of the people of the United States. Legislative acts and judicial determinations continue to provide the most significant signposts of progress in the Afro-American's long journey from chattel-slavery to full citizenship.

In the pre-World War II depression era, the Congress of the United States, under the leadership of Franklin D. Roosevelt, enacted laws directed toward socio-economic goals, many of which were struck down by the Supreme Court subsequently. The laws that remained set the precedent for state and federal legislation the sole purpose of which is to so influence the socio-economic factors relating to some aspect of American life, as to bring about a change in the whole. Thus, the period from 1964-1966 has seen the Congress of the United States enact laws relating to poverty, elementary and secondary education, voting rights, and the creation of a new cabinet level department of housing and urban development, all of which have civil rights dimensions, psychological implications, and socio-economic purposes.

In 1908, Louis D. Brandeis, a corporation lawyer who was to become a famous Associate Justice of the United States Supreme Court, arguing in the case of *Muller v. Oregon*,[1] submitted a brief to the Supreme Court which, by its use of medical and sociological data to support his thesis of the evils of unregulated working hours for women, revolutionized legal briefs. The Justices, by accepting and praising Brandeis for the brief in their unanimous decision upholding the law of Oregon, in turn set the judicial precedent[2] which was to find a most meaningful application in the school desegregation cases, *Brown v. Board of Education*[3] and *Bolling v. Sharpe*.[4] In their decisions in the latter two cases, the Justices indirectly affirmed the Brandeis precedent, gave it a psychological dimension, and widened the constructive application of the due process clause of the Fifth

[1] *Muller vs. Oregon*, 208 U. S. 412 (1908).

[2] Justice Brewer's opinion as quoted in Noel T. Dowling and Gerald Gunther, *Constitutional Law: Cases and Material*, The University Casebook Series, Brooklyn, New York: The Foundation Press, Inc., 1965, pp. 870-871.

[3] *Brown vs. Board of Education*, 347 U.S. 483 (May 17, 1954).

[4] *Bolling vs. Sharpe*, 347 U.S. 497 (May 17, 1954).

Amendment and the equal protection clause of the Fourteenth Amendment.

However, it was not to be supposed that passage of Title II, The Public Accommodations Section of the Civil Rights Act of 1964, involving the regulatory power of the Commerce clause to bar racial discrimination would go unchallenged. In *Heart of Atlanta Motel v. U. S. and Kennedy,*[5] an appeal was made to the United States Supreme Court from a ruling in which a three judge Federal Court had held those sections of the Act (88 201 (a), (b) (1) and (c) (1)) being contested, to be constitutional and had issued a permanent injunction restraining appellant from continuing to violate the Act. The Supreme Court reaffirmed the action of the District Court[6] and, in the opinion written by Mr. Justice Clark, noted that though Congress was dealing with what it considered a moral problem in framing Title II, [this]

> . . . does not detract from overwhelming evidence of the disruptive effect that recial discrimination has had on commercial intercourse.
>
> . . . The determinative test of the exercise of power by Congress under the Commerce Clause is simply whether the activity sought to be regulated is "commerce which concerns more than one state" and has a real and substantial relation to the national interest.
>
> . . . [There is] a qualitative as well as quantitative effect on interstate travel by Negroes. The former was the obvious impairment of the Negro traveler's pleasure and convenience that resulted when he continually was uncertain of finding lodging. As for the latter, there was evidence that this uncertainty stemming from racial discrimination had the effect of discouraging travel on the part of a substantial portion of the Negro community . . .[7]

Thus, the Supreme Court upheld the constitutional validity of Title II of the Civil Rights Act of 1964 against an attack by hotels, motels, and like establishments. In *Katzenbach v. McClung*[8] the complaint for injunctive relief against appellants attacked the constitutionality of the Act as applied to a restaurant. Mr. Justice Clark delivered the Court's opinion that

> We think . . . that Congress acted well within its power to protect and foster commerce in extending the coverage of Title II only to those restaurants offering to serve interstate travellers or serving food, a substantial portion of which has moved in interstate commerce . . . The Civil Rights Act of 1964, as here applied, we find to be plainly appropriate in the resolution of what the Congress found to be a national commercial problem of the first magnitude. We find it in no violation of any express limitations of the Constitution, and we, therefore, declare it valid. The judgment is there, Reversed.

It is important to note that in concurring, Mr. Justice Douglas stated:

> It is rather my belief that the right of people to be free of state action that discriminates against them because of race, like the "right of persons to move freely from State to State[9] occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal across state lines.[10] . . . The result reached by the Court is for me much

[5]*Heart of Atlanta Motel vs. United States and Kennedy,* 379 U.S. 241, 85 S. Ct. 348, L. Ed. 2d 258 (1964).

[6]9*Race Relations Law Reporter* (December 14, 1964), 908, 1950.

[7]*Op. cit.,* Dowling and Gunther, pp. 320-323.

[8]*Katzenbach vs. McClung,* 379 U.S. 294, 85 S. Ct. 377, 13 L. Ed. 2d 290 (1964).

[9]*Edwards vs. California,* 314 U.S. 160, at 177 (1941).

[10]*Hamm vs. City of Rock Hill,* 379 U.S. (1964), and *Lupper vs. State of Arkansas,* ruled on the same ground as *Hamm* (December 14, 1964). See also 9 *Race Relations Law Reporter,* p. 1640; *Blow vs. State of North Carolina,* 379 U.S. 684 (1965).

> more obvious as a protective measure under the Fourteenth Amendment than under the Commerce Clause.

Also concurring, Mr. Justice Goldberg stated

> . . . The primary purpose of the Civil Rights Act of 1964, however, and as I would underscore, is the vindication of human dignity and not more economics . . . Congress clearly had authority both under Sestion 5 of the Fourteenth Amendment and the Commerce Clause to enact the Civil Rights Act of 1964.

In the trespass cases brought before the Supreme Court pursuant to the Civil Rights Act of 1964[11] the constitutional question of the character of the States' involvement and responsibility for discrimination by a private businessman was not resolved by either of the Court's decisions although conviction followed arrest by police officers called to eject from the premises of proprietors whose sole reason to eject was to keep the facilities segregated. In its decisions the Court held that the business establishments were covered by the Public Accommodations provisions of the Act; construed Sec. 203 (C) of the Act as immunizing from prosecution under state criminal trespass or breach of the peace statutes any peaceful attempts to gain admittance or to remain in a covered establishment; and, held pending convictions for such conduct occurring prior to enactment of the law to be abated by its passage. With this application of the Federal Supremacy Clause which requires that in the event a direct conflict between a federal and a state statute, the state law must give way, the Court set a precedent. This (Consolidated *Lupper v. State of Arkansas* and *Hamm v. City of Rock Hill)* "case is the first to mandate the extension of federal abatement across jurisdictional lines of authority."

Of the 1964 Sit-In decisions, only in the case of *Bell v. Maryland*[12] did six members of the Court reach the constitutional question of State action under the Thirteenth and Fourteenth Amendments. These six Justices divided three and three, and the case was decided on the grounds that since the petitioners' convictions were affirmed by the Maryland Court of Appeals on January 9, 1962, laws had been enacted abolishing the crime of which the petitioners were convicted. The judgment was reversed.

Even as the Civil Rights Act of 1964 was being validated by decisions of the Supreme Court, and the abatement cases were extending the Federal Principle across jurisdictional lines, other cases of a civil rights nature were coming before the Court. Two of these came under the criminal law, breach of the peace statutes: *City of Rock Hill v. Leroy Henry*[13] and *Charles F. Burr, et al. v. City of Columbia, South Carolina.*[14] In the former case sixty-five Negroes were convicted in a South Carolina court of breach of the peace. On appeal, the State

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[11] 31 *Brooklyn Law Review — Notes,* Brooklyn Law School (1964-65).

[12] *Bell vs. Maryland,* 378 U.S. 226 (1964). Robert Mack Bell, an honor graduate of Dunbar High School, Baltimore, was graduated from Morgan State College with highest honor, June 6, 1966. At this commencement he received the President's Second Mile Award. He was President of the Student Government for the school year 1965-1966, a Department of State intern during the summer of 1965, a recipient of a $2,600 scholarship to study law at Harvard Law School. During the summer of 1966, Mr. Bell served as an assistant to Dr. Kenneth B. Clark, who was employed by the U. S. Department of State to re-evaluate the written examination given by the Department in recruiting employees for the career service. For a detailed account of the *honors* and *achievements* of Robert Mack Bell, see *Who's Who in American Colleges and Universities,* 1966.

[13] *City of Rock Hill vs. Leroy Henry,* 376 U.S. 776, 84 S. Ct. 1042 (April 6, 1964).

[14] *Charles F. Barr, et al. vs. City of Columbia, South Carolina,* 378 U.S. 146, 84 S. Ct. 1734 (June 22, 1964).

Supreme Court affirmed the convictions, holding that the defendants were convicted of a common law offense, and not under a segregation statute; that their singing, though a lawful act was done at a time and place and in such a way as to be unlawful. The United States Supreme Court remanded the case for reconsideration in the light of *Edwards v. South Carolina.*[15] Finding no error in its previous decision, and holding that the acts of the defendants were a more serious violation of the public peace and order than those in the Edwards case, the South Carolina Supreme Court reinstated the judgment. Again the United States Supreme Court granted a *writ of certiorari* and reversed the judgment. The Supreme Court ruled that in this, as in the Edwards case,

> they [the defendants] were convicted upon evidence which showed no more than that the opinions which they were peaceably expressing were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection.[16]

Edwards had established that the Fourteenth Amendment does not allow a state to make peaceful expression of unpopular views criminal. Thus, the Supreme Court ruled that a conviction resting on any of the grounds cited by the State Supreme Court could not stand.[17]

In the latter case, five sit-in students were convicted of breach of the peace and trespass in Municipal Court. The South Carolina Supreme Court affirmed the convictions, declining to review the evidence on procedural grounds. Rejecting procedural grounds, the United States Supreme Court reversed the convictions finding no evidence to sustain breach of the peace convictions and that, therefore, the convictions violated the due process clause of the Fourteenth Amendement. In separate opinions the criminal trespass convictions were reversed, also for reasons cited in *Bouie v. State of Maryland.*[18] Three Justices dissented from the reversal of the criminal trespass convictions. Mr. Justice Goldberg and the Chief Justice, in part joined by Mr. Justice Douglas, wrote a special opinion of interest not only as to extent but as a revelation of the kind of argument that may someday become the Court's opinion. The opinion held that the Fourteenth Amendment was intended to obligate a state, either by statutory law or by its common law, to guarantee to all citizens access to places of public accommodation, and that the failure of a state to protect this constitutional right of Negroes is no justification for its judiciary's participation in prosecutions of citizens for exercising such rights.

An area of civil rights long in controversy because of the southern custom of excluding Negroes from jury service came before the Supreme Court in the case of *Arnold v. North Carolina.*[19] In this case, two Negroes who had been convicted in a North Carolina court of the murder of a white man, appealed their convictions on the grounds that Negroes had been systematically excluded from their grand jury. The State Supreme Court affirmed their convictions.[20] The United States Supreme Court reversed the judgment, holding that a "prima facie" case of the denial of equal

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[15]*Edwards vs. South Carolina,* 372 U.S. 229, at 237 (January, 1963). See also 8 *Race Relations Reporter,* 801 (1963).

[16]Also, cf. *Terminiello vs. Chicago,* 337 U.S. 1, 5 (1949).

[17]*Op. cit., Edwards vs. South Carolina,* 372 U.S. 229 (January, 1963).

[18]*Bowie vs. State of Maryland,* 84 S. Ct. 1697 (1964).

[19]*Arnold vs. North Carolina,* 376 U.S. 773 (1964).

[20]Cf 8 *Race Relations Law Reporter,* 235 (1963).

protection guaranteed by the constitution had been established by the uncontradicted testimony of the clerk of the trial court that in twenty-four years he could remember only one Negro serving on a grand jury, and the testimony of the county tax assessor that tax records of the county, from which the names of jurors were taken, showed that Negroes made up one-third to one-fourth of the names on the tax rolls.

An historically bitter area of race relations controversy, miscegenation, came before the United States Supreme Court in the case of *McLaughlin v. State of Florida.*[21] A Negro man and a white woman were convicted of having violated a Florida law making cohabitation by persons of different races a criminal offense. The State Supreme court affirmed the conviction citing an earlier decision of the United States Supreme Court holding that the equal protection guaranty is satisfied if the same penalties are prescribed for both offenders.[22]

The convictions were reversed on appeal to the Supreme Court. The Court held that the 1883 decision of the United States Supreme Court was based on too limited a view of the Equal Protection Clause and was no longer authoritative as a precedent. That the Court's opinion invalidated Chapter 798.05 of the statute without ruling on the constitutionality of the miscegenation law per se, and without expressing any views on the states' ban on interracial marriage was a matter of great disappointment. Perhaps no other restriction upon the dignity and freedom of the Negro race has been so burdensome or so relevant to all other limitations imposed upon its right to "life, liberty, and the pursuit of happiness," postulated in the Declaration of Independence. Thus, Mr. Justice Stewart's concurrence in which he was joined by Mr. Justice Douglas is singularly expressive.

> . . . The Court implies that a criminal law of the kind here involved might be constitutionally valid if a state could show "some overriding statutory purpose." This is an implication in which I cannot join, because I cannot conceive of a valid legislative purpose under our Constitution for a state law which makes the color of a person's skin the test of whether his conduct is a criminal offense. . . . I think it is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor. Discrimination of that kind is invidious *per se*.[23]

He notes further, "Since I think this criminal law is clearly invalid under the Equal Protection Clause of the Fourteenth Amendment, I do not consider the impact of the Due Process Clause of that Amendment nor of the Thirteenth and Fifteenth Amendments." It may well be that Mr. Justice Stewart's opinion points the way to future progress in the Supreme Court for the Negro.

As the area of historic break-through and continuing resistance in southern states, educational desegregation cases continue to come before the Court. A landmark decision was added to this growing number in the case of *Griffin, et al. v. County School Board of Prince Edward County, et al.*[24]. The attempts of the county to avoid desegregation began in 1959 with the closing of

[21] *McLaughlin, et al. vs. Florida,* 379 U.S. 184 (1964).

[22] 8 *Race Relations Law Reporter,* 427 (1963); cf. *Pace vs. Alabama,* 106 U.S. 583 (1883).

[23] *Op. cit., McLaughlin, et al. vs. Florida,* 379 U. S. 184 (1964).

[24] *Griffin, et al. vs. Prince Edward County,* 377 U.S. 218 (1964). In 1959, Prince Edward County discontinued its public schools. Both Virginia and Prince Edward County adopted tuition grant programs for children attending private schools for white children.

public schools and the provision of state and county grants to white children to attend private schools. The Court, in an opinion by Justice Black, held that this system violated the Equal Protection Clause, and, that, "Whatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional."[25] The case was remanded with the Court urging "quick and effective" relief. Justice Black noted that the District Court, to prevent further racial discrimination, could require the Supervisiors to use their power to levy taxes and raise funds to reopen, operate, and maintain without racial discrimination a public school system in Prince Edward County like that operated in other counties in Virginia.

During this era, legal attacks upon the N.A.A.C.P. continued. On June 1, 1964, the Supreme Court's decision was made in the case of the *National Association for the Advancement of Colored People et al. v. State of Alabama*[26] which had begun in 1956, when the Attorney General of Alabama brought suit in an Alabama State Court to restrain the N.A.A.C.P. from doing business in Alabama without complying with state laws requiring registration of foreign corportions and, subsequently, the N.A.A.C.P. was ordered to produce certain books. papers, and documents including a membership list. The Association refused to produce the latter, was found in contempt, and fined. Mr. Justice Harlan delivered the opinion of the Court that various acts alleged in the complaint concerning efforts of the N.A.A.C.P. on behalf of integration and civil rights of Negroes were either allegations of lawful conduct or of conduct which, even if unlawful, under state law, did not justify complete suppression of the Association's activities in Alabama. The allegations were found to suggest no legitimate governmental objective and it was asserted that the case involved, not privilege of a corporation to do business but, "the freedom of individuals to associate for the collective advocacy of ideas."[27] The judgment was reversed and the case remanded.

There were, of course, many other civil cases brought before the Court in 1964. Many of these were as notable for the dissenting opinions of the Justices[28] as for any contribution or failure to contribute to the progress of the Negro to full citizenship under the law. However, the cases cited are sufficient to reveal the wide front upon which progress was being made, and the broadened scope of the opinions written, extending the guarantees of the First, Fifth, Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution, to protect the rights of Negro citizens.

The federal legislative activity which began with the Civil Rights Act of 1957 and continued with the Civil Rights Acts of 1960 and 1964 had as one of its major purposes the improvements of remedies against racial discrimination in voting. The 1957 Act established the Civil Rights Commission, whose studies have been important to subsequent legislation, as well as in litigation, and Titles I and VIII of the 1964 Act contained new voting rights provisions. How-

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[25] *Ibid.*

[26] *National Association for the Advancement of Colored People, et al vs. State of Alabama et rel. Flowers*, 377 U.S. 288 (June 1, 1864)

[27] *Ibid.*

[28] For example: *Wright, et al. vs. Rockefeller, et al.*, 84 S. Ct. 603, relating to Reapportionment of the 17th Congressional District of Manhattan Island. Note especially the views of Justice Douglas and Justice Goldberg.

ever, the most historic act of 1964 was the ratification of the Twenty-fourth Amendment to the Constitution eliminating the poll tax in federal elections. This Amendment, with the 1964 Reapportionment Decisions of the Supreme Court and decisions rendered by the Court under the aforementioned Civil Rights Acts, was to provide a formidable array of legal weapons to protect the rights of Negro citizens.

On June 15, 1964, the Supreme Court, in the case of *Reynolds v. Sims,*[29] held that the legislatures of six states – Alabama, Colorado, Delaware, Maryland, New York, and Virginia–had been unconstitutionally apportioned. Chief Justice Warren wrote all of the opinions for the Court with the major Court opinion answering some of the questions left open in *Baker v. Carr.*[30] The opinion states that the number of similar cases filed and decided by lower courts since their decision in *Baker v. Carr* demonstrated that the problem of state malapportionment was one seen to exist in a large number of states. It noted that previous decisions had established the basic principle of equality among voters within a state; that members of the Federal House of Representatives are to be chosen "by the people," while attacks on state legislative apportionment schemes are based primarily on the Equal Protection Clause of the Fourteenth Amendment; and that the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic states, or place of residence within a state.

> . . . A denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us. . . . To the extent that a citizen's right to vote is debased, he is that much less a citizen. . . . The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races. . . . In summary, we can perceive no constitutional difference, with respect to the geographical distribution of state legislative representation, between the two houses of a bicameral state legislature.[31]

The judgment (the District Court) was reaffirmed and remanded for further proceedings consistent with the views stated in the opinion.

In *United States v. Mississippi, et al.*[32] the United States brought action in the Federal District Court against the State of Mississippi, members of the State Board of Elections Commissioners, and six County Registrars, contending that the Mississippi Constitution and statutes governing elections were unconstitutional *prima facie* and in application. The State of Mississippi moved for dismissal and the motion was granted. On appeal to the United States Supreme Court the decision was reversed and remanded so that the Federal District Court could rule on the factual allegations in the light of the United States Supreme Court's opinion. This opinion held that the complaint stated a claim upon which relief could be granted–an alleged system of systematic disenfranchisement of Negroes. It was stated further that the Attorney General of the United Sates has the power to bring suit against a state and its officials to protect the voting rights of Negroes guaranteed by the Civil Rights Act of 1960 and the Fourteenth and Fifteenth Amendments. The Court did not reach the Constitutional questions, holding that the

[29] *Reynolds vs. Sims,* 377 U.S. 533 (1964).

[30] *Baker vs. Carr,* 369 U.S. 186 (1962).

[31] *Ibid.*

[32] *United States vs. Mississippi, et al.,* 380 U.S. 128 (March 8, 1965).

factual allegations were sufficient to justify relief if proved. In *Louisiana v. United States,*[33] the United States brought suit under the Civil Rights Act against the State of Louisiana, directors and members of the Board of Elections alleging that voter registration requirements and procedures were unconstitutional *prima facie*. These involved interpreting the State Constitution and the taking of a citizenship test. Upon direct appeal to the Supreme Court, the decision and remedies of the three judge District Court were affirmed. Their action had held the State constitutional and statutory provisions relating to requirements for voter registration unconstitutional under the Fourteenth and Fifteenth Amendments, and enjoined enforcement of the provisions requiring interpretation of the State Constitution. In order to undo the results of past disenfranchisement, the registrars of the twenty-one parishes named were enjoined from administering the citizenship test which was held to be unconstitutional in its application since Negroes were the only ones unduly burdened by it. The registrars were enjoined from its administration until there was a general re-registration or a demonstration that the efforts of previous discrimination had been vitiated.

On August 6, 1965, the President of the United States, Lyndon B. Johnson, signed into law, the Voting Rights Act of 1965,[34] the fourth bill to be enacted by the United States Congress since 1957 attempting to safeguard the right of every citizen to vote, regardless of race or color. Previous bills had attempted to secure the right to vote through court cases. These cases did not adequately meet the problems of racial discrimination in voting, so the 1965 Act became imperative. The Act created new remedies for voting discrimination where it persists on a large scale and strengthened existing remedies for pockets of voting discrimination elsewhere in the country. The Act suspended literacy tests and devices used to deny citizens their right to vote because of their race or color, provided for the appointment of Federal Registrars, contained a finding that the right to vote has been denied or abridged by the poll tax requirement as a condition to voting, and gave new enforcement powers to the courts in voting cases.

Following the passage of the Voting Rights Act, the State of South Carolina filed a motion in the United States Supreme Court to bring an original suit challenging the constitutionality of the statute and seeking an injunction against its enforcement. The motion was granted in November, 1965,[35] and the hearing was expedited. After twenty-five other states joined the case[36] as friends of the court and after extensive oral argument was heard, the Supreme Court upheld the contested sections of the Act as appropriate means for Congress to use in carrying out is constitutional responsibility to enforce the Fifteenth Amendment. Injunctive relief was denied and the complaint dismissed, thereby validating the Voting Rights Act of 1965 in the case of *State of South Carolina v. Nicholas deB. Katzenbach, etc.* [37]

In Harman v. Forssenius[38] the validity of the Virginia statute pertaining to qualifications for voting in a federal election was challenged. A three judge District Court

[33] *United States vs. Louisiana*, 380 U.S. 145 (March 8, 1965).

[34] Public Law 89-110, 89th Congress, S. 1564 (August 6, 1965).

[35] 10 *Race Relations Law Reporter*, 1448.

[36] *Ibid.*

[37] *State of South Carolina vs. Nicholas deB. Katzenbach, et al.*, 86 S. Ct. 803 (March 7, 1966).

[38] *A. M. Harmon, Jr., et al. vs. Lars Forssenius et al.*, 380 U.S. 528 (1965).

held that the statute violates the Seventeenth and Twenty-fourth Amendments to the Constitution and enjoined enforcement. On appeal, the Supreme Court affirmed. However, it was not until *Harper v. Virginia Board of Elections*[39] was argued before the Supreme Court in January, 1966, that the Virginia Poll Tax was declared unconstitutional. With *South Carolina v. Katzenbach*[40] upholding the Voting Rights Act of 1965, with its more extensive provisions, poll tax provisions, literacy tests, and new voting regulations were suspended until approved by federal officials. Now only the fear of physical violence and intimidation stands between the Negro and the franchise.

The progress of the Negro in Criminal Law has lagged behind that achieved in overcoming the legal barriers between him and the franchise. Perhaps no other area of civil rights with the exception of miscegenation and interracial marriage, has been so colored by emotion, prejudice, and distortion of fact. Statistics are used to picture the Negro as a brutal, senseless, irresponsible criminal. Northern and southern interest in the control and containment of the Negro outside the decision-making structure of economic and political power finds a common ground in the nurture of fear of Negro criminality. Behind the facade of concern for "crimes in the streets," the politically manipulative and economical exploitative join forces to make capital of real problems whose solutions must be found in a delicate balance of individual rights and the public good without regard to sex, creed, race, color, economic status, or educational advantage.

In *Swain v. Alabama,*[41] a Negro was indicted in Talladega, Alabama, for rape of a white girl, convicted and sentenced to death. On appeal to the Supreme Court, defense claimed jury discrimination on a number of grounds, including two relating to preemptory challenge. The Court in a six to three decision rejected all of the the claims. Justice Goldberg, joined by Chief Justice Warren and Justice Douglas, dissented. He stated that the Court's opinion created additional barriers to the elimination of jury discrimination practices which have operated in many communities to nullify the Equal Protection Clause and that "the preference granted by the Court" to use the preemptory challenge was both "unwarranted and unnecessary."

However, landmark decisions were to bring new directions in the use of federal injunctions against State prosecution and in the Court's establishment of a precedent for a more liberal construction of the removal jurisdiction of Federal District Courts in civil rights cases.[42] In *James A. Dombrowski, et al. v. Pfister,*[43] James A. Dombrowski, Executive Director of plaintiff, Southern Conference Educational Fund, Inc., a civil rights group, and the Southern Conference Educational Fund brought suit in the United States District Court, Eastern District, Louisiana, New Orleans Division, February 4, 1964, against certain officials of the State, the governor, attorney general, chairman (Pfister) of the

[39]*Annie E. Harper, et al. vs. Virginia State Board of Elections,* 383 U.S. 663, 85 S. Ct. 942 (March 24, 1966).

[40]*South Carolina vs. Katzenbach,* 86 S. Ct. 803 (March 7, 1966).

[41]*Swain vs. Alabama,* 380 U.S. 202 (1951). The Supreme Court held that a defendant in a criminal case "is not constitutionally entitled to demand a proportionate number of his race on a jury," and that the use of preemptory challenges to eliminate Negroes from the jury does not violate the Constitution. The ruling in this case disturbed the NAACP and civil rights lawyers greatly.

[42]28*U. S. C. A.,* Section 1443.

[43]*James A. Dombrowski, et al, vs. Pfister,* 380 U.S. 479 (1965), cf. 10 *Race Relations Law Reporter,* 475.

Joint Legislative Committee on Un-American Activities of the Louisiana Legislature. Plaintiffs sought a permanent injunction restraining defendants from preventing plaintiffs from exercising the rights, privileges and immunities granted them by the Constitution and laws of the United States. Seeking to have declared unconstitutional Louisiana's Subversive Activities and Communist Control Law and the Community Propaganda Control Law, plaintiffs requested a three judge Court to hear and determine the proceedings. The majority ruled that the plaintiffs' engagement in civil rights activity did not bar the state from prosecuting them for sedition, treason, and subversive or Communist activities aimed at the unlawful overthrow of the constitutional form of state government. Holding that the main issue in the case was that of the states' basic right of self-preservation and enforcement of that right in a lawful manner, refusing to hear evidence of an unconstitutional application of the statutes.[44] The application for the injunction was denied and the suit dismissed "for failure to state a claim upon which relief can be granted."

Judge Wisdom on dissenting contended that the basic issue was whether the state was abusing its legislative power and criminal processes and under the pretext of self-protection from subversion, harassing and humiliating the plantiffs, was about to prosecute them solely because of their activities in promoting civil rights for Negroes. He stated

> "States' Rights" are mystical, emotion-laden words . . . but the crowning glory of American Federalism is not States' Rights. It is the protection the United States Constitution gives to the private citizen against *all* wrongful governmental invasion of fundamental rights and freedoms. . . . Assuming the truth of the complaint, as the Court *had* to do in order to dismiss the suit, the case is a classic example for raising the shield of the Constitution in protection of a citizen's constitutional rights. . . . This Court has jurisdiction. And as a three-judge Court is was instituted for just such a case . . . I consider this Court's refusal to pass on the constitutional issues and to give the plantiffs a day in court an indefensible denial of process.[45]

On appeal to the Supreme Court[46] the decision was reversed and remanded with instructions. A statute was attacked as void on its face and also under 42 U. S. C., Section 1983, as it was being applied. The Court held that the assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases. The Court sanctioned an injunction, the effect of which was to end all prosecutions in the State court. Thus, *Dombrowski* established an exception to the abstention doctrine and to the Rives-Powers[47] doctrine that federal constitutional rights be first litigated in state courts.

As the hue and cry for increased severity in the handling of criminals coalesces with widely publicized incidents showing law enforcement officials abusing the authority vested in them to harass, intimidate and murder Negroes, and with the explosive disorders epitomized by events in the Watts district of Los Angeles, California, cases requiring the Court to protect the constitutional rights of individuals without re-

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[44]The opinion cited, *Watson vs. Buck*, 313 U.S. 387, 400 (May 26, 1941), to note that Federal Courts traditionally have refused, except in rare instances, to enjoin criminal prosecutions under state penal laws.

[45]9 *Race Relations Law Reporter*, 114.

[46]*Op. cit.*, *James A. Dombrowski, et al. vs. Pfister*, 380 U. S. 479 (April 26, 1965).

[47]*Virginia vs. Rives*, 100 U.S. 313 (March 1, 1880), and *Kentucky vs. Powers*, 201 U.S. 1 (March 12, 1906)

gard to color, creed, race, economic status and the nature of their known or alleged crimes continue to arise. The President establishes a National Crime Commission, and the Justice Department proposes new criminal procedures to the Congress in consideration of pending legislation. In the areas of right to counsel, arraignment, self-incrimination, and invasion of privacy, etc., in many cases coming befor the Supreme Court for judicial review, the Negro has no specific involvement. However, because of his peculiar and historic vulnerability, these cases are of the utmost significance to the progress of the Negro to full realization of his constitutional rights. A consolidation of such cases, *Miranda v. Arizona,*[48] a post-*Escobedo case,*[49] the constructive application of the privilege against self-incrimination was extended to in-custody interrogation and to the right of the individual to be informed by the detaining officer and to have counsel during interrogation, either retained or appointed. The Court's opinion made explicit answers to issues left unresolved in *Escobedo*[50] holding that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." Prior to any questioning, the person must be warned of his right to keep silent, that any statement he makes may be used as evidence against him, and that he has the right to counsel, either retained or appointed. The right to counsel may be waived if the waiver is made, "voluntarily, knowingly, and intelligently." During questioning the person detained may stop for consultation with counsel. If alone and he indicates "in any manner" that he does not wish to be interrogated, police may not question him. Even though the person may have answered some questions, he may refuse to be questioned further without prejudice to his guilt or innocence.

The difficulty of obtaining convictions in southern courts of persons charged with the murder of Negroes or civil rights workers continues to pose a legal problem. Lt. Col. Samuel A. Penn, a Negro educator and Commissioned Officer in the U. S. Army, was shot and killed while driving to his home, and three young civil rights workers—Schweener, Chaney and Goodman —were murdered in Philadelphia, Mississippi, In *United States v. Herbert Guest, et al.*[51] and in *United States v. Cecil Price, et al,*[52] (both cases consolidated when heard by the Supreme Court) attempts had been made to convict the alleged murderers in the State courts. All were acquitted of murder and freed. The United States then moved to convict them in Federal Courts of a lesser charge—conspiracy to deprive others of their civil rights. The Federal District

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[48]*Ernesto A. Miranda vs. State of Arizona,* on writ of certiorari to the Supreme Court of the State of Arizona, 34 *Law Week* 4523 (June 13, 1966).

Michael Vignera vs. State of New York, on writ of certiorari to the Court of Appeals of the State of New York, 34 *Law Week* 4523 (June 13, 1966).

Carl Calvin Westover vs. United States, on writ of certiorari to the United States Court of Appeals for the Ninth Circuit, 34 *Law Week* 4523 (June 13, 1966).

State of California vs. Roy Allen Stewart, on writ of certiorari to the Supreme Court of the State of California, 34 *Law Week* 4523 (June 13, 1966).

[49]*Esobedo vs. Illinois,* 378 U.S. 478 (1964).

[50]*Ibid.*

[51]*United States vs. Herbert Guest, et al.* 383 U.S. 745 (March 28, 1966).

[52]*United States vs. Cecil Price, et al.,* 383 U.S. 787 (March 28, 1966).

Court moved to dismiss the conspiracy charge, holding that the parts of the Civil Rights Act which the United States used were unconstitutional. On appeal, the Supreme Court reversed the decision and remanded the case to the District Court for further proceedings in the light of the Court's opinion.

In education, civil rights cases relating to de-facto segregation in Northern ghettos, de-segregation plans for pupils and faculties elsewhere, and discrimination in the schools continue through lower Courts to the Supreme Court. It is probable that the 1966-67 term of the Court may find more significant decisions being rendered in this arena of civil rights breakthrough. The passage of the Elementary and Secondary Education Acts by the Congress and the so-called Poverty Program legislation will produce their quota of cases with implications for civil rights even as their provisions for withholding federal funds in areas of operation where racial segregation and discrimination are found to exist provide new formulae for solving these problems.

Thus, in the period from 1964-1966, we find emerging from federal legislative, executive orders, and judicial processes, an expanding body of Civil Rights and related Common Law, directly incorporating and indirectly influenced by socio-economic considerations and psychological concepts, purposely directed toward the realization of a single class of citizenship in the United States with equality of opportunity for all. Never before in American History has so profound and revolutionary a change been effected as quickly and as bloodlessly.

SUMMARY

President Lyndon B. Johnson has asked the nation to complete the job of voting a civil rights law aimed at creating single-standard citizenship, at erasing the ghetto from the American scene, at securing equal justice for all in the courts, and assuring full citizenship in the public sector.

In his proposed civil rights law, the President emphasized the need to guarantee fair housing by federal law and to make this a fixed premise in the American life, the need to rid the school and jury systems of those corrosive racial conspiracies which still exist, and the need to enforce law now on the books, and to attack directly such organized efforts to thwart them as posed by the Ku Klux Klan and its like.

This remains the uncompleted task facing America in the granting of full rights to all. This legislation voted, the human principles so beautifully embraced in the founding documents finally will have real meaning to all.

Congress owes to this Presidential petition its urgent attention, and Congress has indicated it will give to the President that attention. There as a political momentum existing in American life, furthermore, which makes this deliberation, and the passage of such legislation, a matter of personal political fortune; and so, even the reluctant in Congress must reexamine old positions.

If it is just that equality be held out and enforced, in the schools and in the public place, where is the excuse for exempting the right to housing without prejudice? If it is just that equality be pledged and given, in employment, in public transportation, where is the justice in denying fair, equal hearing and fair, impartial judgment in the courts?

It is a fact, as the President has said, that for all of the guarantees of the 1964 Civil Rights Act, still there is discrimination in certain sectors of the public life. He

asks, and fairly, the question: "Where is the security of any, when the rights of the few still are withheld?"

This nation aspires to greatness. It can never achieve it–divided.

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