Fordham Law Review

Volume 40 | Issue 1 Article 6

1971

Case Notes

CASE NOTES

Constitutional Law—Citizenship—Statute Granting Citizenship on Condition Subsequent Held Not Violative of Fifth or Fourteenth Amendments.—Plaintiff was born in Italy in 1939 to an Italian father and an American mother. He became a United States citizen at birth under section 1993 of the Revised Statutes of 1875, a direct predecessor of section 301(a)(7) of the Immigration and Nationality Act of 1952.[1] He was warned repeatedly by the State Department about the residence requirements of section 301(b),[2] which provides that a person who is subject to the act shall lose his citizenship unless, between age 14 and 28, he comes to the United States and is physically present here continuously for at least five years. Plaintiff was notified in 1964 that he had lost his citizenship. He then instituted an action against the Secretary of State to enjoin enforcement of section 301(b) and to obtain a declaratory judgment that section 301(b) was unconstitutional as violative of the fifth amendment's due process clause, the eighth amendment's cruel and unusual punishment clause and the ninth amendment. A three-judge district court ruled that section 301(b) was unconstitutional[3] and granted plaintiff's motion for summary judgment. The Supreme Court reversed, holding that Congress has the power to impose the condition subsequent of residence in the United States upon persons born outside the country and that its imposition was not in violation of either the citizenship clause of the fourteenth amendment or the due process clause of the fifth amendment. *Rogers v. Bellei, 401 U.S. 815 (1971).*

United States citizenship may be acquired by birth in the United States,[4] by

1. 8 U.S.C. § 1401(a)(7) (1970) provides:

"(a) The following shall be nationals and citizens of the United States at birth:

. . . .

(7) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years . . . ."

2. 8 U.S.C. 1401(b) (1970):

"(b) Any person who is a national and citizen of the United States at birth under paragraph (7) of subsection (a) of this section, shall lose his nationality and citizenship unless he shall come to the United States prior to attaining the age of twenty-three years and shall immediately following any such coming be continuously physically present in the United State [sic] for at least five years: Provided, That such physical presence follows the attainment of the age of fourteen years and precedes the age of twenty-eight years." (footnote omitted) (emphasis deleted). Another section of the statute provides that absences from the United States of less than twelve months in the aggregate "shall not be considered to break the continuity of such physical presence" required by § 1401(b). 8 U.S.C. § 1401(c) (1970) provides that § 1401(b) "shall apply to a person born abroad subsequent to May 24, 1934 . . . ."

3. 296 F. Supp. 1247 (D.D.C. 1969), citing Afroyim v. Rusk, 387 U.S. 253 (1967) and Schneider v. Rusk, 377 U.S. 163 (1964).

4. U.S. Const. amend. XIV, § 1; 8 U.S.C. 1401(a) (1970). The first sentence of the fourteenth amendment states: "All persons born or naturalized in the United States, and subject

naturalization,[5] or by descent under a statute which does not provide for naturalization.[6] Persons born in the United States and those born overseas to at least one citizen parent become United States citizens at birth.[7] Those born outside the United States to non-citizen parents can become citizens only through the process of naturalization after birth.[8] Citizenship by birth in the United States derives from the common law of England and the United States, under which birth within the jurisdiction of the government determined citizenship.[9] Citizenship by descent from a citizen parent was not a common law concept and could be acquired only pursuant to statute.[10] Although citizenship was

---

to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

5. U.S. Const. amend. XIV, § 1; 8 U.S.C. §§ 1421-59 (1970) (Nationality Through Naturalization). Before the Nationality Act of 1940, naturalization had been defined as "the act of adopting a foreigner, and clothing him with the privileges of a native citizen . . . ." Boyd v. Nebraska ex rel. Thayer, 143 U.S. 135, 162 (1892). The 1940 Act defined it as the "conferring of nationality of a state upon a person after birth." Act of Oct. 14, 1940, ch. 876, § 101(c), 54 Stat. 1137. The Immigration and Nationality Act of 1952, the current statute, added "by any means whatsoever." Act of June 27, 1952, ch. 477, § 101(23), 66 Stat. 169. Scharf, A Study of the Law of Expatriation, 38 St. John's L. Rev. 251, 277 (1964) [hereinafter cited as Scharf]. Although there has been some conflict among the authorities, the better and more widely accepted view is that a person who acquired American citizenship at birth abroad because of the citizenship of his parents is natural born and not naturalized. This seems in keeping with the common law concept that jus sanguinis or citizenship by descent confers natural born citizenship. See Weedin v. Chin Bow, 274 U.S. 657, 666 (1927) (citizenship by descent takes place at the birth of the person to whom it is transmitted and is based on the fact and time of birth); Rueff v. Brownell, 116 F. Supp. 298, 303-04 (D.N.J. 1953) (a person born abroad who acquires citizenship under the statute is a citizen by birth, not by naturalization); see Scharf; Note, Developments in the Law, Immigration and Nationality, 66 Harv. L. Rev. 643 (1953); 50 Mich. L. Rev. 926 (1952). But see United States v. Wong Kim Ark, 169 U.S. 649, 702 (1898) (dicta equating natural born with native born); Elk v. Wilkins, 112 U.S. 94, 101-02 (1884); Minor v. Happersett, 88 U.S. 162, 167 (1874); Zimmer v. Acheson, 191 F.2d 209, 211 (10th Cir. 1951).

6. 8 U.S.C. § 1401(a)(3) (1970); 8 U.S.C. § 1401(a)(7) (1970); see Perez v. Brownell, 356 U.S. 44 (1958). Mr. Justice Frankfurter described the fourteenth amendment's citizenship clause as setting forth "the two principal modes (but by no means the only ones) for acquiring citizenship." Id. at 58 n.3. See also Bellei v. Rusk, 296 F. Supp. 1247, 1250-51 (D.D.C. 1969), rev'd sub. nom. Rogers v. Bellei, 401 U.S. 815 (1971) (acknowledging that citizenship may be granted by a statute which does not provide for naturalization).

7. 8 U.S.C. § 1401(a)(3) (1970); 8 U.S.C. § 1401(a)(7) (1970). Citizenship at birth may also be acquired in other ways, as prescribed by section 1401.

8. See note 5 supra.

9. Nishikawa v. Dulles, 356 U.S. 129, 138 (1958) (concurring opinion); Perez v. Brownell, 356 U.S. 44, 65-66 (1958) (dissenting opinion); Perkins v. Elg, 307 U.S. 325, 329 (1939); Morrison v. California, 291 U.S. 82, 85 (1934); Weedin v. Chin Bow, 274 U.S. 657, 660 (1927); United States v. Wong Kim Ark, 169 U.S. 649, 670 (1898).

10. United States v. Wong Kim Ark, 169 U.S. 649, 670 (1898). In Wong Kim Ark, Mr. Justice Gray discussed English statutes spanning four centuries from 1350 to 1773 relating to the citizenship of children born abroad to British subjects. He concluded that naturalization by descent was not a common law concept.

not defined in the Constitution as originally adopted, the common law principles governing the source of citizenship prevailed during the period preceding the adoption of the fourteenth amendment.[11] That amendment affirmed the common law view.[12] Citizenship by birth in the United States is now acquired directly under the fourteenth amendment.[13] Citizenship by naturalization and by descent are acquired under legislation enacted pursuant to article I, section 8, clause 4.[14]

While citizenship by *jus soli*, or place of birth, is the basic rule of American nationality law,[15] the principle of *jus sanguinis*, or citizenship by descent, has been recognized since the first United States nationality act.[16] Statutes conferring citizenship on foreign-born children of American citizens, subject to a condition of parental residence in the United States, were enacted in 1790, 1795, 1802, 1855, 1907, 1934, 1940 and 1952.[17] In addition to requiring specified paternal residence, the 1907 statute[18] provided that foreign-born children who were statutory citizens and who continued to live outside the United States had to take two additional steps in order to receive governmental protection.[19] These were to record, at age 18, their intention to become residents and remain United States citizens and to take the oath of allegiance to the United States when they reached their majority. Under the 1934 Act,[20] children born overseas to one citizen and one alien parent were permitted to acquire citizenship by descent from the citizen mother as well as the citizen father, but the citizen parent was required to have resided in the United States prior to the child's birth. The 1934 act also dropped the governmental protection condition but substituted the requirement that the child reside in the United States for a specified period in

11. Id. at 688. Mr. Justice Gray, discussing the fourteenth amendment, noted that its first sentence merely affirmed the existing law that a person born or naturalized in the United States and subject to its jurisdiction was a citizen at birth. He also noted that citizenship by descent had always been regulated by statute. Id.

12. Id.

13. See note 4, supra.

14. U.S. Const. art. 1, § 8. That clause authorizes Congress to establish a uniform rule of naturalization. See United States v. Wong Kim Ark, 169 U.S. 649, 688 (1898).

15. Weedin v. Chin Bow, 274 U.S. 657, 660, 670 (1927); United States v. Wong Kim Ark, 169 U.S. 649, 674-75 (1898); Flournoy, Dual Nationality and Election, 30 Yale L.J. 545, 553 (1921) [hereinafter cited as Flournoy].

16. Act of March 26, 1790, ch. 3, § 1, 1 Stat. 103.

17. Act of March 26, 1790, ch. 3, § 1, 1 Stat. 103; Act of January 29, 1795, ch. 20, § 3, 1 Stat. 415; Act of April 14, 1802, ch. 28, § 4, 2 Stat. 155; Act of February 10, 1855, ch. 71, § 1, 10 Stat. 604; Act of March 2, 1907, ch. 2534, § 6, 34 Stat. 1229; Act of May 24, 1934, ch. 334, § 1, 48 Stat. 797; Nationality Act of 1940, Act of Oct. 14, 1940, ch. 2, § 201(g), 54 Stat. 1138; Immigration and Nationality Act of 1952, Act of June 27, 1952, ch. 477, § 301(b), 66 Stat. 173.

18. Act of March 2, 1907, ch. 2534, § 6, 34 Stat. 1229.

19. Governmental protection embraces the type of diplomatic protection provided by governments for their citizens living abroad, including the issuance of passports. Rueff v. Brownell, 116 F. Supp. 299, 305 (D.N.J. 1953); Tomasicchio v. Acheson, 98 F. Supp. 166, 171-73 (D.D.C. 1951); see Flournoy, 562-63.

20. Act of May 24, 1934, ch. 344, § 1, 48 Stat. 797.

order to retain his citizenship. Similar conditions subsequent of continued United States residence were imposed by the 1940 and 1952 statutes.[21]

Although the constitutionality of the condition subsequent of United States residence was not questioned until *Bellei*,[22] the Supreme Court had previously decided three cases involving citizenship by descent. In *United States v. Wong Kim Ark*,[23] where the construction of the first sentence of the fourteenth amendment was at issue, the Court said that since citizenship by descent was not a common law principle, it could only be conferred by statute.[24] In *Weedin v. Chin Bow*,[25] the long-standing requirement of paternal residence in the United States as a condition to citizenship by descent was construed to mean residence here by the citizen father prior to the child's birth. In *Montana v. Kennedy*,[26] the Court again indicated that citizenship did not descend automatically to foreign-born children of American parents, and held that where the child did not satisfy the terms of the statute, he remained an alien.

Although the constitution as originally adopted did not define United States citizenship, it referred to citizenship in several places.[27] The citizenship status of the native born was first defined in the Civil Rights Act of 1866,[28] which stated that all persons born in the United States and not subject to any foreign power were citizens of the United States. This definition was expanded by the fourteenth amendment to include persons naturalized in the United States.[29]

The Supreme Court observed in *Wong Kim Ark* that the first sentence of the fourteenth amendment, the citizenship clause, merely declared existing rights and affirmed existing law with respect to the requirement of being born or naturalized in the United States and being subject to its jurisdiction in order to qualify for citizenship.[30] The Court observed that the citizenship clause of the fourteenth amendment did not apply to citizenship by descent:

> But it [the first sentence of the Fourteenth Amendment] has not touched the acquisition of citizenship by being born abroad of American parents; and has left that subject to be regulated, as it had always been, by Congress, in the exercise of the power conferred by the Constitution to establish an uniform rule of naturalization.[31]

---

21. Nationality Act of 1940, Act of Oct. 14, 1940, ch. 2, § 201(g), 54 Stat. 1138; Immigration and Nationality Act of 1952, Act of June 27, 1952, ch. 477, § 301(b), 66 Stat. 173.

22. Rogers v. Bellei, 401 U.S. 815 (1971).

23. 169 U.S. 649 (1898).

24. Id. at 670.

25. 274 U.S. 657 (1927). A ten year old boy born in China whose father and grandfather were both American citizens was held to be an alien because his father had not resided in the United States before the boy's birth.

26. 366 U.S. 308 (1961). Petitioner claimed citizenship by descent through his citizen mother. The claim was denied because the applicable statute, Rev. Stat. § 1993 (1875), granted citizenship by descent only to children whose fathers were citizens.

27. U.S. Const. art. I, § 2, cl. 2 (qualifications for members of the House); art. I, § 3, cl. 3 (qualifications for Senators); art. II, § 1, cl. 5 (eligibility for the office of President); art. III, § 2, cl. 1 (citizenship as affecting judicial power).

28. Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27.

29. U.S. Const. amend. XIV, § 1; see note 4 supra.

30. 169 U.S. 649, 688 (1898).

31. Id. The Court also noted with approval an opinion by Secretary of State Fish in

The statutes regulating citizenship under the principle of *jus sanguinis* and the decisions in *Wong Kim Ark*, *Chin Bow* and *Montana* made it clear that Congress could properly impose conditions on the grant of citizenship by descent.[32] Furthermore, dictum in *Wong Kim Ark* suggested that Congress could confer less than full citizenship on persons acquiring citizenship by descent.[33] The 1907 statute had distinguished citizenship by descent from native-born citizenship by authorizing revocation of diplomatic protection for the foreign-born citizen by descent who failed to comply with conditions imposed by Congress.[34] Whether citizenship by descent could also be made subject to a condition subsequent remained an open question.

A line of cases commencing with *Perez v. Brownell*[35] and culminating in *Afroyim v. Rusk*[36] established the principle that a citizen could not be expatriated unless he voluntarily relinquished his citizenship.[37] In *Perez*, the Supreme Court held that Congress had the authority, under its power to conduct foreign relations, to provide that anyone who voted in a foreign election would lose his American citizenship.[38] Mr. Justice Frankfurter, writing for the Court, argued that:

[T]here is nothing in the terms, the context, the history or the manifest purpose of the Fourteenth Amendment to warrant drawing from it a restriction upon the power otherwise possessed by Congress to withdraw citizenship. . . . 'As at birth she be-

August 1873 discussing several questions asked by President Grant concerning allegiance, naturalization and expatriation. Id. at 690. Mr. Fish, commenting on the Act of February 10, 1855, ch. 71, § 1, 10 Stat. 604, observed that by providing " 'that the rights of citizenship shall not descend to persons whose fathers never resided in the United States,' " Congress had conferred "only a qualified citizenship" on the foreign-born children of American fathers, and had denied them the right to transmit citizenship to their children unless they became residents of the United States, "or, in the language of the Fourteenth Amendment of the Constitution, have made themselves 'subject to the jurisdiction thereof.' " Opinions of the Heads of the Executive Departments, and Other Papers, Relating to Expatriation, Naturalization, and Change of Allegiance, [1873] 2 Foreign Rel. U.S. 1192 (1873). The fourteenth amendment leaves Congress with the power to regulate naturalization. 169 U.S. at 703.

32. See notes 17-26 supra and accompanying text.

33. See note 31 supra.

34. See notes 18 & 19 supra and accompanying text.

35. 356 U.S. 44 (1958).

36. 387 U.S. 253 (1967).

37. Id. at 268. The trial court in Bellei v. Rusk, 296 F. Supp. 1247 (D.D.C. 1969), held section 1401(b) of the 1952 Act unconstitutional, relying on Afroyim and on Schneider v. Rusk, 377 U.S. 163 (1964).

38. 356 U.S. at 62. In concluding that Congress had properly used its power to regulate foreign affairs, the Court cited United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936) and Mackenzie v. Hare, 239 U.S. 299, 311-12 (1915). In Mackenzie, the Court held that an American woman who had married a foreigner could be regarded as having lost her American citizenship during coverture and that she could be expatriated under Congress' power to conduct foreign relations. Id. at 311-12. See Roche, The Loss of American Nationality—The Development of Statutory Expatriation, 99 U. Pa. L. Rev. 25 (1951) [hereinafter cited as Roche]. The author notes that the constitutional basis for the power to denationalize citizens was found in the " 'inherent power of sovereignty' in the area of foreign relations." Id. at 27.

came a citizen of the United States, that citizenship must be deemed to continue unless she has been deprived of it through the operation of a treaty or congressional enactment or by her voluntary action in conformity with applicable legal principles.'[39]

To the *Perez* Court, the only bar to expatriation was the due process clause and the issue was simply whether withdrawal of citizenship was reasonably related to the power of Congress to conduct foreign relations. The Court concluded that there was a rational connection between the two, and that due process had not been violated.[40]

In the nine years following *Perez*, the Court handed down four decisions denying Congress the power to expatriate an American citizen without his voluntary relinquishment of citizenship.[41] In *Schneider v. Rusk*,[42] the Court declared unconstitutional section 352(a)(1) of the Immigration and Nationality Act of 1952,[43] which provided for the loss of nationality by a naturalized citizen who had resided continuously for three years in the foreign state of which he was formerly a national or in which he had been born. The *Schneider* court stated that such a provision discriminated against naturalized citizens, since no similar restriction was placed upon a native-born citizen's right to reside abroad. Therefore, it said, the statute created a "second-class citizenship" violative of due process.[44]

The Court also announced the principle that the rights of citizenship of the naturalized citizen are "of the same dignity and are coextensive"[45] with the rights of the native-born. The Court also indicated that Congress lacked constitutional authority to revoke citizenship, endorsing Chief Justice Marshall's dictum in *Osborn v. Bank of the United States*[46] that: "The simple power of the national legislature is, to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual."[47]

Finally, in *Afroyim v. Rusk*, the Court overruled *Perez*, declaring:

We hold that the Fourteenth Amendment was designed to, and does, protect every citizen of this Nation against a congressional forcible destruction of his citizenship, whatever his creed, color, or race. Our holding does no more than to give to this citizen

39. 356 U.S. at 58 n.3, quoting Perkins v. Elg, 307 U.S. 325, 329 (1939).

40. Id. at 58.

41. Afroyim v. Rusk, 387 U.S. 253 (1967) (striking down Immigration and Nationality Act of 1952, § 349(a)(5), 66 Stat. 268, formerly 8 U.S.C. § 1481(a)(5) (1970)); Schneider v. Rusk, 377 U.S. 163 (1964) (invalidating Immigration and Nationality Act of 1952, § 352(a)(1), 66 Stat. 269, formerly 8 U.S.C. § 1484(a)(1) (1970)); Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) (invalidating Immigration and Nationality Act of 1952, § 349(a)(10), 66 Stat. 268, formerly 8 U.S.C. § 1481(a)(10) (1970)); Trop v. Dulles, 356 U.S. 86 (1958) (striking down Immigration and Nationality Act of 1952, § 349(a)(8), 66 Stat. 268, formerly 8 U.S.C. § 1481(a)(8) (1970)).

42. 377 U.S. 163 (1964).

43. 66 Stat. 269, formerly 8 U.S.C. § 1484(a)(1) (1964).

44. 377 U.S. at 168.

45. Id. at 165.

46. 22 U.S. (9 Wheat.) 738 (1824).

47. Id. at 827.

that which is his own, a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship.[48]

The *Afroyim* court also held that Congress is without "any general power, express or implied, to take away an American citizen's citizenship without his assent."[49] In effect, *Afroyim* set forth in absolute terms the principle that every American citizen is protected by the fourteenth amendment against congressional revocation of his citizenship,[50] and that citizenship can be lost only by voluntary relinquishment.[51]

The district court in *Bellei* held that *Schneider* and *Afroyim* were controlling and that Congress could not first confer citizenship and then either qualify or terminate the grant.[52]

The Supreme Court, however, declined to extend the holdings in *Afroyim* and *Schneider* to the facts in *Bellei*. The Court noted that while Mrs. Schneider and Mr. Afroyim had lived in the United States for years and had acquired citizenship by naturalization[53] in the United States, Mr. Bellei was neither born nor naturalized *in the United States* and had not been subject to its jurisdiction.[54] The Court therefore concluded that Mr. Bellei was not the type of citizen described in the fourteenth amendment and was not entitled to the protection that *Afroyim* mandated.[55]

In support of this conclusion, the Court cited the statement in *Wong Kim Ark* that the first sentence of the fourteenth amendment did not apply to citizenship by descent, which was left to be regulated by Congress.[56] The Court argued that since acquisition of citizenship by birth overseas to an American parent was outside the scope of constitutional citizenship as defined by the fourteenth amendment, such citizenship was left to be regulated by Congress, subject only

---

48. 387 U.S. at 268.

49. Id. at 257.

50. Id. at 268.

51. Id.; see 44 N.Y.U.L. Rev. 824, 826 (1969).

52. Bellei v. Rusk, 296 F. Supp. 1247, 1252 (D.D.C. 1969), rev'd sub nom. Rogers v. Bellei, 401 U.S. 815 (1971).

53. 401 U.S. at 822. Mrs. Schneider, a German national by birth, acquired United States citizenship derivatively through her mother's naturalization in the United States. Mr. Afroyim, a Polish national by birth, immigrated to the United States and acquired his American citizenship by naturalization.

54. Presumably this was because he had not resided in the United States. The importance which has been assigned to United States residence as a sign of attachment to the country can be seen from the five-year residence requirement under the present naturalization statute. 8 U.S.C. § 1427(a) (1970). The Framers of the Constitution also stressed the importance of residence. Madison, in the debates concerning the Constitution, argued that residence should be an essential requirement for naturalization. 1 Annals of Congress 1110 (1790); see Schneider v. Rusk, 377 U.S. 163, 171 (1964) (Clark, J., dissenting).

55. 401 U.S. at 827. "He simply is not a Fourteenth-Amendment-first-sentence citizen." Id.

56. See text accompanying note 31 supra. For discussion of naturalization, see note 5 supra.

to due process limitations.[57] Congress could properly decline to grant citizenship by descent or confer it subject to conditions, including a residence requirement.[58]

The Court then considered whether due process was violated by requiring a person who had acquired citizenship by descent to reside in the United States for a specified period in order to retain his citizenship.[59] It concluded that such a requirement was not unreasonable on the ground that Congress has an appropriate concern with the problems of dual nationality.[60] It noted further that the Court had previously recognized that dual nationality creates problems for the governments concerned.[61] Dual nationals may constitutionally be required to elect their citizenship[62] and, under certain circumstances, can be deprived of their citizenship by an Act of Congress.[63] The solution of the dual nationality problem by a residency requirement was held not to be unreasonable, arbitrary or unfair.[64] Since Congress can impose a condition precedent to citizenship, "precisely the same condition subsequent"[65] can also be imposed, the Court concluded, rejecting *Afroyim* and *Schneider*. As the decisions in those cases dealt with fourteenth amendment citizenship, the Court found them not binding here.[66]

---

57. 401 U.S. at 830.

58. Id. at 830-31. For more than 50 years after the 1802 naturalization act, children born abroad even of citizen fathers were aliens if their fathers had acquired citizenship after the effective date of the act. H. Binney, The Alienigenae of the United States, 2 Am. L. Reg. 193 (1854). The Court has supported Mr. Binney's conclusion that without an Act of Congress, foreign-born children of citizens did not derive American citizenship through their parents. Until 1934, for example, citizenship could not be transmited to a child born abroad of a citizen mother and an alien father. Montana v. Kennedy, 366 U.S. 308, 311 (1961); Weedin v. Chin Bow, 274 U.S. 657, 668 (1927); United States v. Wong Kim Ark, 169 U.S. 649, 673-74 (1898). See also 44 N.Y.U.L. Rev. 824, 829-30 (1969).

59. 401 U.S. at 831.

60. Id. at 831-32, citing Savorgnan v. United States, 338 U.S. 491, 500 (1950); N. Bar-Yaacov, Dual Nationality xi, 4 (1961). In Savorgnan, the Court sustained the denationalization of a woman who had had no intention of renouncing her U.S. citizenship when she made application for Italian citizenship and signed an oath of allegiance to the Italian government.

61. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 187 (1963) (concurring opinion); Kawakita v. United States, 343 U.S. 717, 734 (1952); Bellei v. Rusk, 296 F. Supp. 1249, 1252 (D.D.C. 1969), rev'd sub nom. Rogers v. Bellei, 401 U.S. 815 (1971).

62. 401 U.S. at 832-33, citing Perkins v. Elg, 307 U.S. 325, 329 (1939). See also Mandoli v. Acheson, 344 U.S. 133, 138 (1952).

63. 401 U.S. at 832-33, citing Kawakita v. United States, 343 U.S. 717, 734 (1952); see 8 U.S.C. § 1482 (1970) (dual nationals; divestiture of nationality). This section provides that a person who obtains both American and foreign nationality at birth and who claims the benefits of his foreign nationality shall lose his American citizenship if he resides in that foreign state for three years after his 22nd birthday unless he takes a formal oath of allegiance to the United States during his foreign residence or resides abroad exclusively for one of a number of reasons specified in sections 1485 and 1486.

64. 401 U.S. at 833.

65. Id. at 834.

66. Id. at 834-35. "We do not accept the notion that those utterances are now to be

Mr. Justice Black dissented, arguing that under the citizenship clause of the fourteenth amendment, as construed by *Afroyim*, no American can be deprived of his citizenship without his assent. He contended that since section 301(b)[67] of the Immigration and Nationality Act of 1952 does not take into account whether the citizen intends to relinquish his citizenship, the section is unconstitutional[68] under the decision in *Afroyim*.[69] Mr. Justice Black also argued that plaintiff was entitled to the fourteenth amendment's protection because he was, constitutionally speaking, naturalized *in* the United States.[70] He maintained that the fourteenth amendment contemplates only two sources of citizenship: birth and naturalization; and citizenship by descent is a form of naturalization.[71] Since the fourteenth amendment provides a comprehensive definition of citizenship covering all citizens,[72] he added, the phrase "naturalized in the United States" which appears in the citizenship clause must be construed to mean naturalized *into* the United States by United States law.[73]

The *Bellei* decision represents a sharp departure by the Court from the prior trend in citizenship cases. Although it finds support in history and in the factual differences between Mr. Bellei's situation and those of Mrs. Schneider and Mr.

---

judicially extended to citizenship not based on the Fourteenth Amendment and to make citizenship an absolute." Id. at 835.

67. 8 U.S.C. 1401(b) (1970).

68. 401 U.S. at 838.

69. 387 U.S. at 268. The Court in Afroyim had rejected a construction of the citizenship clause which distinguished constitutionally between citizens born or naturalized in or outside the United States, Mr. Justice Black argued, when it held that that clause was "designed to, and does, protect every citizen of this Nation . . . ." Id.

70. 401 U.S. at 839.

71. Id. at 843. Justice Black argued that there was considerable constitutional history supporting this view. See United States v. Wong Kim Ark, 169 U.S. 649, 702-03 (1898). "A person born out of the jurisdiction of the United States can only become a citizen by being naturalized, either by treaty, as in the case of the annexation of foreign territory; or by authority of Congress, exercised either by declaring certain classes of persons to be citizens, as in the enactments conferring citizenship upon foreign-born children of citizens, or by enabling foreigners individually to become citizens by proceedings in the judicial tribunals, as in the ordinary provisions of the naturalization acts." See also Elk v. Wilkins, 112 U.S. 94, 101-02 (1884); Minor v. Happersett, 88 U.S. (21 Wall.) 162, 167 (1875), cited by Mr. Justice Black in 401 U.S. at 841-42.

72. 401 U.S. at 842. Mr. Justice Black cited the Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 73 (1873), in which the Court stated that one of the primary purposes of the fourteenth amendment was "to establish a clear and comprehensive definition of citizenship . . . . " Id. See Afroyim v. Rusk, 387 U.S. 253, 262, 292 (1967). See also H. Flack, The Adoption of the Fourteenth Amendment 89 (1908).

73. 401 U.S. at 843. This interpretation, Mr. Justice Black contended, is supported by the legislative history of the citizenship clause. As introduced, that clause referred to all those "born in the United States or naturalized by the laws thereof." Cong. Globe, 39th Cong., 1st Sess. at 2768 (1866). The final version of the citizenship clause was intended to have the same effect, Justice Black insisted. See H. Flack, The Adoption of the Fourteenth Amendment 88-89 (1908).

Afroyim,[74] the decision is not compelled by legal principle. Rather, it reflects a policy change on the part of the Court.

Permitting Congress to use its power to conduct foreign affairs as the basis for revoking citizenship poses a very serious threat to the rights of every American citizen, as Mr. Chief Justice Warren and Mr. Justice Douglas noted in their dissents in *Perez*.[75] The expatriation cases following *Perez*,[76] in which the Court invalidated a number of expatriation statutes, eliminated that threat and held that citizenship, once granted, is an absolute right that cannot be revoked by Congress.

In earlier cases involving dual nationality,[77] the Court seemed determined to preserve the petitioners' American citizenship, if a basis could be found, even in the face of extreme circumstances. This is in marked contrast to *Bellei*, where the revocation of plaintiff's citizenship was upheld on highly technical grounds.

Future cases will show whether the bases for *Afroyim* and *Schneider* have been so seriously eroded by *Bellei* as to support Mr. Justice Black's statement that those cases have been overruled.[78] It would be unfortunate if *Bellei* served to undermine the protection of citizenship rights provided by the fourteenth amendment.

Constitutional Law—Home Visits as Structured by New York City Department of Social Services Held Not Violative of Fourth Amendment.— Plaintiff, mother of a dependent child and a recipient of welfare payments under the Aid to Families with Dependent Children program (AFDC),[1] denied

74. Mr. Bellei's situation is substantially different in fact from that of Mrs. Schneider and Mr. Afroyim because Bellei never resided in this country, while they both did. Yet it was the fact that Bellei was not naturalized here which the Court relied on to make the legal distinction between the cases.

75. The fundamental nature of citizenship was proclaimed by Mr. Chief Justice Warren: "Citizenship *is* man's basic right for it is nothing less than the right to have rights." 356 U.S. 44, 64 (1958) (dissenting opinion). Mr. Justice Douglas, arguing that expatriation requires voluntary relinquishment of citizenship, warned that ". . . if the power to regulate foreign affairs can be used to deprive a person of his citizenship because he voted abroad, why may not it be used to deprive him of his citizenship because his views on foreign policy are unorthodox or because he disputed the position of the Secretary of State or denounced a Resolution of the Congress or the action of the Chief Executive in the field of foreign affairs?" Id. at 81 (dissenting opinion).

76. See cases cited in note 41 supra.

77. Nishikawa v. Dulles, 356 U.S. 129 (1958); Kawakita v. United States, 343 U.S. 717 (1952). In Kawakita, the Court found that the defendant had not expatriated himself despite the performance of numerous acts that could have been construed as an abandonment of his American allegiance and nationality. In Nishikawa, the Court found that a Nisei who had been drafted into the Japanese army had not voluntarily expatriated himself. The Court insisted expatriation must be shown by clear, convincing and unequivocal evidence. 356 U.S. at 133.

78. 401 U.S. at 837, 839 (dissenting opinion).

1. "AFDC is a categorical assistance program supported by federal grants-in-aid but administered by the States according to regulations of the Secretary of Health, Education,

her caseworker's written request for a home visit which was required by the regulations of the New York City Department of Social Services.[2] Upon receipt of notice of termination of welfare benefits resulting from her refusal, plaintiff brought an action in the United States District Court for the Southern District of New York[3] alleging that the state's denial of AFDC benefits was unconstitutional.[4] The district court issued a temporary restraining order[5] and convened a

---

and Welfare." Wyman v. James, 400 U.S. 309, 310-11 n.1 (1971), citing Goldberg v. Kelly, 397 U.S. 254, 256 n.1 (1970). The federal program was established by the Social Security Act of 1935, ch. 531, §§ 401-06, 49 Stat. 620, as amended, 42 U.S.C. §§ 601-09 (1964), as amended, (Supp. V, 1970). In New York, it is implemented by the provisions of N.Y. Soc. Welfare Law §§ 343-62 (McKinney 1966), as amended, (McKinney Supp. 1970). The Supreme Court has considered other aspects of AFDC in, e.g., Dandridge v. Williams, 397 U.S. 471 (1970) (Maryland regulation limiting maximum payments under AFDC held not violative of section 402(a)(10) of the Social Security Act, or of equal protection); Rosado v. Wyman, 397 U.S. 397 (1970) (New York welfare legislation eliminating "special need grants" held violative of section 402(a)(23) of the Social Security Act); Goldberg v. Kelly, supra (New York procedures allowing termination of AFDC benefits without a prior evidentiary hearing held violative of due process); Shapiro v. Thompson, 394 U.S. 618 (1969) (Connecticut statutory prohibition of AFDC benefits to residents of less than one year held violative of equal protection); King v. Smith, 392 U.S. 309 (1968) (Alabama regulation authorizing termination of AFDC benefits where mother of dependent children was found cohabiting with man not the children's father held violative of section 406(a) of the Social Security Act, absent obligation of "substitute father" to support children under state law). See also Solman v. Shapiro, 300 F. Supp. 409 (D. Conn.), aff'd per curiam, 396 U.S. 5 (1969) (Connecticut practice of attributing income of stepparent to support of minor child held violative of section 402(a)(7) of the Social Security Act, absent legal obligation of stepparent to support minor child under state law of general applicability).

2. City of New York Dep't of Welfare Policies Governing the Administration of Public Assistance § 175 (1967) provides: "Mandatory visits must be made in accordance with law which requires that persons be visited at least once every three months if they are receiving . . . Aid to Dependent Children . . . ." These policies were promulgated by the Department in accordance with the requirements of N.Y. Soc. Welfare Law § 134 (McKinney 1966), which authorizes the appropriate departments to issue regulations governing visits with individuals receiving public assistance. See generally N.Y. Dep't Soc. Servs., 18 N.Y. Codes, Rules & Regs. §§ 351.10, 351.21 (1962).

3. Plaintiff's cause of action was based on 42 U.S.C. § 1983 (1964) which provides: "Every person who, under color of any statute, ordinance, regulation . . . of any State or Territory, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 28 U.S.C. § 1343(3)-(4) (1964) confers original jurisdiction on the district courts in civil actions commenced, inter alia, under 42 U.S.C. § 1983 (1964).

4. James v. Goldberg, 303 F. Supp. 935, 938 (S.D.N.Y. 1969), rev'd sub nom. Wyman v. James, 400 U.S. 309 (1971). In addition, plaintiff alleged violations of the Social Security Act and the regulations promulgated thereunder. 303 F. Supp. at 938. See Service Programs for Families and Children: Title IV Parts A and B of Social Security Act, 45 C.F.R. §§ 220.1-.65 (1971).

5. James v. Goldberg, 302 F. Supp. 478, 481 (S.D.N.Y. 1969), rev'd sub nom. Wyman v. James, 400 U.S. 309 (1971). 28 U.S.C. § 2284(3) (1964) provides, inter alia, that: "[A] district judge . . . may, at any time, grant a temporary restraining order to prevent ir-

three-judge district court,[6] which held that home visits were unreasonable "searches" within the meaning of the fourth amendment and that the state could not condition AFDC benefits upon a waiver of the rights secured to the recipient by that amendment.[7] On appeal, the United States Supreme Court reversed, holding that home visits as structured by New York did not constitute searches within the fourth amendment meaning of that term and that even if they did constitute searches, they were not unreasonable. *Wyman v. James*, 400 U.S. 309 (1971).

The right to be free from *unreasonable* searches and seizures is secured by the fourth amendment[8] against both federal[9] and, by operation of the fourteenth amendment, state[10] action. In *Boyd v. United States*,[11] the Supreme Court said that the essence of that which is prohibited by the fourth amendment "is the invasion of [an individual's] indefeasible right of personal security"[12] rather than a mere physical trespass to his property. This position was recently restated in *Katz v. United States*,[13] where the Court emphasized that "the Fourth Amendment protects people, not places."[14] Fourth amendment protection, however, has traditionally been discussed in terms of "constitutionally protected areas"[15] with the home being the area most scrupulously guarded.[16] In *Adams*

---

reparable damage." The district court, implementing this passage, found that: "The harm to plaintiff and others similarly situated from continued enforcement of the regulations challenged herein is both clear and abundant, while the cost to the State and City is obscure and minimal." 302 F. Supp. at 481.

6. 302 F. Supp. at 481. 28 U.S.C. § 2281 (1964) requires a three-judge district court to be convened when a permanent injunction restraining the enforcement of a state statute is sought on the grounds that the statute is unconstitutional.

7. James v. Goldberg, 303 F. Supp. 935 (S.D.N.Y. 1969), rev'd sub nom. Wyman v. James 400 U.S. 309 (1971).

8. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV; see, e.g., Sibron v. New York, 392 U.S. 40, 61 (1968); Terry v. Ohio, 392 U.S. 1, 9 (1968); Elkins v. United States, 364 U.S. 206, 222 (1960); United States v. Jeffers, 342 U.S. 48, 51 (1951); Carroll v. United States, 267 U.S. 132, 147 (1925).

9. See, e.g., Katz v. United States, 389 U.S. 347 (1967); Byars v. United States, 273 U.S. 28 (1927); Amos v. United States, 255 U.S. 313 (1921); Gouled v. United States, 255 U.S. 298 (1921); Weeks v. United States, 232 U.S. 383 (1914); Boyd v. United States, 116 U.S. 616 (1886).

10. See, e.g., Berger v. New York, 388 U.S. 41 (1967); Stanford v. Texas, 379 U.S. 476 (1965); Ker v. California, 374 U.S. 23 (1963); Lanza v. New York, 370 U.S. 139 (1962); Mapp v. Ohio, 367 U.S. 643 (1961); Elkins v. United States, 364 U.S. 206 (1960).

11. 116 U.S. 616 (1886).

12. Id. at 630.

13. 389 U.S. 347 (1967).

14. Id. at 351.

15. Id. n.9; see, e.g., Berger v. New York, 388 U.S. 41, 57, 59 (1967); Lopez v. United States, 373 U.S. 427, 438-39 (1963); Silverman v. United States, 365 U.S. 505, 511-12 (1961).

16. See, e.g., See v. City of Seattle, 387 U.S. 541, 543 (1967); Camara v. Municipal Court,

v. New York,[17] the Supreme Court said: "The security intended to be guaranteed by the Fourth Amendment against wrongful [unreasonable] search and seizures [was] designed to prevent . . . unlawful invasion of the sanctity of the home of the citizen by officers of the law, acting under legislative or judicial sanction . . . ."[18] This statement was repeated in *Weeks v. United States*,[19] where the Court added that, to sanction the use of evidence in a federal prosecution which had been illegally seized by federal officers from the defendant's home "would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution . . . ."[20] The extent to which the Supreme Court has gone to protect the individual's right to be free from governmental intrusion in his own home[21] is illustrated by the principle that "a search of private houses is *presumtively unreasonable* if conducted without a warrant."[22]

In recent years the Supreme Court has been called upon to determine the scope of fourth amendment protection with respect to warrantless searches of homes for violations of local health, safety, and fire codes. In *Frank v. Maryland*,[23] the

387 U.S. 523, 530-31 (1967); Monroe v. Pape, 365 U.S. 167, 210 (1961); Johnson v. United States, 333 U.S. 10, 14 (1948); Agnello v. United States, 269 U.S. 20, 32-33 (1925); Weeks v. United States, 232 U.S. 383, 389-91 (1914).

17. 192 U.S. 585 (1904).

18. Id. at 598.

19. 232 U.S. 383, 394 (1914).

20. Id. at 394. Although the exclusionary rule was originally based on the Supreme Court's supervisory power over the federal courts, (Weeks v. United States, 232 U.S. 383 (1914)), it is now applicable to the states through the operation of the fourteenth amendment. Mapp v. Ohio, 367 U.S. 643 (1961).

21. While courts are generally in agreement as to what constitutes a "home" so as to be within the protection of the fourth amendment, there is great disagreement with respect to the exact physical extent of "houses." Compare Hester v. United States, 265 U.S. 57, 59 (1924) (open fields not within scope of protection), and Atwell v. United States, 414 F.2d 136, 138 (5th Cir. 1969) (illegal still, 250 yards in back of house not within scope of protection), and Monnette v. United States, 299 F.2d 847, 850 (5th Cir. 1962) (grounds surrounding building not within scope of protection), and Dulek v. United States, 16 F.2d 275 (6th Cir. 1926) (cabin 230 feet from dwelling not within scope of protection), and United States v. Watt, 309 F. Supp. 329, 330-31 (N.D. Cal. 1970) (vacant lot not within scope of protection), and United States v. One Ford V-8 Sedan, 7 F. Supp. 705, 707 (W.D. Mich. 1934) (lean-to not within scope of protection), with Taylor v. United States, 286 U.S. 1, 5 (1932) (garage adjacent to dwelling within scope of protection), and Rosencranz v. United States, 356 F.2d 310, 313 (1st Cir. 1966) (curtilege within scope of protection), and Walker v. United States, 225 F.2d 447, 449 (5th Cir. 1955) (barn 80 yards from dwelling within scope of protection), and Roberson v. United States, 165 F.2d 752, 754-55 (6th Cir. 1948) (smoke house located inside yard fence of dwelling within scope of protection), and Wakkuri v. United States, 67 F.2d 844, 845 (6th Cir. 1933) (bath house adjacent to dwelling within scope of protection), and Temperani v. United States, 299 F. 365, 367 (9th Cir. 1924) (garage underneath a one-story dwelling within scope of protection).

22. See v. City of Seattle, 387 U.S. 541, 543 (1967) (emphasis added). See also Camara v. Municipal Court, 387 U.S. 523, 528-29 (1967); Stoner v. California, 376 U.S. 483, 486 (1964); United States v. Jeffers, 342 U.S. 48, 51 (1951); McDonald v. United States, 335 U.S. 451, 453 (1948); Agnello v. United States, 269 U.S. 20, 32 (1925).

23. 359 U.S. 360 (1959), overruled, Camara v. Municipal Court, 387 U.S. 523 (1967).

defendant was charged with violating a provision of the Baltimore City Code by refusing to permit an inspection of his home by a city health investigator. In the course of its opinion the Court pointed out that the historical significance of the origin of the fourth amendment was "the right to be secure from searches for evidence to be used in criminal prosecutions . . . ."[24] After noting that the challenged system of inspection had "been an integral part of the enforcement of Baltimore's health laws for more than a century and a half,"[25] and that "[t]he need for preventive action [was] great,"[26] the Court concluded: "[T]he carefully circumscribed demand which Maryland here makes on appellant's freedom has [not] deprived him of due process of law."[27]

The *Frank* opinion was a 5–4 decision. The dissenters, Chief Justice Warren, and Justices Douglas, Black, and Brennan, described the majority viewpoint as an "inquest over a substantial part of the Fourth Amendment."[28] The dissenters quarreled with the majority's historical analysis of the fourth amendment and its consequent emphasis on searches for evidence in criminal proceedings[29] and argued that where a homeowner refused an administrative search a warrant issued only upon a showing of probable cause was required. The minority opinion was careful to point out, however, that the probable cause required for an administrative search warrant should not be as stringent as that required for a criminal search warrant.[30]

The minority position in *Frank* became essentially the majority position eight years later[31] in *Camara v. Municipal Court*[32] where the petitioner was charged with violating the San Francisco Housing Code[33] by refusing to permit a

24. Id. at 365.

25. Id. at 370.

26. Id. at 372.

27. Id. at 373.

28. Id. at 374 (dissenting opinion).

29. Id. at 376-80 (dissenting opinion).

30. Id. at 383 (dissenting opinion).

31. One year after Frank, the question of a homeowner's right to refuse a warrantless administrative search of his premises was again brought before the Court in Ohio ex rel. Eaton v. Price, 364 U.S. 263 (1960), aff'g by an equally divided Court 168 Ohio St. 123, 151 N.E.2d 523 (1958). Contrary to the normal Supreme Court procedure where no opinion is expressed in such affirmances, the Frank dissenters filed an opinion in which they concluded that warrantless inspections violated the fourth amendment. 364 U.S. at 273. They urged the substitution of a warrant system and the expansion of the concept of probable cause. Id. at 272-73.

32. 387 U.S. 523 (1967).

33. San Francisco, Cal., Housing Code § 503 (1967). Under the code inspectors were authorized to enter any building at a reasonable time in performance of their duties. Section 507 provided that anyone who violated the code "shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding five hundred dollars ($500.00), or by imprisonment, not exceeding six (6) months or by both such fine and imprisonment, . . . and shall be deemed guilty of a separate offense for every day such violation . . . shall continue."

warrantless inspection of his premises.[34] The petitioner claimed, and the Court agreed, that such an inspection without his permission constituted "significant intrusions upon the interests protected by the Fourth Amendment . . . ."[35] The majority in *Camara*, composed of the *Frank* dissenters plus Justices White and Fortas, sought to balance the needs of the community against the right of the individual to privacy[36] by expanding the grounds upon which a showing of probable cause may be made in administrative search cases.[37] The Court specifically noted that a warrant could properly issue without "specific knowledge of the condition of the particular dwelling."[38]

In *See v. City of Seattle*,[39] a companion case to *Camara*, the Court extended the *Camara* holding to include the right to refuse a warrantless inspection of commercial buildings. Noting that governmental regulations of business had mushroomed, the Court said:

> The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant.[40]

However, the Court sought to assure the government's right of inspection by measuring probable cause for the issuance of a warrant in such cases "against a flexible standard of reasonableness that takes into account the public need for effective enforcement of the particular regulation involved."[41]

Justice Clark, joined by Justices Harlan and Stewart, filed a vigorous dissent to both *Camara* and *See*, in which he cited *Frank* as determinative of the constitutionality of warrantless administrative searches,[42] and noted that statutes similar to those in *Camara* and *See* had consistently withstood constitutional challenge in the state courts.[43] While the dissenters implicitly acquiesced in the majority's determination that the inspections in question were searches within the meaning of the fourth amendment, they nevertheless concluded that such searches did not violate the fourth amendment's standard of reasonableness.[44] The arguments advanced by Justice Clark were generally identical to those stated by Justice Frankfurter in the majority opinion in *Frank*: community need, long historical acceptance of warrantless inspections, and the impersonal

34. 387 U.S. at 525.
35. Id. at 534.
36. Id. at 533.
37. Id. at 535. However, "reasonableness is still the ultimate standard." Id. at 539.
38. Id. at 538. "If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant." Id. at 539.
39. 387 U.S. 541 (1967).
40. Id. at 543.
41. Id. at 545.
42. Id. at 547 (dissenting opinion).
43. Id. at 548 (dissenting opinion).
44. Id. at 548-49 (dissenting opinion).

nature of the inspection.[45] Justice Clark called the proposed warrant system "burdensome,"[46] and noted that it might actually expand the inspector's powers, thus resulting in a greater intrusion into the home.[47]

In determining that a welfare recipient had a constitutional right to refuse to permit a home visit by a case worker and that the state could not condition welfare payments upon acquiescence to such visits, the three-judge district court in *James* found *Camara* to be dispositive of its holding that home visits were searches within the meaning of the fourth amendment.[48] The court further held that such searches were unreasonable when not consented to or supported by a warrant issued on the basis of probable cause.[49] Although recognizing that home visits served legitimate state purposes, the court said that within the context of New York case law[50] as well as under section 145 of the Social Welfare Law,[51] "home visits may appropriately be considered searches for evidence of welfare fraud or other criminal activity."[52]

The United States Supreme Court reversed the district court, holding alternatively that home visits were not "searches" within the fourth amendment proscription,[53] and that even if they were "searches," they did not violate the standard of reasonableness.[54] The Court's determination that home visits were not "searches" was based on the nature and purposes of such visits.[55] Although

45. Compare Frank v. Maryland, 359 U.S. 360 (1959), overruled, Camara v. Municipal Court, 387 U.S. 523 (1967), with See v. City of Seattle, 387 U.S. 541, 553-55 (1967) (dissenting opinion).

46. 387 U.S. at 554 (dissenting opinion).

47. Id. at 554-55 (dissenting opinion).

48. James v. Goldberg, 303 F. Supp. 935, 941 (S.D.N.Y. 1969), rev'd sub nom. Wyman v. James, 400 U.S. 309 (1971).

49. 303 F. Supp. at 943-44.

50. E.g., People v. LaFace, 148 Misc. 238, 266 N.Y.S. 458 (Westchester County Ct. 1933), in which the court, interpreting Law of April 12, 1929, ch. 565, § 148 [1929] N.Y. Laws 152d Sess. 1191 (consolidated in Law of April 18, 1940, ch. 619, § 3 [1940] N.Y. Laws 163d Sess. 1718, as amended, N.Y. Soc. Welfare Law § 145 (McKinney 1966)), which authorized penalties for welfare fraud, found that: "The essence of the crime is the false representation in an application for relief. It makes no difference whether the relief is obtained or could have been obtained." 148 Misc. at 243, 266 N.Y.S. at 464-65.

51. N.Y. Soc. Welfare Law § 145 (McKinney 1966) provides in part: "Whenever a public welfare official has reason to believe that any person has violated any provision of this section, he shall refer the facts and evidence available to him to the appropriate district attorney or other prosecuting official." See also N.Y. Penal Law §§ 155.00-.45 (McKinney 1967), as amended, (McKinney Supp. 1970); N.Y. Dep't of Soc. Servs., 18 N.Y. Codes, Rules & Regs. §§ 347.1-.6, 348.1-.6, 351.1 (1962).

52. 303 F. Supp. at 944.

53. Wyman v. James, 400 U.S. 309, 318 (1971).

54. Id.; see note 8 supra and accompanying text.

55. 400 U.S. at 317-18. See also id. at 320, citing Note, Rehabilitation, Investigation and the Welfare Home Visit, 79 Yale L.J. 746, 748-51 (1970) [hereinafter cited as The Home Visit].

characterizing the visits as "both rehabilitative and investigative,"[56] the Court said that the investigative character of the visits did not correspond to a search "in the traditional criminal law context."[57] The major part of the *James* decision was not directed to the search aspects of the caseworker's visit, but rather to the reasonableness of the visit in light of the prohibition against "unreasonable" searches.[58] In considering the reasonableness of the home visits the Court looked first to the state's interest in protecting the child: "The dependent child's needs are paramount, and only with hesitancy would we relegate those needs, in the scale of comparative values, to a position secondary to what the mother claims as her rights."[59] The Court also noted that the caseworker's visits "[afford] 'a personal, rehabilitative orientation, unlike that of most federal programs.' "[60] The reasonableness of home visits was further reviewed in terms of the state's interest in the proper fiscal administration of welfare payments,[61] and also in terms of the necessity for such visits as well as the "significant" procedures employed by the New York Department of Social Services.[62] Home visits were required, the Court said, to "assure verification of actual residence or of actual physical presence in the home . . . or of impending medical needs."[63] The procedures employed by the department, such as advance written notification of the impending visit, "[minimized] any 'burden' upon the homeowner's right . . . ."[64]

The final consideration on which the Court based its finding of reasonableness was the non-penal nature of the visit: "The home visit is not a criminal investigation, does not equate with a criminal investigation, and . . . is not in aid of any criminal proceeding."[65] The Court distinguished *Camara* and *See* on the ground

56. 400 U.S. at 317.

57. Id.

58. Id. at 318-24; see note 8 supra and accompanying text.

59. 400 U.S. at 318. See also 42 U.S.C. § 601 (Supp. V, 1970).

60. 400 U.S. at 320, quoting The Home Visit, supra note 55, at 746. The "personal" nature of the home visit was disputed by the caseworkers themselves, through their collective bargaining agent. Brief for Social Service Employees Local 371 as Amicus Curiae at 4-5, Wyman v. James, 400 U.S. 309 (1971) [hereinafter cited as Brief for Amicus]. See also Graham, Civil Liberties Problems in Welfare Administration, 43 N.Y.U.L. Rev. 836, 853-54 (1968).

61. 400 U.S. at 318-19.

62. Id. at 320. See generally N.Y. Dep't of Soc. Servs., 18 N.Y. Codes, Rules & Regs. §§ 351.1, .6, .7 (1962).

63. 400 U.S. at 322. In contrast to the Supreme Court's finding, the district court felt that: "Less drastic means may be suggested for achieving the same basic purposes for which . . . home visits are designed. Proof of actual residence may be ascertained, for example, by the submission of a duly-executed lease upon the premises in question. Family composition may be verified by the submission, in this instance, of birth certificates. The physical well-being of the child could be safeguarded by making available facilities for periodic medical examinations rather than by requiring routine home visits by caseworkers." 303 F. Supp. at 943.

64. 400 U.S. at 321.

65. Id. at 323. While the Court specifically did not rule on the admissibility in a criminal prosecution of evidence procured as a result of home visits, it did note that the use of such

that those cases "arose in a criminal context where a genuine search was denied and prosecution followed."[66] The fact that Mrs. James' refusal to permit a home visit did not constitute "a criminal act by any applicable New York or federal statute"[67] was carefully noted by the Court.

Justices Douglas, Marshall and Brennan dissented from the majority's findings, both as to the existence of a search and as to its reasonableness. Viewing with alarm modern government's growing intrusion into the individual's life,[68] Justice Douglas argued that the government could not condition welfare payments upon the relinquishment of fourth amendment rights.[69] He characterized the issue in *James* as "whether the government by force of its largesse has the power to 'buy up' rights guaranteed by the Constitution."[70] Justice Marshall, joined by Justice Brennan, quarreled with what they considered to be the majority's disregard of the investigative nature of home visits, stating that: "In an era of rapidly burgeoning governmental activities and their concomitant inspectors, caseworkers, and researchers, a restriction of the Fourth Amendment to 'the traditional criminal law context' tramples the ancient concept that a man's home is his castle."[71] They also felt that the majority's effort to distinguish *Camara* and *See* failed because home visits may ultimately result in prosecution.[72] Citing an "unbroken line of cases" which held "that, subject to a few narrowly drawn exceptions, any search without a warrant is constitutionally unreasonable,"[73] they concluded that the majority had departed "from the entire history of Fourth Amendment case law."[74]

While many civil libertarians may be alarmed at the *James* holding, the scope

---

evidence was "a consequence no greater than that which necessarily ensues upon any other discovery by a citizen of criminal conduct." Id.

66. Id. at 325.

67. Id.

68. "The bureaucracy of modern government is not only slow, lumbering, and oppressive; it is omnipresent. It touches everyone's life at numerous points. It pries more and more into private affairs, breaking down the barriers that individuals erect to give them some insulation from the intrigues and harassments of modern life. Isolation is not a constitutional guarantee; but the sanctity of the sanctuary of the home is such—as marked and defined by the Fourth Amendment . . . . What we do today is to depreciate it." Id. at 335 (dissenting opinion) (emphasis deleted) (footnote omitted).

69. Id. at 327-28 (dissenting opinion).

70. Id. at 328 (dissenting opinion) (footnote omitted).

71. Id. at 339 (dissenting opinion).

72. Id. at 340 (dissenting opinion); see, e.g., People v. Shirley, 55 Cal. 2d 521, 360 P.2d 33, 11 Cal. Rptr. 537 (1961); County of Kern v. Coley, 229 Cal. App. 2d 172, 40 Cal. Rptr. 53 (Dist. Ct. App. 1964); People v. Wood, 214 Cal. App. 2d 298, 29 Cal. Rptr. 444 (Dist. Ct. App. 1963); People v. Flores, 197 Cal. App. 2d 611, 17 Cal. Rptr. 382 (Dist. Ct. App. 1961); Blackmone v. United States, 151 A.2d 191 (D.C. Mun. Ct. App. 1959).

73. 400 U.S. at 341 (dissenting opinion), citing Vale v. Louisiana, 399 U.S. 30, 34-35 (1970); Chimel v. California, 395 U.S. 752, 762 (1969); Camara v. Municipal Court, 387 U.S. 523, 528-29 (1967); Chapman v. United States, 365 U.S. 610, 613-15 (1961); Johnson v. United States, 333 U.S. 10, 13-14 (1948); Agnello v. United States, 269 U.S. 20, 32 (1925).

74. 400 U.S. at 341 (dissenting opinion).

of the majority opinion is limited, for the Court repeatedly emphasized that home visits *as structured by New York* were not unconstitutional.[75] In particular, the Court found the fact that Mrs. James received advance written notification of the visit to be "significant."[76] Nonetheless, the *James* decision seems to fall substantially short of guaranteeing full fourth amendment protection to welfare recipients since New York does not, in fact, condition home visits on such advance written notification to the client.[77] The Court's reliance on the fact that such notice was given raises the question whether unannounced home visits would be constitutionally permissible. The spiraling cost of welfare payments,[78] coupled with the growing hostility of voters toward all welfare programs,[79] makes the use of surprise visits to determine eligibility increasingly attractive to state officials.[80] Since the *James* decision neither encourages nor deters such action, its importance lies in the fact that it has not removed the incentive for surprise visits—conduct which is, at best, constitutionally questionable.

Constitutional Law—Imprisonment of Indigent for Nonpayment of Fine Held Violative of Equal Protection.—Petitioner, an indigent, was convicted of nine traffic offenses and a fine of $425 was imposed upon him. Since he was unable to pay the fine, the trial court, pursuant to a Texas statute[1] and mu-

75. E.g., id. at 320-21, 326. The question of the validity of early morning mass raids on the homes of welfare recipients was specifically excluded from the opinion. Id. at 326; see, e.g., Parrish v. Civil Service Comm'n, 66 Cal. 2d 260, 425 P.2d 223, 57 Cal. Rptr. 623 (1967). See also Bell, The 'Rights' of the Poor: Welfare Witch-hunts in the District of Columbia, Social Work, Jan. 1968, at 60 (vol. 13); Reich, Midnight Welfare Searches and the Social Security Act, 72 Yale L.J. 1347 (1963); Comment, Pre-Dawn Welfare Inspections and the Right of Privacy, 44 J. Urban L. 119 (1966); Note, Warrantless Welfare Searches Violate Recipient's Constitutional Rights, 19 Syracuse L. Rev. 95 (1967).

76. 400 U.S. at 320.

77. The New York City Commissioner of Social Services, expressing his department's policy, has said: "Caseworkers are encouraged . . . wherever . . . practicable to . . . send notice of such visits to recipients. However, failure to give such notice is not a valid basis of refusing admittance to the caseworker . . . ." He also said that refusal to admit a caseworker would be a sufficient basis for termination of benefits. Brief for Amicus 14.

78. See, e.g., N.Y. Times, Dec. 29, 1970, at 1, col. 2; id., Dec. 13, 1970, at 1, col. 6; id., Dec. 8, 1970, at 55, col. 5.

79. See, e.g., id., Oct. 1, 1969, at 22, col. 1; id., June 5, 1969, at 37, cols. 1, 5-6.

80. On the day that the James decision was handed down, Nevada state officials announced that they had conducted a series of visits to the homes of all welfare recipients to determine their continued eligibility. As a result of this procedure, twenty-two percent of the recipients visited were struck from the welfare rolls on the grounds that they had been "cheating." Id., Jan. 12, 1971, at 20, cols. 1, 6. This practice is not a new one. In January, 1963, an exercise called "Operation Bedcheck" took place in Alameda, California. "Welfare caseworkers swept through ghetto neighborhoods, barging into welfare mothers' homes and searching into closets, bathrooms and beds . . . ." Id., Jan. 17, 1971, § 4 (Review), at 8, col. 1.

1. Tex. Code Crim. Proc. Ann. art. 4.14 (1966) provides: "The corporation court in each incorporated city, town or village of this State shall have jurisdiction within the corporate

nicipal ordinance,[2] imposed a jail sentence which required that he remain imprisoned until the fine was "worked off" at the rate of five dollars per day. After twenty-one days of confinement, petitioner was released on bond and applied to a state appellate court for a writ of habeas corpus.[3] The writ was denied, and the Texas Court of Criminal Appeals affirmed the denial.[4] The United States Supreme Court granted certiorari and subsequently reversed the denial of habeas corpus on the ground that such imprisonment violated the equal protection clause of the fourteenth amendment. *Tate v. Short*, 401 U.S. 395 (1971).

There are four types of cases involving the imprisonment of indigents for nonpayment of fines. These may be classified both as to the type and length of sentence imposed: first, cases where an indigent who is sentenced to both a jail term and fine and who, because of his inability to pay the fine, is subjected to an additional term of imprisonment which in the aggregate exceeds the maximum statutory term for the original offense;[5] second, cases where the confinement for nonpayment, combined with the initial jail sentence, results in an aggregate prison term below the maximum allowed by statute;[6] third, cases where the indigent is incarcerated for nonpayment of a fine alone;[7] and fourth, cases involving the familiar, if somewhat apocryphal, alternative— "thirty dollars or thirty days."[8]

The United States Supreme Court, in *Williams v. Illinois*,[9] held that incarceration for nonpayment of fines resulting in a term of imprisonment beyond the statutory maximum was constitutionally invalid as a denial of equal protection.[10]

---

limits in all criminal cases arising under the ordinances of such city, town or village, and shall have concurrent jurisdiction with any justice of the peace in any precinct in which said city, town or village is situated in all criminal cases arising under the criminal laws of this State, in which punishment is by fine only, and where the maximum of such fine may not exceed two hundred dollars, and arising within such corporate limits."

2. Houston, Tex., Code of Ordinances § 35-8 (1968) provides: "Each prisoner committed to the city jail or to the municipal prison farm for nonpayment of the fine arising out of his conviction of a misdemeanor in the corporation court shall receive a credit against such fine of five dollars ($5.00) for each day or fraction of a day that he has served."

3. Tate v. Short, 401 U.S. 395, 397 (1971).

4. Ex parte Tate, 445 S.W.2d 210 (Tex. Crim. App. 1969).

5. E.g., Williams v. Illinois, 399 U.S. 235 (1970); People v. Saffore, 18 N.Y.2d 101, 218 N.E.2d 686, 271 N.Y.S.2d 972 (1966).

6. E.g., United States ex rel. Privitera v. Kross, 239 F. Supp. 118 (S.D.N.Y.), aff'd, 345 F.2d 533 (2d Cir.), cert. denied, 382 U.S. 911 (1965).

7. E.g., Kelly v. Schoonfield, 285 F. Supp. 732, 735 (D. Md. 1968); State v. Brown, 5 Conn. Cir. Ct. 228, 249 A.2d 672 (1967).

8. See generally Comment, Fines, Imprisonment and the Poor: "Thirty Dollars or Thirty Days", 57 Calif. L. Rev. 778 (1969).

9. 399 U.S. 235 (1970).

10. Id. at 243-44. Closely connected to the problem of fines is the practice of imprisonment for nonpayment of court costs. In Kelly v. Schoonfield, 285 F. Supp. 732 (D. Md. 1968), the court sustained the imprisonment of an indigent for nonpayment of a fine, but held that the incarceration for failure to pay court costs violated equal protection because all persons were

In *Williams*, the defendant was convicted of petty theft pursuant to Illinois law.[11] As a result, he was sentenced to the maximum term of one year imprisonment, fined five hundred dollars,[12] and in addition, was taxed five dollars in court costs.[13] The judgment further provided that, should the defendant default in the payment of the fine, he would remain incarcerated until the fine was "worked off" at the statutory rate of five dollars per day.[14] Mr. Chief Justice Burger, writing for the majority, relied solely on the equal protection clause in holding such confinement unconstitutional.[15] Basic to this holding is the principle

---

not subject to such commitment. Id. at 737. In a federal case in Tennessee, the petitioner was imprisoned for nonpayment of court costs and jail fees directly related to her inability to post bail. The court reasoned that it would constitute an invidious discrimination to imprison the petitioner for nonpayment of the accrued costs and fees since a wealthier defendant could easily have posted bail and escaped such imprisonment. Dillehay v. White, 264 F. Supp. 164, 166-67 (M.D. Tenn. 1966); see Note, Imprisonment for Nonpayment of Fines and Costs: A New Look at the Law and the Constitution, 22 Vand. L. Rev. 611 (1969). Imprisonment for nonpayment of court costs has also been held to violate the thirteenth amendment's ban on involuntary servitude. Anderson v. Ellington, 300 F. Supp. 789 (M.D. Tenn. 1969); Wright v. Matthews, 209 Va. 246, 163 S.E.2d 158 (1968). Although commitment for nonpayment of court costs had previously been treated somewhat differently from incarceration for nonpayment of fines, Williams held that incarceration for default in payment of fines and court costs were to be treated similarly. 399 U.S. at 244 n.20.

11. Ill. Ann. Stat. ch. 38, § 16-1 (Smith-Hurd 1970).

12. 399 U.S. at 236.

13. Id.

14. Id. The judgment was in accordance with Ill. Ann. Stat. ch. 38, § 1-7(k) (Smith-Hurd Supp. 1970) which provides: "A judgment of a fine imposed upon an offender may be enforced in the same manner as a judgment entered in a civil action; Provided, however, that in such judgment imposing the fine the court may further order that upon non-payment of such fine, the offender may be be imprisoned until the fine is paid, or satisfied at the rate of $5.00 per day of imprisonment; Provided, further, however, that no person shall be imprisoned under the first proviso hereof for a longer period than 6 months."

15. 399 U.S. at 244. The New York Court of Appeals had come to a similar conclusion four years earlier in People v. Saffore, 18 N.Y.2d 101, 104, 218 N.E.2d 686, 688, 271 N.Y.S.2d 972, 975 (1966), noted in 16 Buffalo L. Rev. 428 (1967) and 27 Md. L. Rev. 200 (1967) and 41 St. John's L. Rev. 628 (1967); accord, People v. McMillan, 53 Misc. 2d 685, 686, 279 N.Y.S.2d 941, 942 (Orange County Ct. 1967); People v. Collins, 47 Misc. 2d 210, 212, 261 N.Y.S.2d 970, 973 (Orange County Ct. 1965). Contra, People ex rel. Loos v. Redman, 48 Misc. 2d 592, 594-95, 265 N.Y.S.2d 453, 455-56 (Sup. Ct. 1965); People v. Watson, 204 Misc. 467, 468-69, 126 N.Y.S.2d 832, 834-35 (Ct. Gen. Sess. 1953).

Prior to Williams and its equal protection mode of analysis, numerous other constitutional arguments had been employed by defendants. For example, the eighth amendment's prohibition against the imposition of excessive fines has been relied upon frequently. See cases collected in Annot., 31 A.L.R.3d 926, 929-30 (1970). Although indigent defendants have contended that, as applied to them, the fine is excessive since they cannot pay it, this argument has generally been rejected. E.g., United States ex rel. Privitera v. Kross, 239 F. Supp. 118 (S.D.N.Y.), aff'd, 345 F.2d 533 (2d Cir.), cert. denied, 382 U.S. 911 (1965); accord, Kelly v. Schoonfield, 285 F. Supp. 732, 735 (D. Md. 1968); People ex rel. Loos v. Redman, supra; People v. Watson, supra. However, this contention has been sustained in several cases where

that commitment for nonpayment of a fine[16] is not imposed as an additional punitive measure for the crime perpetrated, but only to coerce payment of the fine.[17] The opinion conceded that, in view of the sentencing judge's discretion in imposing penal sanctions, an indigent could, for the same offense, be sentenced to a longer term of imprisonment than a non-indigent.[18] The Court, however, held that under the equal protection clause the state may not impose on an indigent a term of confinement beyond the statutory maximum "solely by reason of [his] indigency."[19] The Court concluded that: first, such imprisonment would extend beyond the outer limits necessary to satisfy the state's penal interests;[20]

---

nonpayment of fines has subjected the indigents to imprisonment beyond the maximum jail term. E.g., People v. Saffore, supra; People v. Johnson, 24 App. Div. 2d 577, 262 N.Y.S.2d 431 (2d Dep't 1965) (mem.). In People v. McMillan, supra, the court stated: "In these times in which all of the engines of the criminal law are driving toward preserving and defending the rights of the indigent, our local courts should avoid resort to an archaic system akin to imprisonment for debt. 'Equal treatment under the law' means more than 'A day for a dollar—pay and you go'." Supra at 687, 279 N.Y.S.2d at 943.

The eighth amendment's ban upon the imposition of cruel and unusual punishment has also been pleaded by defendants, although never successfully. In Kelly v. Schoonfield, supra, the court denied the extension of the application of the status concept as enunciated in Robinson v. California, 370 U.S. 660 (1962), where a statute providing for the arrest and prosecution of a drug addict was held unconstitutional, and Driver v. Hinnant, 356 F.2d 761 (4th Cir. 1966), in which a statute providing for the arrest and prosecution of persons intoxicated in public was held unconstitutional with respect to a chronic alcoholic. See also Easter v. District of Columbia, 361 F.2d 50 (D.C. Cir. 1966). Whether Driver is still good law has not been fully determined. In Powell v. Texas, 392 U.S. 514 (1968), a divided Court, 4-1-4, held that a person could be convicted of being in a state of intoxication in a public place without violating the eighth amendment's prohibition against the imposition of cruel and unusual punishment. See generally Dubin, The Ballad of Leroy Powell, 16 U.C.L.A.L. Rev. 139 (1968); Note, Driver to Easter to Powell: Recognition of the Defense of Involuntary Intoxication?, 22 Rutgers L. Rev. 103 (1967).

Indigent defendants have also utilized the due process clause in attempting to avoid incarceration for nonpayment. However, the due process argument has generally been rejected by the courts, since a defendant's economic status was not considered applicable in determining the sentence imposed, provided that sentence fell within the bounds of the statutory penalty. State v. Brown, 5 Conn. Cir. Ct. 228, 249 A.2d 672 (1967). See also Wade v. Carsley, 221 So. 2d 725 (Miss. 1969). However, in Morris v. Schoonfield, 301 F. Supp. 158 (D. Md. 1969), vacated per curiam on other grounds, 399 U.S. 508 (1970), the district court held that due process had been violated because petitioners had not been given an opportunity to present their financial condition before the sentencing judge. Id. at 165.

16. The Court held that imprisonment for involuntary nonpayment of court costs violated the equal protection clause in the same manner as did imprisonment for nonpayment of fines since "the purpose of incarceration appears to be the same in both instances: ensuring compliance with a judgment." 399 U.S. at 244 n.20.

17. Id. at 240.

18. Id. at 243.

19. Id. at 242.

20. Id.

and second, such confinement would subject the indigent and his financially able counterpart to dissimilar consequences, *i.e.*, the latter could free himself at any time by paying the fine while the former, by virtue of his insolvency, was destined to remain imprisoned.[21] The Court pointed out, moreover, that constitutional alternatives to incarceration were available, and that, although a state was free to choose among various methods, it was nevertheless required to provide the indigent with a viable alternative.[22]

The Court, in *Williams*, did not determine whether a state could impose a term of imprisonment on an indigent for nonpayment of a fine where the aggregate term was less than the maximum jail sentence,[23] where a fine alone was imposed,[24] or where the sentence was thirty dollars or thirty days. In *Morris v. Schoonfield*,[25] however, which was decided on the same day as *Williams*, Mr. Justice White, in his concurring opinion, in which Justices Douglas, Brennan

21. Id. See Greenawalt, Constitutional Law, 1966 Survey of N.Y. Law, 18 Syracuse L. Rev. 180, 193-98 (1966). "When no substantial state interest justifies a significant differentiation in the effect of sentences on rich and poor, the poor man's claim to equal treatment should surely be given constitutional recognition." Id. at 195.

22. 399 U.S. at 244-45. Systems for installment payments have been enacted in several states. E.g., Cal. Penal Code § 1205 (West 1970); Mich. Comp. Laws Ann. § 769.3 (1968); Pa. Stat. Ann. tit. 19, §§ 953-56 (1964). See ABA Minimum Standards for Criminal Justice, Sentencing Alternatives and Procedures § 2.7, Commentary b at 121-22 (Approved Draft 1968); Model Penal Code §§ 302.1-2 (Proposed Official Draft 1962); National Commission on Reform of Federal Criminal Laws, Study Draft of a New Federal Criminal Code § 3302(4) (1970); President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 18 (1967). See also Note, The Equal Protection Clause and Imprisonment of the Indigent for Nonpayment of Fines, 64 Mich. L. Rev. 938 (1966); Comment, Equal Protection and the Use of Fines as Penalties for Criminal Offenses, 1966 U. Ill. L.F. 460; Note, Imprisonment for Nonpayment of Fines and Costs: A New Look at the Law and the Constitution, 22 Vand. L. Rev. 611 (1969). Another measure which has been suggested is the application of fines in accordance with the wealth of the defendant. See generally Turkington, Unconstitutionally Excessive Punishments: An Examination of the Eighth Amendment and the Weems Principle, 3 Crim. L. Bull. 145 (1967); Note, Discriminations Against the Poor and the Fourteenth Amendment, 81 Harv. L. Rev. 435, 448 (1967); Note, Fines and Fining—An Evaluation, 101 U. Pa. L. Rev. 1013, 1024-26 (1953).

23. 399 U.S. at 243-44. However, in United States ex rel. Privitera v. Kross, 239 F. Supp. 118 (S.D.N.Y.), aff'd, 345 F.2d 533 (2d Cir.), cert. denied, 382 U.S. 911 (1965), the defendant was sentenced to a jail term and fined but, as a result of the defendant's indigency, the sentence was converted into a longer jail term. The aggregate remained below the statutory maximum. The district court held that such confinement was constitutional because "once convicted, petitioner has no constitutional right that another defendant, no matter what his economic status, rich or poor, receive the same sentence for the same offense." Id. at 120; accord, Kelly v. Schoonfield, 285 F. Supp. 732, 736 (D. Md. 1968); State v. Brown, 5 Conn. Cir. Ct. 228, 249 A.2d 672 (1967). But see Morris v. Schoonfield, 399 U.S. 508, 509 (1970) (per curiam) (concurring opinion); In re Antazo, 3 Cal. 3d 100, 473 P.2d 999, 89 Cal. Rptr. 255 (1970).

24. 399 U.S. at 243.

25. 399 U.S. 508 (1970), vacating per curiam 301 F. Supp. 158 (D. Md. 1969).

and Marshall joined, argued that "the same constitutional defect condemned in *Williams* also inheres in jailing an indigent for failing to make immediate payment of any fine, whether or not the fine is accompanied by a jail term and whether or not the jail term of the indigent extends beyond the maximum term that may be imposed on a person willing and able to pay a fine."[26] These four Justices, together with Mr. Justice Harlan, who, concurring in *Williams*,[27] expressed a similar view, constituted a majority of five who were in favor of holding unconstitutional all imprisonments of indigents for nonpayment of fines.[28]

In *Tate v. Short*,[29] a case involving sanctions imposed for traffic offenses, the Court adopted the concurring opinion in *Morris* and extended the holding of *Williams* to all situations where an indigent is imprisoned for his inability to pay the fine imposed.[30] Although *Williams* involved an aggregate imprisonment beyond the maximum jail term while *Tate* involved an incarceration for nonpayment of a fine alone, the Court held the two to be analogous[31] since in either case a wealthy man could have paid the fine and avoided imprisonment. The Court reasoned that since Texas had chosen to legislate a "fines only" system of punishment for traffic violations, "[the] statutory ceiling [could not], con-

26. Id. at 509.

27. 399 U.S. at 259. Although Mr. Justice Harlan concurred in the judgment in Williams, he thought the equal protection argument inapplicable, preferring instead to rely on due process. Id. Unlike the majority, he saw "no distinction between circumstances where the State through its judicial agent determines that effective punishment requires less than the maximum prison term plus a fine, or a fine alone, and the circumstances of this case." Id. at 265 n.*.

28. 399 U.S. at 509. Shortly after Williams, such a pronouncement was made in at least one state jurisdiction. In In re Antazo, 3 Cal. 3d 100, 473 P.2d 999, 89 Cal. Rptr. 255 (1970), petitioner was fined $2,500 plus a penalty assessment of $625, or, in lieu of payment thereof, one day in the county jail for each $10 unpaid. Since petitioner was unable to pay due to his indigency, he was incarcerated. The Supreme Court of California, however, declared such imprisonment violative of equal protection, since a wealthy defendant could extricate himself from the threat of confinement by payment of the fine—an option not open to an indigent. Id. at 115, 473 P.2d at 1009, 89 Cal. Rptr. at 265. Although Antazo followed Williams in relying on the equal protection clause, the cruel and unusual punishment argument under the eighth amendment has a definite appeal. If a person cannot constitutionally be arrested and prosecuted for merely "being" a drug addict or chronic alcoholic can he be confined for the status of being impoverished? In Kelly v. Schoonfield, 285 F. Supp. 732 (D. Md. 1968), the court answered this argument with the observation that the defendant was arrested for committing a crime and not for being poor. Id. at 735. Although the decisions which accepted the status concept concerned arrest and prosecution rather than sentencing, the emphasis of each case was not on the stage of the criminal proceeding but on the status of the defendants. E.g., Robinson v. California, 370 U.S. 660, 666 (1962); Driver v. Hinnant, 356 F.2d 761, 765 (4th Cir. 1966).

30. Id. at 398-99.

31. Id. at 398. In Tate, "like Williams, petitioner was subjected to imprisonment solely because of his indigency." Id. It is interesting to note that Justice Harlan concurred in Tate on the basis of his opinion in Williams. See id. at 401.

sistently with the Equal Protection Clause, limit the punishment to payment of the fine if one is able to pay it, yet convert the fine into a prison term for an indigent defendant without the means to pay his fine."[32] The Court noted that the stated purpose of such imprisonment was not penal in nature but was aimed at adding to the state's revenues.[33] Yet even this objective was not realized since imprisoning the indigent "saddle[d] the State with the cost of feeding and housing him . . . ."[34] As in *Williams*, the Court in *Tate* pointed to the increasing number of states legislating in favor of installment payments and the relative success of these systems.[35]

The Court cautioned that its decision did not extend to those who have the means to pay the fine or to those who have the means but refuse to pay.[36] Furthermore, the Court expressly stated that its decision would not preclude imprisonment if the alternative means provided by statute failed, despite a defendant's good faith in complying with the alternative provided.[37] *Tate* suggests, however, that the state is under a duty to provide a reasonable alternative in any situation involving nonpayment of fines.[38] Perhaps all that should be required of the indigent is his good faith attempt at compliance. For example, if a state legislates that all indigents may pay fines through an installment system, and that system fails because of administrative difficulties, the state should not then be able to incarcerate the indigent for the shortcomings of its own system. The same result would follow where the state imposes an installment plan which would overburden the indigent, provided, of course, that the indigent makes a good faith effort to comply with the plan. In both instances, the error would be inherent in the system and not in the indigent's good faith attempts to comply with the alternative provided. The indigent cannot be made to assume the state's duty of creating reasonable alternatives to incarceration. If the alternative chosen by the state is not reasonable, then another method must be provided.[39]

---

32. Id. at 399.

33. Id.

34. Id.

35. Id. at 399-400 & 400 n.5; see note 22 supra.

36. 401 U.S. at 400.

37. Id. at 400-01. "Nor is our decision to be understood as precluding imprisonment as an enforcement method when alternative means are unsuccessful despite the defendant's reasonable efforts to satisfy the fines by those means; the determination of the constitutionality of imprisonment in that circumstance must await the presentation of a concrete case." Id.

38. Id. at 399. Although the state must provide a reasonable alternative to the incarceration of the indigent, it " 'is not powerless to enforce judgments against those financially unable to pay a fine; indeed, a different result would amount to inverse discrimination since it would enable an indigent to avoid both the fine and imprisonment for nonpayment whereas other defendants must always suffer one or the other conviction.' " Id.

39. See Comment, Fines, Imprisonment and the Poor: "Thirty Dollars or Thirty Days", 57 Calif. L. Rev. 778, 819-20 (1969), which suggests that courts "should carefully tailor [their] response to remedy the cause of default" by providing reasonable alternatives. Id. at 820.

Tate leaves open the question of the constitutionality of the "thirty dollar or thirty day" sentence. Mr. Justice Harlan, in his concurring opinion in *Williams*,[40] distinguished this situation from instances where the state legislature has indicated that thirty dollars or thirty days should be the *penalty* for the particular offense. Once a legislature does this, "[s]uch a statute evinces the perfectly rational determination that some individuals will be adequately punished by a money fine, and others, indifferent to money—whether by virtue of indigency or other reasons—can be punished only by a jail term."[41] Technically the imprisonment in such a case does not result from nonpayment of a fine but rather from the imposition of a punitive sanction, thus satisfying the state's punitive rather than revenue interest.[42] The result is no different, however, for while the wealthy defendant may choose to pay the fine, the indigent, "solely by reason of his indigency," has no similar choice. Of course a state might attempt to legislate an equation whereby thirty dollars equals, *e.g.*, two days. By increasing the dollar value of each day served in jail to the point where imprisonment would be a reasonable alternative to payment of the fine, the state would certainly increase the possibility that the plan, if challenged in the future, would be upheld. The vagaries of the economy, however, might make such a proposal impractical and would still not confront the problem of a discriminatory application. A far more facile solution would be to apply an installment payment system to the "thirty dollar or thirty day" sentence,[43] thereby giving the indigent a more reasonable alternative.

It is not at all certain that *Tate* will be the last word in this area. It might be argued that equal protection requires that each defendant be fined in accordance with his wealth or his rehabilitative needs.[44] A defendant with only five hundred dollars in the bank might have grounds to complain if he and his wealthy accomplice were each fined five hundred dollars for the same crime. Arguably the poorer defendant may have learned his lesson, but can the same be said for his more prosperous codefendant?

40. 399 U.S. at 265.

41. Id. at 265-66 (concurring opinion).

42. See note 33 supra and accompanying text.

43. See note 22 supra and accompanying text.

44. See Turkington, supra note 22; Comment, Fines, Imprisonment and the Poor: "Thirty Dollars or Thirty Days", 57 Calif. L. Rev. 778, 779 (1969). The large number of persons incarcerated for nonpayment of fines compounds the problem. A study of the Philadelphia County jail conducted by the President's Crime Commission revealed that sixty percent of the inmates had been incarcerated for nonpayment of fines. President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 18 (1967). Other studies have indicated similar results. See generally ABA Minimum Standards for Criminal Justice, Sentencing Alternatives and Procedures § 2.7, Commentary b at 119-20 (Approved Draft 1968); S. Rubin, The Law of Criminal Correction 252-54 (1963).

Constitutional Law—One-year Residency Requirement as Prerequisite to Taking Bar Examination Violative of Right to Interstate Travel and Equal Protection.—Three attorneys, each admitted to practice law in at least one other state, brought a class action seeking a judgment declaring unconstitutional a North Carolina rule which required a person to have been a bona fide citizen and resident of the state for twelve months before taking the bar examination.[1] Injunctive relief was also requested. Since the North Carolina bar examination was administered but once a year, the effect of the residence requirement was that an applicant for admission to the bar could have been required to wait from twelve to twenty four months after establishing his residence within the state before being allowed to take the examination.[2] A three-judge district court for the Eastern District of North Carolina held that the rule was unconstitutional in that it imposed a burden on the right to interstate travel and was a denial of equal protection of the laws. *Keenan v. Board of Law Examiners*, 317 F. Supp. 1350 (E.D.N.C. 1970).

The constitutional status of the right to travel interstate "has been firmly established and repeatedly recognized,"[3] notwithstanding the conspicuous absence of any express constitutional provision concerning freedom of movement.[4] Thus, despite the fact that "[a]ll have agreed that the right exists,"[5] it remains unsusceptible of definitive statement as to source and, therefore, scope.[6]

1. Rules Governing Admission to the Practice of Law in the State of N.C. Rule VI(6) at 13 (1970). The challenged portion of Rule VI provided: " 'Before being certified (licensed) by the Board to practice law in the State of North Carolina, a general applicant shall: . . . (6) Be and continuously have been a bona fide citizen and resident of the State of North Carolina for a period of at least twelve (12) months prior to the date of his bar examination. . . .' " Keenan v. Board of Law Examiners, 317 F. Supp. 1350, 1352 (E.D.N.C. 1970).

2. 317 F. Supp. at 1352.

3. United States v. Guest, 383 U.S. 745, 757 (1966).

4. Id. at 758. Notably, the Articles of Confederation expressly provided that "the people of each state shall have free ingress and regress to and from any other state . . . ." Articles of Confederation, art. IV. See Z. Chafee, Three Human Rights in the Constitution of 1787 at 185 (1956) [hereinafter cited as Chafee].

5. United States v. Guest, 383 U.S. 745, 759 (1966). See, e.g., Chafee, at 188.

6. See, e.g., Chafee, at 185; Harvith, The Constitutionality of Residence Tests for General and Categorical Assistance Programs, 54 Calif. L. Rev. 567 (1966). Not to be confused with the right to travel interstate is the constitutional freedom of Americans to travel outside the country. Recent cases in this somewhat parallel area have held the source of the right to be the due process clause of the fifth amendment. E.g., Aptheker v. Secretary of State, 378 U.S. 500 (1964); Kent v. Dulles, 357 U.S. 116 (1958). The Court held that § 6 of the Subversive Activities Control Act of 1950, 50 U.S.C. § 785 (1964), which denied passports to members of Communist organizations registered under the Act, infringed the right to travel, which was "part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment." Aptheker v. Secretary of State, supra at 505, quoting Kent v. Dulles, supra at 125 (dictum). "Freedom of movement is basic in our scheme of values." Id. at 506, quoting 357 U.S. at 126. Justice Goldberg, writing for the majority in Aptheker, approached the constitutional status of the freedom of travel by acknowledging it to be "a constitutional liberty closely related to rights of free speech and association . . . ." Id. at 517. See also Zemel v. Rusk, 381 U.S. 1 (1965).

An early federal case[7] recognized the right to travel as constituting one of the privileges and immunities under article IV, section 2 of the Constitution.[8] The earliest[9] Supreme Court statement regarding the right was enunciated by Mr. Chief Justice Taney in the *Passenger Cases*.[10] In a dissenting opinion, he characterized the right to travel as an incident of national citizenship, guaranteeing "free access, not only to the principal departments established at Washington, but also to its judicial tribunals and public offices in every State and Territory of the Union."[11]

Taney's dissent was clearly relevant to the determination of *Crandall v. Nevada*,[12] a case which brought the right to travel squarely before the Supreme Court.[13] The Nevada legislature had levied a tax upon each person who left the state.[14] A majority of the Court, holding the statute unconstitutional[15] on the ground that it impeded the right to travel, followed Taney's suggestion that the source of the right was the necessity of permitting full redress of grievances in "the courts of justice in the several States."[16] Justices Clifford and Chase, however, while concurring in the majority's reasoning as to the statute's unconstitutionality, invoked the commerce clause[17] as the origin of the right.[18]

This divergence of opinion as to the constitutional source of the right to travel evidenced in *Crandall* and in later cases,[19] was emphasized in *Edwards v.*

7. Corfield v. Coryell, 6 F. Cas. 546 (No. 3230) (C.C.E.D. Pa. 1823). This case involved the constitutionality of a New Jersey law which prohibited non-residents from gathering oysters in waters claimed by the state. In answering the question of whether the law was violative of article IV, Mr. Justice Washington stated that "[t]he right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise" was clearly among the fundamental privileges and immunities enjoyed by citizens of all states. Id. at 552 (dictum).

8. U.S. Const. art. IV, § 2: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

9. Note, Residence Requirements After Shapiro v. Thompson, 70 Colum. L. Rev. 134, 137 (1970).

10. 48 U.S. (7 How.) 282 (1849). These cases involved statutes of New York and Massachusetts which imposed taxes upon aliens arriving in the ports of those states. A majority of the justices held the statutes unconstitutional. Id.

11. Id. at 491. He further observed that "[w]e are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States." Id. at 492.

12. 73 U.S. (6 Wall.) 35 (1867).

13. Id. at 39-41.

14. Id. at 39.

15. Id. at 48-49.

16. Id. at 44, 48-49.

17. U.S. Const. art. I, § 8.

18. 73 U.S. (6 Wall.) at 49.

19. See, e.g., Twining v. New Jersey, 211 U.S. 78 (1908); Ward v. Maryland, 79 U.S. (12 Wall.) 418 (1870); Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1868). In Paul and Ward, the right was attributed to article IV, § 2, while the Twining Court saw its origin as the privileges and immunities clause of the fourteenth amendment. 211 U.S. at 97; 79 U.S. (12 Wall.) at 430; 75 U.S. (8 Wall.) at 180. See also Williams v. Fears, 179 U.S. 270, 274 (1900); Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 79 (1873).

California,[20] which concerned the validity of a California statute which made it a criminal offense to bring or assist in bringing into the state any non-resident indigent.[21] The statute was utilized to pressure indigents who had recently entered the state to return to their prior homes.[22] If the indigent and his family moved back to their former abode, the sentence imposed under the statute was suspended.[23] A majority of the Supreme Court held the statute to be an unconstitutional burden upon interstate commerce.[24] In his concurring opinion, Mr. Justice Douglas, however, declined to utilize the commerce clause.[25] Rather, he declared the right to travel to be grounded in the privileges and immunities clause, not of article IV, section 2,[26] but of the fourteenth amendment.[27]

Shapiro v. Thompson[28] marked a turning point in the historical development of the right to travel. Whereas the earlier cases demonstrated a constant shifting of emphasis as to a constitutional source for the right,[29] the *Shapiro* Court saw no reason to "ascribe the source of this right to travel interstate to a particular constitutional provision."[30] *Shapiro* involved state and District of Columbia

20. 314 U.S. 160 (1941). See Meyers, Federal Privileges and Immunities: Application to Ingress and Egress, 29 Cornell L.Q. 489 (1944); Roback, Legal Barriers to Interstate Migration, 28 Cornell L.Q. 286 (1943); Note, Interstate Migration and Personal Liberty, 40 Colum. L. Rev. 1032 (1940).

21. 314 U.S. at 171.

22. Exhibit 6, Supplement to Brief for the Attorney Gen. of Calif., in Hearings Before Select Comm. Investigating Nat'l Defense Migration, 77th Cong., 2d Sess. 10052-62 (1942).

23. Id. at 10062.

24. 314 U.S. at 177.

25. Id.

26. Id. at 181.

27. Id. Perhaps the best analysis of the three legal theories concerning the origin of the right can be found in Mr. Justice Harlan's opinion in United States v. Guest, 383 U.S. 745, 762-74 (1966). There he considered "the several asserted constitutional bases for the right to travel, and the scope of its protection in relation to each source." Id. at 764. He pointed out that as a right grounded in the commerce clause, it would primarily be concerned with the interrelation of state and federal power. Id. at 767-69. As a right arising under the privileges and immunities clause of the fourteenth amendment, however, it would exist as essentially a protection against oppressive state action. Id. at 764. Quite differently, however, if viewed as a privilege and immunity of national citizenship under article IV, section 2, it would guarantee protection against not merely state interference with free movement but against private interference as well. Id. at 763. These distinctions must nevertheless be considered in light of the fact that while the right to travel has respectable precedent to support its status as a privilege and immunity of national citizenship, the cases so holding all dealt with the right of travel as affected by oppressive state action. Id. at 766. Moreover, the recent trend of the Supreme Court is to avoid the problem of ascribing the right to travel's origin to any specific constitutional provision. See note 30 infra and accompanying text.

28. 394 U.S. 618 (1969). See The Supreme Court, 1968 Term, 83 Harv. L. Rev. 7, 118-26 (1969).

29. See notes 16-27 supra and accompanying text.

30. 394 U.S. at 630; accord, United States v. Guest, 383 U.S. 745 (1966). The Guest court saw no reason to ascribe the source of the right to a particular constitutional provision either. Id. at 759. Although Guest was relied upon by the Court in Shapiro, it actually concerned the denial of the right to travel in a collateral area since the right was infringed by private

statutory provisions which categorically denied welfare assistance to persons who had not resided within the jurisdictions for at least one year immediately preceding their applications for such assistance.[31] The essential contention of those attacking the residence requirements was that their effect was to create "a classification which constitutes an invidious discrimination denying . . . equal protection of the laws."[32] Expressing agreement with this assertion,[33] the Court proceeded to consider whether the discrimination could be justified by any countervailing state interests.[34] Determining, however, that a welfare residence requirement would necessarily serve to "chill" the exercise of an indigent's right to travel,[35] the Court held that the statutes could not be justified by the state's simple assertion of an economic need to prevent the influx of poor persons in need of assistance.[36] Having recognized the connection between the right to travel and durational residence requirements, the Court then declined to accept a showing of a mere "rational relationship"[37] as sufficient to sustain the statutory classification.[38] Mr. Justice Brennan pointedly rejected this contention, stating:

---

rather than state action. Id. at 754. The defendants were accused of conspiring to deprive Negro citizens of the right to travel interstate in violation of 18 U.S.C. § 241 (1964). Id. at 746-47. The court upheld the constitutionality of this criminal statute, stating that if the predominant purpose of the alleged conspiracy was to impede the exercise of the right, then, the conspiracy became a proper object of federal law. Id. at 760. Shapiro, though faced with state, not private, interference with travel, followed the Guest approach in not specifically naming the source of the right. Perhaps this approach is best explained by Mr. Justice Stewart's statement in Guest: "Although there have been recurring differences in emphasis within the Court as to the source of the constitutional right of interstate travel, there is no need here to canvass those differences further. All have agreed that the right exists." Id. at 759.

31. 394 U.S. at 621-22. The plaintiffs successfully persuaded three-judge district courts to overturn the statutes in each instance. Harrell v. Tobriner, 279 F. Supp. 22, 31 (D.D.C. 1967); Reynolds v. Smith, 277 F. Supp. 65, 68 (E.D. Pa. 1967); Thompson v. Shapiro, 270 F. Supp. 331, 338 (D. Conn. 1967). In each decision, the judges found the requirements unconstitutional in that they denied newly arrived residents equal protection of the law. 279 F. Supp. at 25; 277 F. Supp. at 67-68; 270 F. Supp. at 336-37. The Reynolds court held the residency requirements created a classification of people which was "without rational basis and without legitimate purpose or function." 277 F. Supp. at 67. Such unreasonable classifications, in the court's view, were violations of the right to equal protection of the law as guaranteed by the fourteenth amendment. Id. at 67-68.

32. 394 U.S. at 627. The Court, relying on Sherbert v. Verner, 374 U.S. 398, 404 (1963), noted that this constitutional challenge could not be answered by the arguments that public assistance benefits are a "privilege" and not a "right." 394 U.S. at 627 n.6.

33. Id.

34. Id. at 627-28.

35. Id. at 629-31.

36. Id. at 631.

37. This was the traditional formula employed by the courts to test a classification in light of the fourteenth amendment guarantees of equal protection. See, e.g., Rinaldi v. Yeager, 384 U.S. 305, 309 (1966); McGowan v. Maryland, 366 U.S. 420, 426 (1961); Flemming v. Nestor, 363 U.S. 603, 611 (1960); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911); notes 57-59 infra and accompanying text.

38. 394 U.S. at 634.

Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a *compelling* state interest. Under this standard, the waiting-period requirement clearly violates the Equal Protection Clause.[39]

Since the Court did not consider the state's desire to deter the influx of indigents to be a constitutionally permissible purpose,[40] the residence requirements fell below this standard.[41] Although the *Shapiro* Court sought to limit its holding to the validity of residence requirements as a prerequisite to welfare benefits,[42] the profound implications of that decision have provoked much litigation.[43]

Courts in subsequent cases encountered no difficulty in extending *Shapiro's* broad notions of the right to travel and equal protection to invalidate residence requirements for other welfare benefits such as financial assistance,[44] admission to public housing programs[45] and hospitalization and medical care.[46]

However, since the *Shapiro* Court expressly refused to discuss the validity of residence requirements governing voting,[47] education and professional licensing,[48] many litigants have attempted to apply, by analogy, its broad language to these areas as well. In *Kirk v. Board of Regents*,[49] a California court held that the

---

39. Id. at 638. See also Sherbert v. Verner, 374 U.S. 398, 406 (1963); Bates v. Little Rock, 361 U.S. 516, 524 (1960); Korematsu v. United States, 323 U.S. 214, 216 (1944); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

40. See text accompanying notes 35 & 36 supra.

41. 394 U.S. at 631.

42. Id. at 638 n.21. "We imply no view of the validity of waiting-period or residence requirements determining eligibility to vote, eligibility for tuition-free education, to obtain a license to practice a profession, to hunt or fish, and so forth." Id. (emphasis omitted).

43. See notes 44-46 infra.

44. E.g., Richardson v. Graham, 313 F. Supp. 34 (D. Ariz. 1970) (fifteen-year residency requirement applicable to aliens); Baxter v. Birkins, 311 F. Supp. 222 (D. Colo. 1970) (one-year residency requirements); Passmore v. Birkins, 311 F. Supp. 588 (D. Colo. 1969) (one-year residency requirements); Gaddis v. Wyman, 304 F. Supp. 713 (S.D.N.Y. 1969) (statutory presumption that resident of less than one year enters state for purpose of securing assistance); Morrison v. Vincent, 300 F. Supp. 541 (S.D.W. Va. 1969) (one-year residency requirement).

45. E.g., King v. New Rochelle Mun. Housing Auth., 314 F. Supp. 427 (S.D.N.Y. 1970) (five-year requirement); Cole v. Housing Auth., 312 F. Supp. 692 (D.R.I.), aff'd, 435 F.2d 807 (1st Cir. 1970) (two-year requirement).

46. E.g., Crapps v. Duval Hosp. Auth., 314 F. Supp. 181 (M.D. Fla. 1970) (one-year requirement); Vaughn v. Bower, 313 F. Supp. 37 (D. Ariz.), aff'd, 400 U.S. 884 (1970) (one-year requirement); Board of Supervisors v. Robinson, 10 Ariz. App. 238, 457 P.2d 951, vacated as moot, 105 Ariz. 280, 463 P.2d 536 (1970) (one-year requirement).

47. 394 U.S. at 638 n.21. The only cases dealing with the validity of residency requirements governing voter eligibility have been in direct conflict on the issue of the right to travel. Compare Kohn v. Davis, 320 F. Supp. 246 (D. Vt. 1970) (one-year residency requirement held unconstitutional), with Howe v. Brown, 319 F. Supp. 862 (N.D. Ohio 1970) (one-year residency requirement upheld).

48. 394 U.S. at 638 n.21. See note 42 supra.

49. 273 Cal. App. 2d 430, 78 Cal. Rptr. 260 (Dist. Ct. App. 1969), appeal dismissed, 396 U.S. 554 (1970), noted in 38 Fordham L. Rev. 338 (1969).

reasoning of *Shapiro* did not invalidate a one-year residency requirement for the receipt of tuition-free education at a state university.[50] The *Kirk* majority distinguished *Shapiro* on the theory that tuition-free education was not as fundamental to survival and subsistence as welfare benefits and, therefore, its denial would not be a consideration of sufficient magnitude to discourage interstate travel.[51] On the basis of this distinction, the court applied the pre-*Shapiro* "reasonableness" test and not the "compelling state interest" standard.[52] Thus, *Kirk* appeared to add a new dimension to the formula. If the benefit sought is vital, then the state interest in denying it must be compelling. If, on the other hand, the benefit is not fundamental to survival, the state's interest need only be reasonable.[53]

As in *Shapiro*, the court in the instant case[54] first noted that the residence requirement created two classes of bar applicants—residents of one year and residents of less than the requisite period.[55] However, the court did not immediately apply the strict standards prescribed by *Shapiro*.[56] Rather, the judges scrutinized the residency requirements in the light of the more traditional and

50. 273 Cal. App. 2d at 440, 78 Cal. Rptr. at 266.

51. Id.

52. Id. at 440 n.10, 78 Cal. Rptr. at 267 n.12.

53. Id.

54. Before reaching the substantive issues in the case, the Keenan court rejected several jurisdictional objections raised by the Board. 317 F. Supp. at 1352-58. The court first noted that it was granted jurisdiction to decide the matter by a federal statute. Id. at 1353; see 28 U.S.C. §§ 1343(3), 2201, 2281 (1964). To the Board's contention that federal district courts lack subject matter jurisdiction "over matters of admission to State bars," the court replied "that federal district courts have jurisdiction under 28 U.S.C. § 1343 to consider claims arising out of the application by state officials of a general bar admission requirement that is alleged to be unconstitutional on its face." 317 F. Supp. at 1353; see Schware v. Board of Bar Examiners, 353 U.S. 232 (1957). Moreover, relying on 28 U.S.C. § 2281, the court stated that "[a] district court of three judges is properly convened because an injunction is sought to restrain the enforcement by state officials of an administrative rule of statewide significance upon grounds that the rule is unconstitutional." 317 F. Supp. at 1353.

The Board further contended, in the alternative, that the court should abstain from exercising its jurisdiction. Id. at 1356. Basically, the abstention doctrine applies to a few situations in federal practice where a court, concededly having jurisdiction over a case may, nonetheless, refuse to exercise that jurisdiction and elects instead to leave the matter to the state court system. The court rejected the Board's arguments in favor of abstention since the constitutional question could not be avoided—plaintiff's claims were based solely upon the federal constitution and raised no state law issues, thereby precluding disposition of the case on state grounds in the state court. Id. at 1357. Finally, the Board's argument that unnecessary friction in the federal-state relationship would be avoided by abstention was rejected by the court. Id. at 1357-58. It held that a decision on the merits concerning the residence requirement would in no way interfere with the internal administration of the State Board of Law Examiners. Id. at 1358; see England v. Louisiana, 375 U.S. 411 (1964).

55. 317 F. Supp. at 1358.

56. Shapiro is not considered until the eleventh page of the decision (p. 1361). See notes 73-75 infra and accompanying text.

lenient standard of equal protection.[57] This test requires only that if citizens are arbitrarily classified by a statute, the class created must bear a rational relationship to the purpose of the statute.[58] Therefore, since the rule under examination prevented otherwise qualified candidates from sitting for the bar examination, their disqualification must have been for a valid state purpose.[59] If there were no valid reason for this negative classification, the rule would deny equal protection to members of the excluded class.[60] The court, therefore, conducted an examination of the various purposes for which the rule was enacted.[61] Each rationale presented by the Board to support the regulation was given lengthy consideration in the opinion.[62] The court prefaced this inquiry by quoting *Schware v. Board of Bar Examiners*:[63] "any qualification [for admission to the bar] must have a rational connection with the applicant's fitness or capacity to practice law."[64]

Defendants claimed that one salutary effect of the rule was that a person who lives in an area for a year will be afforded an opportunity to familiarize himself with the local customs and governmental functions.[65] The court rejected this argument because it saw no "rational relationship between 'fitness or capacity to practice law' and a knowledge of 'local custom.' "[66] The judges were also unimpressed by the Board's allegation that a year's residency would allow the community to observe an applicant's ethical behavior and thus aid in determining his fitness for admission.[67] In the court's view, one year was not enough to ascertain facts which only an extensive investigation would disclose.[68] Nor was the court persuaded by the defendant's contention that a year's residence would manifest a clear intention to remain permanently in the state.[69] "In our highly mobile society, one who has lived in a particular locale for one year may be firmly rooted in the community or he may be ready to move on tomorrow."[70]

In finding none of the purposes for the rule to be reasonable, the court concluded that the residency classification would exclude the "eminently qualified"

---

57. 317 F. Supp. at 1358-59. The court relied primarily on Rinaldi v. Yeager, 384 U.S. 305, 309 (1966) in defining this formula. See note 37 supra and accompanying text.

58. 317 F. Supp. 1358-59. See also Rinaldi v. Yeager, 384 U.S. 305, 309 (1966); Baxstrom v. Harold, 383 U.S. 107, 111 (1966); Tigner v. Texas, 310 U.S. 141, 147 (1940).

59. 317 F. Supp. at 1358-59.

60. Id. at 1358. See generally, Note, Developments in the Law: Equal Protection, 82 Harv. L. Rev. 1065, 1076-1131 (1969).

61. 317 F. Supp. at 1359-61.

62. Id.

63. 353 U.S. 232, 239 (1957).

64. 317 F. Supp. at 1359 (emphasis omitted).

65. Id.

66. Id. The court implied that such a position would reward "cultural provincialism." Id.

67. Id. at 1359-60.

68. Id.

69. Id. at 1359.

70. Id.

as well as the unfit.[71] Therefore, since the rule "create[d] an arbitrary classification without rational relationship to the bar applicants' fitness or capacity to practice law, it must fall."[72]

Having invalidated the rule under the traditional equal protection test, the court could have concluded its determination at this point. However, the judges were of the view that the rule also infringed "personal rights without satisfying the more stringent" standard set forth in *Shapiro*.[73] Since the residency requirements impeded an attorney's right to travel, it was necessary that a "*compelling* governmental interest" be promoted by the rule.[74] Although the court recognized the state's "compelling interest in the competency of its bar," the challenged rule in no way served that end.[75] Moreover, the rule was held to contravene another constitutional right of the plaintiff in that it prevented the practice of his chosen profession.[76] "If a man may be arbitrarily made to give up his lifetime endeavor—even for a year—in order to move his residence it is idle to talk to him about Fourteenth Amendment protection of personal freedom."[77] The opinion did not treat the right to travel and the right to work separately. Rather, they were held to be indispensable to one another, since a person "cannot live where [he] cannot work."[78] Thus, the rule was declared unconstitutional and the Board was enjoined from enforcing it.[79]

Keenan is the first instance where the strict rule of *Shapiro* was applied to scrutinize the requisites for professional licensing. Since not only the right to travel but the right to work were involved, it is likely that review of such rules will no longer be limited to the examination of residency requirements if *Keenan* is followed. The court implied that the right to work is of at least equal importance, and therefore any rule which might hinder that right will be subject to judicial inspection. The salutary effect of *Keenan* should be pervasive in the legal, medical and dental fields. Provincial interests and outmoded procedures can be challenged in federal courts whenever they appear. It is even possible that much less discriminatory residence requirements than the North Carolina rule—perhaps one-month requirements—will be overruled if they fail to promote a "compelling state interest." The various American professions could only benefit from vigorous judicial examination of the rules which govern admission to their membership.

71. Id. at 1360.

72. Id. at 1361. The court had already stated that "fitness and capacity" were the only valid criteria for admission. Id. at 1359.

73. Id. at 1361.

74. Id.

75. Id.

76. Id. at 1361-62. Without specifically mentioning Kirk, the Keenan court seems to have employed similar reasoning. In Kirk a residency requirement was upheld because it did not interfere with a person's ability to obtain benefits which were necessary to survival, 273 Cal. App. 2d at 440, 78 Cal. Rptr. at 266. See notes 49-53 supra and accompanying text. The Keenan court certainly viewed the right to work at one's chosen profession to be fundamental to subsistence.

77. 317 F. Supp. at 1362.

78. Id., quoting Traux v. Raich, 239 U.S. 33, 42 (1915).

79. 317 F. Supp. at 1362.

Criminal Procedure—Inspection of Grand Jury Minutes Granted to a Public Agency for Purposes Not in the Furtherance of Criminal Justice.—The New York State Public Service Commission, a public agency, requested permission to inspect the minutes of certain grand jury proceedings which had led to the indictment and conviction of various contractors for submitting rigged bids to the Consolidated Edison Company.[1] The Commission sought the minutes to ascertain whether the excess charges resulting from the rigged bids should be borne by the shareholders of Consolidated Edison or by the rate payers. The supreme court issued an order granting the Commission's motion for inspection.[2] On appeal, the contractors moved to vacate the order,[3] alleging that it was unprecedented, that the Commission was not an official body charged with the duty of criminal investigation, and that such information should not be made available in furtherance of a civil action.[4] The appellate division affirmed the order.[5] Subsequently, the New York Court of Appeals affirmed, holding that disclosure of the minutes would best serve the public interest. *People v. Di Napoli*, 27 N.Y.2d 229, 265 N.E.2d 449, 316 N.Y.S.2d 622 (1970).

In the early stages of the development of the grand jury,[6] the proceedings were open to the public and thus afforded little or no secrecy.[7] With the emergence of "le graunde inquest" in 1368, however, the custom of secrecy began to develop

1. "The affidavit in support of the [Commission's] request for the Grand Jury minutes [alleged that] a former vice-president of Consolidated Edison [had] testified before the Grand Jury and [that] there was other testimony before it relative to knowledge [of] and participation in the conspiracy underlying the indictment by officers, employees and agents of Consolidated Edison." People v. Di Napoli, 35 App. Div. 2d 28, 29, 312 N.Y.S.2d 547, 549 (1st Dep't), aff'd, 27 N.Y.2d 229, 265 N.E.2d 449, 316 N.Y.S.2d 622 (1970). Each of the contractors had pleaded guilty and subsequently paid the fines which had been imposed. 35 App. Div. 2d at 29, 312 N.Y.S.2d at 549.

2. People v. Di Napoli, 27 N.Y.2d 229, 234, 265 N.E.2d 449, 451, 316 N.Y.S.2d 622, 624 (1970). Special Term's order also prohibited any disclosure of the minutes while litigation was pending. 35 App. Div. 2d at 30, 312 N.Y.S.2d at 549. The order directing delivery of the minutes was grounded in section 952-t of the Code of Criminal Procedure, which provided, with respect to the stenographer attending the grand jury: "[I]t shall be his duty . . . to furnish to the district attorney of such county a full copy of all such testimony as such district attorney shall require, but he shall not permit any other person to take a copy of the same . . . except upon the written order of the court duly made after hearing the said district attorney . . . ." Law of May 27, 1885, ch. 348, § 5, [1885] N.Y. Laws 108th Sess. 600, as amended, N.Y. Code Crim. Proc. § 952-t (McKinney 1958) (repealed 1970).

3. 35 App. Div. 2d at 29, 312 N.Y.S.2d at 549. The contractors also appealed from an order of the supreme court, special term, denying their motion to vacate the inspection order. Id.

4. Id.

5. People v. Di Napoli, 35 App. Div. 2d 28, 312 N.Y.S.2d 547 (1st Dep't 1970).

6. Most authorities consider the Assize of Clarendon of 1166 to be the precursor to the modern day grand jury. E.g., 1 W. Holdsworth, A History of English Law 312-27 (3d ed. 1922); 2 F. Pollock & F. Maitland, The History of English Law 642 (2d ed. repl. 1959); Taswell-Langmead, English Constitutional History 106 (11th ed. 1960); 1 W. Stubbs, The Constitutional History of England 116 (5th ed. 1891).

7. Calkins, Grand Jury Secrecy, 63 Mich. L. Rev. 455, 456 (1965). See also G. Cross & G. Hall, The English Legal System 37 (4th ed. 1964).

from the jurors' practice of interviewing witnesses in private.[8] This custom became fixed as a legal principle[9] in the Earl of Shaftesbury's Trial in 1681,[10] where the ultimate independence of the grand jury was established in order to free the proceedings from any adverse influence the government may have had upon the jurors.[11] Ironically, by the end of the nineteenth century and in the early twentieth century, the use of the minutes had become an effective weapon in the preparation of the state's case.[12] The shift in theory was so complete that in *United States v. Garsson*[13] Judge Learned Hand denied the defendant's request for inspection of the grand jury minutes, indicating that the effect of granting the motion would be to handicap the prosecution by giving the defendant an unfair advantage over the state.[14] Thus, although the fear of undue governmental pressure was a driving force in the formation of the secrecy rule, today it is no longer a valid reason for retaining the doctrine.[15]

In the federal courts, disclosure of grand jury minutes is within the discretion of the trial judge.[16] However, courts have been reluctant to grant inspection of

8. Calkins, supra note 7, at 457; Kuh, The Grand Jury "Presentment": Foul Blow or Fair Play?, 55 Colum. L. Rev. 1103, 1107 (1955).

9. 8 J. Wigmore, Evidence § 2360, at 728-29 (J. McNaughton rev. repl. 1961).

10. Proceedings at the Old-Bailey, upon a Bill of Indictment for High Treason, against Anthony Earl of Shaftesbury, 8 How. St. Tr. (33 Chars. 2) 759 (1681). The King's Counsel asserted certain charges against the Earl of Shaftesbury before the grand jury. The jurors demanded the right to interview the witnesses in private and ultimately failed to indict, giving only their consciences as the reason for declining.

11. J. Edwards, The Grand Jury 28 (1906).

12. See, e.g., Bressler v. People, 117 Ill. 422, 8 N.E. 62 (1886); State v. Bovino, 89 N.J.L. 586, 99 A. 313 (Ct. Err. & App. 1916); Calkins, supra note 7, at 458; Comment, Secrecy in Grand Jury Proceedings: A Proposal For a New Federal Rule of Criminal Procedure 6(e), 38 Fordham L. Rev. 307, 308 (1969).

13. 291 F. 646 (S.D.N.Y. 1923).

14. Id. at 649. Judge Hand declared: "Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. . . . Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see." Id.

15. In United States v. Amazon Indus. Chem. Corp., 55 F.2d 254 (D. Md. 1931), the court summarized the reasons most frequently advanced for the policy of closed grand jury records, none of which concerned fear of oppression from the state. The reasons given were: (1) to prevent the escape of those whose indictment may be contemplated; (2) to insure freedom of grand jurors in their deliberations and prevent importuning of grand jurors by a person subject to indictment or his friends; (3) to prevent subornation of perjury or tampering with witnesses who may later appear at the trial of those indicted; (4) to encourage free and untrammeled disclosures by persons who have information with respect to a crime; and (5) to protect an innocent person from disclosure that he was under investigation. Id. at 261. The same reasons were set forth in United States v. Procter & Gamble Co., 356 U.S. 677, 681-82 n.6 (1958); United States v. Youngblood, 379 F.2d 365, 370 n.3 (2d Cir. 1967); United States v. Rose, 215 F.2d 617, 628-29 (3d Cir. 1954). See also In re Attorney-General of the United States, 160 Misc. 533, 534, 291 N.Y.S. 5, 7 (Kings County Ct. 1936).

16. Fed. R. Crim. P. 6(e); see, e.g., Pittsburgh Plate Glass Co. v. United States, 360 U.S.

the minutes unless a petitioner can show a "particularized need" or some "compelling necessity."[17] In *United States v. Procter & Gamble Co.*,[18] the Supreme Court held that a defendant in a civil suit must display a particularized need in order to lift the shroud of secrecy.[19] The following year, the Court determined that a defendant in a criminal case must also demonstrate this need to pierce the veil of secrecy pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure.[20] The federal courts have extended this principle to encompass plaintiffs in a civil action, intimating that "simply because disclosure is sought in aid of a recovery rather than to defend against recovery or criminal conviction, justice [will not deny] disclosure to a civil plaintiff."[21]

The Supreme Court has provided little guidance with respect to the circumstances that must be shown in order to constitute sufficient need. In *Dennis v.*

395, 399 (1959); Jackson v. United States, 297 F.2d 195, 198 (D.C. Cir. 1961); United States v. Alper, 156 F.2d 222, 226 (2d Cir. 1946).

17. Dennis v. United States, 384 U.S. 855, 872 (1966); Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 400 (1959); United States v. Procter & Gamble Co., 356 U.S. 677, 683 (1958). The Supreme Court has used the terms "particularized need" and "compelling necessity" interchangeably. See United States v. Procter & Gamble Co., supra. See also Atlantic City Elec. Co. v. A.B. Chance Co., 313 F.2d 431 (2d Cir. 1963) (mem.), where the court employed a conglomerate term, "compelling need." Id. at 434. But see United States v. Youngblood, 379 F.2d 365, 370 (2d Cir. 1967), where the court pointed out that disclosure is a matter of right and no "particularized need" must be shown.

18. 356 U.S. 677 (1958). Following a grand jury investigation in which no indictment was returned, the Government instituted a civil suit against the appellees to enjoin alleged violations of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (1964). The Government used the grand jury transcript in its preparation for this civil action, which prompted the appellees to seek the same privilege. The Supreme Court reversed the district court's ruling that the defendants were entitled to the minutes, holding that the defendants had failed to demonstrate a particularized need. The Court found that although the petitioner maintained that the minutes would be useful and relevant, this showing fell short of proof "that without the transcript a defense would be greatly prejudiced or that without reference to it an injustice would be done." 356 U.S. at 682.

19. Id. The particularized need standard developed in order to satisfy the good cause requirement of Rule 34 of the Federal Rules of Civil Procedure. Id. at 683. The pertinent part of the Rule, before it was amended, read: "Upon motion of any party showing good cause . . . the court in which an action is pending may (1) order any party to produce and permit the inspection . . . of any designated documents . . . which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) . . . ." Fed. R. Civ. P. 34, 329 U.S. 857 (1947), as amended, 398 U.S. 997 (1970). The 1970 amendment eliminated the "good cause" requirement.

20. Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959). Rule 6(e) provides that disclosure can only be made to "attorneys for the government for use in the performance of their duties" or when so directed by the court "preliminarily to or in connection with a judicial proceeding . . . ." Fed. R. Crim. P. 6(e).

21. Atlantic City Elec. Co. v. A.B. Chance Co., 313 F.2d 431, 434 (2d Cir. 1963) (mem.); see Hancock Bros. v. Jones, 293 F. Supp. 1229 (N.D. Cal. 1968) (mem.); Washington v. American Pipe & Constr. Co., 41 F.R.D. 59 (W.D. Wash. 1966); Consolidated Edison Co. v. Allis-Chalmers Mfg. Co., 217 F. Supp. 36 (S.D.N.Y. 1963); Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 211 F. Supp. 729 (N.D. Ill. 1962).

United States,[22] the Court indicated that such a necessity would be present whenever the "importance of preserving the secrecy of the grand jury minutes is minimal" and the arguments for disclosure persuasive[23]—in essence, a subjective test to be applied by each judge. While *Dennis* discussed the particularized need that a defendant in a criminal proceeding must demonstrate,[24] the district court in *Hancock Brothers, Inc. v. Jones*,[25] indicated that a plaintiff in a civil case must show a greater need for inspection due to "the strong overriding policy of protecting interests of the criminally-accused."[26] A plaintiff in *Consolidated Edison Co. v. Allis-Chalmers Manufacturing Co.*[27] met this standard when the court, after comparing the testimony given by a certain witness in depositions with his grand jury testimony, decided that since there were material discrepancies between the two testimonies and there were also significant facts that the witness had failed to recall at the deposition, sufficient need was demonstrated to justify disclosure.[28] On the other hand, some federal courts have refused to allow inspection where the plaintiff alleged that disclosure would merely save him time and expense.[29]

In New York,[30] as in the federal courts, disclosure of grand jury minutes is

22. 384 U.S. 855 (1966).

23. Id. at 871-72. In Dennis, the defendant desired to obtain grand jury testimony with which to impeach a witness. He was successful in demonstrating a particularized need sufficient to require disclosure by revealing that: (1) there was a 7 year time lag between the grand jury and trial testimony; (2) the testimony desired was that of key witnesses for the government; (3) the witnesses were the main source of the information in question, and their statements were for the most part uncorroborated; (4) another witness evidenced personal hostility toward the defendant; and (5) one witness had admitted that he had mistakenly quoted incorrect data in his earlier statements. Id. at 872-73. Although the Supreme Court did note that the showing in Dennis went substantially beyond the minimum showing of circumstances necesary to demonstrate sufficient need, it did not define what that minimum showing would be. Id. at 872.

24. For other cases illustrating the requirements for a showing of particularized need by a defendant, see, e.g., National Dairy Prods. Corp. v. United States, 384 F.2d 457 (8th Cir. 1967), cert. denied, 390 U.S. 957 (1968); Worthy v. United States, 383 F.2d 524 (D.C. Cir. 1967) (mem.); Cargill v. United States, 381 F.2d 849 (10th Cir. 1967), cert. denied, 389 U.S. 1041 (1968).

25. 293 F. Supp. 1229 (N.D. Cal. 1968) (mem.).

26. Id. at 1234. The defendant's access to the minutes would be seriously hampered if the standard for allowing disclosure to him was as rigid as that applied to party litigants. Id.

27. 217 F. Supp. 36 (S.D.N.Y. 1963). See also Atlantic City Elec. Co. v. A.B. Chance Co., 313 F.2d 431 (2d Cir. 1963) (mem.).

28. 217 F. Supp. at 38.

29. E.g., In re Grand Jury Proceedings, 29 F.R.D. 151 (E.D. Pa. 1961), aff'd, 309 F.2d 440 (3d Cir. 1962); accord, United States v. Downey, 195 F. Supp. 581 (S.D. Ill. 1961); Application of California, 195 F. Supp. 37 (E.D. Pa. 1961).

30. Various tests have been adopted by the states for determining what is necessary to countervail the grand jury secrecy doctrine. Some states have adopted the broad approach of allowing disclosure whenever public interest considerations outweigh those favoring the maintenance of secrecy. See, e.g., In re Petition of Jessup, 50 Del. 530, 136 A.2d 207 (1957);

within the discretion of the court.[31] However, judges have been reluctant to allow outside parties to inspect grand jury minutes unless the party is in some way connected with law enforcement. One of the first cases to enunciate this policy was *People v. Ewald*,[32] where the New York Supreme Court maintained that "no reported decision has gone the length of permitting over objection an inspection of the minutes of the grand jury in a non-criminal investigation . . . ."[33] Adhering to a strict application of the secrecy rule, the court did not want to minimize the " 'protection thrown around [witnesses] before a grand jury' " and thereby discourage them from freely appearing and offering their testimony.[34] The impact of *Ewald* in New York has been difficult to ascertain since subsequent cases have hardly been uniform. The decision was not even considered by the court of appeals in *In re Quinn*,[35] which was the only case in which that court spoke on the issue prior to *People v. Di Napoli*.[36] In *Quinn*, permission to inspect the minutes was granted to a number of residents of the Town of Mount Pleasant to aid them in proceedings to remove the Receiver of Taxes.[37] The appellate division's holding that, despite the fact that the petitioners were not connected with law enforcement, the county court "had the power to grant the application and that under the circumstances in this case the motion should have been

---

Mannon v. Frick, 365 Mo. 1203, 295 S.W.2d 158 (1956); Opinion of the Justices, 96 N.H. 530, 73 A.2d 433 (1950); State v. Putnam, 53 Ore. 266, 100 P. 2 (1909). California has taken the position that an effective, useful and functioning grand jury system is not impaired by the requirement of compulsory disclosure of the transcript. In certain instances, sessions of the grand jury may be open to the public. See Cal. Penal Code § 939.1 (West 1970). Other states have espoused a similar but somewhat narrower test for allowing inspection. In Arizona, as in the federal courts, a petitioner must show a "particularized need" in the furtherance of justice. State ex rel. Ronan v. Superior Ct., 95 Ariz. 319, 390 P.2d 109 (1964). Florida allows inspection when it would further the administration of criminal law, but not to aid private litigants in a civil action. State v. Tillett, 111 So. 2d 716 (Dist. Ct. App. Fla. 1959). New Jersey permits inspection "when the ends of justice so require," but the petitioner must have made a timely application and demonstrated good cause. State v. Di Modica, 73 N.J. Super. 1, 6, 179 A.2d 17, 20 (1962), aff'd, 40 N.J. 404, 192 A.2d 825 (1963). On the other hand, Ohio does not allow any disclosure. State v. Rhoads, 81 Ohio St. 397, 91 N.E. 186 (1910); State v. Selby, 126 N.E.2d 606 (C.P., Franklin County, Ohio 1955). See also State v. Revere, 232 La. 184, 94 So. 2d 25 (1957).

31. E.g., In re Quinn, 293 N.Y. 787, 58 N.E.2d 730 (1944) (mem.); People v. Sweeney, 213 N.Y. 37, 106 N.E. 913 (1914); People v. Brown, 272 App. Div. 972, 71 N.Y.S.2d 594 (3d Dep't 1947) (mem.).

32. 144 Misc. 657, 259 N.Y.S. 314 (Sup. Ct. 1932). In Ewald a subcommittee of the New York City Bar Association was denied access to the testimony given by the chief clerk of the City Court of the City of New York in furtherance of an investigation concerning the activities of that clerk.

33. Id. at 660, 259 N.Y.S. at 317.

34. Id. at 661, 259 N.Y.S. at 318 (citation omitted).

35. 293 N.Y. 787, 58 N.E.2d 730 (1944) (mem.).

36. 27 N.Y.2d 229, 265 N.E.2d 449, 316 N.Y.S.2d 622 (1970).

37. In re Quinn, 267 App. Div. 913, 47 N.Y.S.2d 66 (2d Dep't) (mem.), aff'd, 293 N.Y. 787, 58 N.E.2d 730 (1944) (mem.).

granted as a matter of discretion"[38] was approved by the court of appeals without opinion.

In *In re People ex rel. Sawpit Gymnasium*,[39] permission to inspect minutes critical of the police department was granted to the Mayor of Port Chester in order to assist him in adopting corrective measures.[40] Although citing *Quinn*, the majority maintained that "[s]uch an inspection is permitted when the application is made *by a law enforcement agency* and in the public interest."[41] This law enforcement agency exception to the secrecy rule was strictly adhered to in *In re Special Report of Grand Jury of Erie County*,[42] which involved an application by the State Motor Vehicle Bureau for inspection of grand jury minutes for use in a proceeding to revoke a certificate of registration of a dealer in motor vehicles.[43] The court denied the Bureau's request stating that "[t]he Commissioner of Motor Vehicles is not an officer charged with the duty of enforcing the criminal law of the State of New York . . . ."[44] The court found that it was in the public interest to deny this quasi-criminal agency access to the minutes, reasoning that the underlying rule of secrecy "tends to loosen the tongues of reluctant witnesses to testify before the Grand Jury where without it they might hesitate to so do . . . ."[45]

In *People v. Doe*,[46] the petitioner, a former Assistant District Attorney and a candidate for District Attorney of Suffolk County, asserted that his opponent was aided by underworld influences. A grand jury investigated the matter but failed to indict. The petitioner then requested to see the minutes, claiming that this issue was vital to the campaign, and therefore a matter of public interest.[47] Although he admittedly could not rely on any precedent, he urged the court to grant his application in the exercise of its discretion.[48] The court denied his application, reasoning that this was not the proper case to establish the "danger-

38. 267 App. Div. at 913, 47 N.Y.S.2d at 67.

39. 60 N.Y.S.2d 593 (Sup. Ct. 1946).

40. Id. at 594.

41. Id. (emphasis added); accord, Dworetzky v. Monticello Smoked Fish Co., 256 App. Div. 772, 774, 12 N.Y.S.2d 270, 273 (3d Dep't 1939). See In re City of New Rochelle, 35 Misc. 2d 254, 229 N.Y.S.2d 350 (Westchester County Ct. 1962), where the court granted the city's corporation counsel access to the minutes to aid in the investigation of a detective in the police department. The majority reasoned that public policy required the courts to cooperate with public officials entrusted with the administration of criminal law. Id. at 256, 229 N.Y.S.2d at 351.

42. 192 Misc. 857, 77 N.Y.S.2d 438 (Erie County Ct. 1948).

43. Id. at 858, 77 N.Y.S.2d at 440.

44. Id. at 860, 77 N.Y.S.2d at 442.

45. Id. at 859, 77 N.Y.S.2d at 441. The court went on to say that "to further extend the exceptions to this rule of secrecy might hamper the wheels of criminal justice." Id.

46. 47 Misc. 2d 975, 263 N.Y.S.2d 607 (Suffolk County Ct.), aff'd, 263 N.Y.S.2d 688 (2d Dep't 1965) (mem.).

47. 47 Misc. 2d at 975-77, 263 N.Y.S.2d at 609-11.

48. Id. at 986, 263 N.Y.S.2d at 619.

ous" precedent of allowing inspection of the minutes by an outside party who was not in any way connected with the administration of criminal law.[49]

Thus, at the time *Di Napoli* was decided, New York law was in a state of confusion. Lower courts had consistently followed the "furtherance of criminal justice" exception to the secrecy rule,[50] whereas the court of appeals had totally disregarded this exception the one time it had spoken on the issue.[51] Now the court of appeals in *Di Napoli* has balanced the competing interests involved, agreeing with the appellate division[52] that public interest considerations outweigh the doctrine of grand jury secrecy.[53] Chief Judge Fuld, writing for the majority, reasoned that secrecy itself should not be a major consideration if there is no compelling necessity to impose it. Since the appellants had already been convicted and fined, they were not in danger of incrimination by disclosure of the contents of the minutes.[54] As to other reasons frequently given for the application of the secrecy doctrine,[55] the court noted that, since the grand jury proceedings had been concluded, "there [was] no danger of any escape of persons who may be indicted, no interference with the grand jury's freedom to deliberate, no danger of subornation of perjury and no need to protect any innocent accused person."[56] A possible chilling effect on the ability of grand juries to obtain witnesses in the future was not persuasive to the court since the witnesses could have anticipated "that some investigatory body . . . would be set up to consider the impact of such criminal activity upon the public utility . . . ."[57] The Commission was not looked upon as an "outsider" but as a "governmental investigatory body, with specific authority over the subject matter into which the grand jury was inquiring."[58]

49. Id. at 988, 263 N.Y.S.2d at 621. The Doe court also maintained that minutes were not available to aid the petitioner in private litigation, and although he asserted his interest as mainly a public one, his personal interest in the minutes made his application essentially one by a private litigant. Id. at 984, 263 N.Y.S.2d at 617.

50. E.g., Dworetzky v. Monticello Smoked Fish Co., 256 App. Div. 772, 12 N.Y.S.2d 270 (3d Dep't 1939); In re People ex rel. Sawpit Gymnasium, 60 N.Y.S.2d 593 (Sup. Ct. 1946); People v. Ewald, 144 Misc. 657, 259 N.Y.S. 314 (Sup. Ct. 1932); People v. Doe, 47 Misc. 2d 975, 263 N.Y.S.2d 607 (Suffolk County Ct.), aff'd, 263 N.Y.S.2d 688 (2d Dep't 1965) (mem.); In re City of New Rochelle, 35 Misc. 2d 254, 229 N.Y.S.2d 350 (Westchester County Ct. 1962); In re Special Report of Grand Jury of Erie County, 192 Misc. 857, 77 N.Y.S.2d 438 (Erie County Ct. 1948).

51. In re Quinn, 293 N.Y. 787, 58 N.E.2d 730 (1944) (mem.); see text accompanying notes 35, 37 & 38 supra.

52. People v. Di Napoli, 35 App. Div. 2d 28, 312 N.Y.S.2d 547 (1st Dep't 1970).

53. 27 N.Y.2d at 234-35, 265 N.E.2d at 451-52, 316 N.Y.S.2d at 625.

54. Id. at 235, 265 N.E.2d at 452, 316 N.Y.S.2d at 626. Agreeing with the appellate division, the court of appeals observed that "'[i]mplicit in the absence of objection on the part of the District Attorney is the lack of detriment in respect of any prospective criminal proceeding.'" Id. at 235-36, 265 N.E.2d at 452, 316 N.Y.S.2d at 626 (citation omitted).

55. See note 15 supra.

56. 27 N.Y.2d at 235, 265 N.E.2d at 452, 316 N.Y.S.2d at 626.

57. Id. at 236, 265 N.E.2d at 452, 316 NY.S.2d at 626.

58. Id.

In declining to be bound exclusively by the criminal law enforcement exception to the secrecy rule,[59] the court simply relied on its prior determination in *Quinn*[60] and, in so doing, did not consider the numerous lower court decisions subsequent to *Quinn* which had faithfully abided by this exception.[61] The court reasoned that granting inspection to town residents, as in *Quinn*, was "far more inhibiting to prospective witnesses than limited disclosure to an official investigative agency of the State."[62] Furthermore, the court maintained that its authorization to inspect would not "sanction any general disclosure or widespread publication of the minutes,"[63] but that use of the minutes was granted solely to assist the Commission in its investigation.[64] Chief Judge Fuld pointed out that it was still possible for the appellants to object to any unauthorized use to which the minutes might be put. Thus they could prevent disclosure of certain testimony which should be kept "secret or confidential" or which would be "inimical to public policy."[65]

59. Id. "We find no merit in the appellants' contention that permission to inspect grand jury minutes has been granted only to those officials or agencies concerned with the administration or enforcement of the criminal law." Id.

60. Although the court mentioned other cases supporting its contention that inspection of the minutes has not been limited to officials or agencies connected with law enforcement, a careful reading of these cases reveals that they are at best poor authority for this proposition. In In re Temporary State Comm'n of Investigation, 47 Misc. 2d 11, 261 N.Y.S.2d 916 (Nassau County Ct. 1965), the court stated that inspection would be proper by a State Investigation Commission selected by the Governor. Id. at 16, 261 N.Y.S.2d at 922. In People v. Behan, 37 Misc. 2d 911, 235 N.Y.S.2d 225 (Onondaga County Ct. 1962), the court granted inspection to a Special State Investigation Commissioner appointed by the Governor and the Attorney General. Id. at 923, 235 N.Y.S.2d at 237. In In re Scro, 200 Misc. 688, 108 N.Y.S.2d 305 (Kings County Ct. 1951), inspection was granted to a Police Commissioner for disciplinary proceedings, which were quasi-criminal in nature. Id. at 689-90, 108 N.Y.S.2d at 306-07. In re People ex rel. Sawpit Gymnasium, 60 N.Y.S.2d 593 (Sup. Ct. 1946), granted a Mayor access to grand jury minutes and in so doing stated that such application is permitted when made "by a law enforcement agency and in the public interest." Id. at 594; see notes 39-41 supra and accompanying text. In In re Crain, 139 Misc. 799, 250 N.Y.S. 249 (Ct. Gen. Sess. 1931), a Governor's commission investigating the conduct of a public officer was permitted to inspect the minutes. Id. at 801-02, 250 N.Y.S. at 252. Apparently, the court of appeals has adopted a narrow view of what constitutes a law enforcement body by not including the parties listed above. In In re Martin, 170 Misc. 919, 11 N.Y.S.2d 607 (Kings County Ct. 1939), the majority declared: "It is not difficult to understand how a commissioner of the Governor appointed to investigate crime, the police commissioner of the city of New York, and the United States Attorney-General . . . in special instances might be effectively aided by an inspection of grand jury minutes in their respective duties as law enforcement officials." Id. at 921, 11 N.Y.S.2d at 610.

61. See note 50 supra.

62. 27 N.Y.2d at 237, 265 N.E.2d at 453, 316 N.Y.S.2d at 627.

63. Id.

64. Id.

65. Id. at 238, 265 N.E.2d at 453-54, 316 N.Y.S.2d at 628. The dissent was unimpressed with the majority's reasoning on this point: "Nor is the majority's assurance . . . that 'if the testimony sought to be used should be kept secret or confidential or, if its disclosure would be inimical to public policy, the court—on application of a party, a witness or any

The dissent in *Di Napoli* also took a public interest approach in determining whether inspection of the minutes should be granted. However, Judge Scileppi felt that it was within the public interest to maintain the secrecy rule when the minutes were to be used "in unrelated noncriminal investigations or to promote the personal or collective interests of a party to any civil litigation."[66] Although the dissent agreed that the rule of secrecy was not absolute, it could not justify disclosure where the moving party was "neither involved in criminal law enforcement nor has . . . demonstrated any compelling necessity for disclosure."[67] The dissent further contended that because of this erosion of the secrecy rule, future witnesses would be more reluctant to testify and grand jurors would be subject to greater risks of retaliation from those under investigation.[68]

The *Di Napoli* court adopted a more liberal approach in allowing inspection than that applied by the federal courts or previously applied in New York. A petitioner seeking inspection in New York apparently can fall short of the federal standard of "particularized need"[69] and still accomplish his objective. Furthermore, while it is settled that a mere saving of time and expense is not a sufficient need on the federal level,[70] the majority dictated that lower courts "were not required, as a matter of law, to compel the Commission to conduct its own investigation at the expenditure of considerable time and money and make a record of its own rather than avail itself of the existing record resulting from the grand jury inquiry."[71] As a result of *Di Napoli*, not only can an agency with a noncriminal function inspect grand jury minutes, but also it need only show that inspection would serve the public interest.

The continuance of the secrecy doctrine in New York will hinge on the interpretation of the *Di Napoli* rationale by future courts. The decision may be viewed as one "which opens the door to further assaults on the secrecy of grand

---

appropriate public official—may be asked to intervene to prevent disclosure of the testimony in question', an adequate method of safeguarding the public interest involved in this case since this court, by affirming, has already determined that the minutes need not be kept secret and that disclosure does not violate public policy." Id. at 242, 265 N.E.2d at 456, 316 N.Y.S.2d at 631-32 (citation omitted).

66. Id. at 239, 265 N.E.2d at 454, 316 N.Y.S.2d at 629. The dissent distinguished Quinn, claiming that, while the case represented the law of New York, it was merely another exception to the secrecy rule. Judge Scileppi declared that Quinn stood for the proposition that minutes may be used to investigate alleged misconduct of public officials by agencies not connected with the administration of criminal law. He would therefore deny the Commission access to the minutes since it was neither investigating a public official nor connected with the enforcement of criminal law. Id. at 240, 265 N.E.2d at 455, 316 N.Y.S.2d at 630.

67. Id. The dissent also asserted that "secrecy . . . should not be invaded on a mere showing of convenience," since it would be exacting "too high a price—that of trading secret grand jury testimony for the sake of expedience." Id.

68. Id. at 241, 265 N.E.2d at 455, 316 N.Y.S.2d at 630-31.

69. See notes 16-29 supra and accompanying text.

70. In re Grand Jury Proceedings, 29 F.R.D. 151 (E.D. Pa. 1961), aff'd, 309 F.2d 440 (3d Cir. 1962); accord, United States v. Downey, 195 F. Supp. 581 (S.D. Ill. 1961); Application of California, 195 F. Supp. 37 (E.D. Pa. 1961).

71. 27 N.Y.2d at 238, 265 N.E.2d at 454, 316 N.Y.S.2d at 628.

jury proceedings" as feared by Judge Scileppi.[72] If that be the case, an enterprising *private* litigant could conceivably convince a court that *Di Napoli* is precedent for his own inspection of the minutes. Such a result would virtually eliminate the doctrine of secrecy, thereby exposing an accused to unnecessary humiliation and also severely weakening the grand jury's role in crime detection by dissipating the protection presently accorded an accuser. Hopefully, a more enlightened interpretation of *Di Napoli* will follow; that being that although a petitioner need no longer be connected exclusively with the administration of criminal law, the exception is limited to an agency functioning on behalf of the public. In addition, such agency must demonstrate that not only itself, but rather the public in general, would benefit from disclosure. Only under these exigent circumstances should the courts permit inspection of the minutes by any party other than a law enforcement agency.

72. Id. at 241, 265 N.E.2d at 456, 316 N.Y.S.2d at 631 (dissenting opinion).