Volume 6
Number 3 *Spring 1972*

*pp.*260-285

Spring 1972

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STATE COURT EVASION OF UNITED STATES SUPREME COURT MANDATES DURING THE LAST DECADE OF THE WARREN COURT

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INTRODUCTION

In the United States, both federal and state courts must adhere to the Constitution as interpreted by the United States Supreme Court. Nevertheless, one of the most unique characteristics of our dual judiciary is the ability of state courts to avoid, delay or evade the mandates of the Supreme Court. Although several studies have noted this phenomenon, only a few have made any attempt to be systematic or comprehensive.[1] The purpose of this study is to examine the litigation in state courts subsequent to a remand by the Supreme Court in an effort to determine the extent to which state courts use their discretion in a manner inconsistent with the Court's mandates. Because of the controversial nature of many rulings of the Court under Chief Justice Earl Warren, the conditions for evasive state court action were particularly ripe during that era of judicial activism.[2]

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1. The most recent systematic study of state court evasion was published nearly twenty years ago. *See* Note, *Evasion of Supreme Court Mandates in Cases Remanded to State Courts Since 1941,* 67 HARV. L. REV. 1251 (1954). Other investigations of noncompliance by state courts include: Note, *Final Disposition of State Court Decisions Reversed and Remanded by the Supreme Court, October Term, 1931, to October Term 1941,* 55 HARV. L. REV. 1357 (1942); Note, *State Court Evasion of United States Supreme Court Mandates,* 56 YALE L.J. 574 (1947). *See also* S. WASBY, THE IMPACT OF THE UNITED STATES SUPREME COURT: SOME PERSPECTIVES 28-32 (1970); Balustein & Ferguson, *Avoidance, Evasion and Delay,* in THE IMPACT OF SUPREME COURT DECISIONS 96 (T. Becker ed. 1969); Schmidhauser, *The Tensions of Federalism: The Case of Judge Peters,* in CONSTITUTIONAL LAW IN THE POLITICAL PROCESS 36 (J. Schmidhauser ed. 1963); Murphy, *Lower Court Checks on Supreme Court Power,* 53 AM. POL. SCI. REV. 1017 (1959).

2. The declining prestige and popularity of the Warren Court can be demonstrated by a Gallup Poll taken in 1957 and repeated in 1966. In the 1957 poll, 30 percent of the respondents asserted that they respected the Court more than Congress, while 29 percent had greater respect for Congress. In the 1966 poll, 25 percent trusted the Court more, while 34 percent had greater trust in Congress. Dolbeare, *The Public Views the Supreme Court,* in LAW, POLITICS, AND THE SUPREME COURT 194, 202 (H. Jacob ed. 1967); Murphy & Tanenhaus, *Constitutional Courts and Political Representation,* in MODERN AMERICAN DEMOCRACY: READINGS 541, 551 (M. Danielson & W. Murphy eds. 1969). Moreover, a 1969 Gallup Poll indicated that 75 percent of the American public believed the courts had been too lenient with criminal suspects. *See* N.Y. Times, Feb. 16, 1969, at 47, col. 1. *See also* Dolbeare & Hammond, *The Political Party Basic Attitudes Toward the Supreme Court,* 31 PUB. OP. Q. 16 (1967); Hirsch & Donohew, *A Note on Negro-White Differences in Attitudes Toward the*

After the United States Supreme Court "reverses" or "vacates" a judgment and "remands" a case to the state courts, the lower courts may be asked to clarify the issues, decide upon new issues, rule on the effect of intervening state legislation or determine the constitutionality of state laws or state constitutional provisions. Since the Supreme Court when reviewing a state court case generally confines its decision to "federal" issues and remands a case to state courts to render final judgment, there are many opportunities for state courts to avoid, mitigate or nullify the ruling or advice of the Court.[3] Except when state procedural grounds impose unreasonable obstacles to the vindication of federal rights or when such rights are discriminately or inconsistently applied, the Supreme Court will generally not review state court decisions based on non-federal grounds.[4]

Moreover, when the Supreme Court grants certiorari to hear a state case which has exhausted all lower court remedies and presents a "substantial federal question," the Court has several options in disposing of the litigation. It can express a clear mandate and direct the state courts to render a new judgment "not inconsistent with" the decision of the Court or, conversely, it might only suggest that the lower courts give "further consideration" to the case "in light of" a recent Court

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Supreme Court, 49 Soc. Sci. Q. 557 (1968); Kessel, *Public Perceptions of the Supreme Court*, 10 Midwest J. Pol. Sci. 167 (1966); Murphy & Tanenhaus, *Public Opinion and the Supreme Court: The Goldwater Campaign*, 32 Pub. Op. Q. 31 (1968).

The declining prestige of the Court can also be demonstrated by over a hundred bills and amendments which were introduced in Congress to nullify the Supreme Court's Bible reading—prayer decisions. Also, in reaction to the Court's reapportionment decisions, Senator Dirksen on two occasions obtained majority support in the United States Senate for a constitutional amendment allowing states to apportion one of their legislative chambers on a basis other than population.

In 1958, 36 state court justices signed a report highly critical of recent Supreme Court decisions on state criminal procedures. Only eight chief justices opposed the report. *See Report by the 1958 Conference of State Chief Justices*, Harv. L. Rec. (Spec. ed.) Oct. 23, 1958, in Constitutional Law in the Political Process 32 (J. Schmidhauser ed. 1963).

3. For example, state courts may evade the letter or intent of a Supreme Court mandate by construing the state law to conform with minimal constitutional standards, by narrowly interpreting the dictum of Supreme Court precedents, by requiring precisely parallel fact situations, by refusing to logically expand the rulings of the Supreme Court to closely related areas and by declining to permit an appeal because of a violation of procedural rules.

4. The doctrine of "adequate state grounds" was articulated nearly one hundred years ago in *Murdock v. Memphis*, 86 U.S. (20 Wall.) 590 (1874). For decisions prohibiting "unreasonable" or "inconsistent" obstacles in the way of federal substantive rights see *NAACP v. Alabama ex. rel. Patterson*, 357 U.S. 449 (1958); *Davis v. Wechsler*, 263 U.S. 22 (1923). The "adequate state grounds" doctrine was somewhat modified by *Fay v. Noia*, 372 U.S. 391 (1963). In *Fay*, the Supreme Court ruled that when federal rights are involved, the lower federal courts have the right to make an independent determination of the question in habeas corpus proceedings regardless of the adequacy of the state grounds upon which the judgment rested.

decision mentioned in the remand opinion. Thus, a Supreme Court mandate may be definite and forthright or limited, equivocal and ambiguous.

In the decade from October, 1959, through June, 1969, the United States Supreme Court issued decisions on 560 state cases from 42 state courts of last resort.[5] Of these cases, 41 were affirmed by the Court, 182 were reversed, 133 were reversed and remanded and 204 were vacated and remanded. Analysis of the 337 cases which were either "reversed and remanded" or "vacated and remanded" during the last decade of the Warren Court indicates that in 199 or 46.3 percent of these cases, further litigation occurred in state courts following the Supreme Court remand.[6] Interestingly, in 27.1 percent of these cases having further litigation (54 of 199 cases), the party victorious in the Supreme Court was unsuccessful in the state courts following the remand.[7] Of course, this in itself is not indicative of deliberate evasion of Supreme Court mandates or violation of federal constitutional rights. As mentioned above, many cases are reversed by the Supreme Court because the state court failed to provide a fair trial, refused to rule on constitutional issues raised or was ambiguous in its judicial interpretation. Frequently, the Supreme Court will remand a case to the state courts for a new trial on the merits. Moreover, the issues presented in the second trial may differ substantially from those originating from the initial appeal. In short, that the state court reaffirms its previous judgment and rules against the party successful in the Supreme Court does not mean that the state court is evading the command of the Supreme Court. In many cases the mandate itself may be ambiguous or merely suggestive, thus

5. During this period, the United States Supreme Court did not hear any cases from the state supreme courts of Hawaii, Maine, Montana, Nevada, New Mexico, North Dakota, Oklahoma and Vermont.

6. This figure represents a midpoint between the percentages of subsequent litigation found in two previous studies. During the 1941-1951 decade, about one-fourth of the cases (46 of 175) had further litigation at the state level following a Supreme Court remand. *See* Note, *Evasion of Supreme Court Mandates in Cases Remanded to State Courts Since 1941*, 67 HARV. L. REV. 1251 (1954). During the 1931-1940 period, approximately two-thirds of the cases remanded resulted in further litigation. *See* Note, *Final Disposition of State Court Decisions Reversed and Remanded by the Supreme Court, October Term, 1931, to October Term, 1941*, 55 HARV. L. REV. 1357 (1942).

7. In the 1931-1941 study, this phenomenon occurred in 25 of the 34 cases in which new issues were raised after the Supreme Court remand. *See* Note, *Final Disposition of State Court Decisions Reversed and Remanded by the Supreme Court, October Term, 1931 to October Term, 1941*, 55 HARV. L. REV. 1357 (1942). In the 1941-1951 study, nearly one-half of the 46 cases having further litigation found the party successful in the Supreme Court losing at the state level on remand. *See* Note, *Evasion of Supreme Court Mandates in Cases Remanded to State Courts Since 1941*, 67 HARV. L. REV. 1251 (1954).

giving the state court some latitude in its later decision.

In this study the term "evasion" is used to describe the shadowy area between halfhearted compliance and outright defiance. Although some state court action may be questionable and perhaps "quasi-evasive," the narrow construction of "evasion" given in this study requires the Supreme Court to twice: 1) accept an appeal, 2) issue a mandate and 3) overrule the judgment of the state supreme court. In other words, a truly "evasive" state court action does not occur unless the state court which resists the initial Supreme Court mandate is overruled for a second time by the Court. Even in these cases, evasion is conditioned upon the clarity of the original mandate of the Supreme Court.

In order to review other instances of doubtful or "quasi-evasive" state court action, a second category was devised. Cases comprising this group include those which appeared to this writer and at least one dissenting state justice to violate the judicial intent of the Supreme Court mandate.[8] This requirement, together with the traditionally low dissent rate in state courts of last resort,[9] limited the subjective elements in selecting the cases indicative of "quasi-evasive" state court action. Although the Supreme Court never overruled the adverse state court judgments in these cases following its initial remand, a brief examination of these cases clearly suggested a situation far from full compliance. The "quasi-evasion" cases also demonstrated the wide latitude permitted by the Supreme Court in decisions remanded to the state courts.

Of the 54 cases in which the state courts, on remand, ruled against the party successful in the Supreme Court, eight cases met the standards here established for state court "evasion," and ten cases exemplified "quasi-evasive" state court action. Only five of these 18 cases were appealed from state supreme courts in the northern states.[10] In fact, only one-third (18) of the 54 "maverick" cases came from northern courts.[11]

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8. For the analysis of cases involving quasi-evasive state court action see notes 54-86 *infra* and accompanying text.

9. A survey in the early Sixties indicated that the average dissent rate on state courts of last resort was only 10.6 percent. *See* Sickels, *The Illusion of Judicial Consensus: Zoning Decisions in the Maryland Court of Appeals,* 59 AM. POL. SCI. REV. 100 (1965).

10. The five cases from northern state courts came from: Ohio (2); Iowa, Alaska and Washington (1). The cases from non-northern courts came from: California (3); Louisiana and Maryland (2); Alabama, Georgia, North Carolina, Virginia, Florida and Arizona (1).

11. A breakdown of the origin of the 54 cases is as follows: California (12); Indiana (5); New York, Georgia and Alabama (3); Arizona, Florida, Kansas, Louisiana, Maryland, Mississippi, North Carolina, Ohio, South Carolina and Virginia (2); Colorado, Alaska, Connecticut, Iowa, Oklahoma, Texas, Washington and West Virginia (1).

During the period covered by this study, the majority of cases heard by the

The judicial conflict between the "activist" Warren Court and the more "conservative" or "states' rights" courts in the South is no better illustrated than in these figures. Indeed, the evasiveness of southern supreme courts may well reflect the greater hostility of the South towards the United States Supreme Court.[12]

INSTANCES OF EVASIVE STATE COURT ACTION

The first evasion case analyzed in this study, *Sullivan v. Little Hunting Park, Inc.*,[13] involved an appeal requesting injunctive relief and monetary damages for the refusal of a nonprofit corporation, organized to operate a community park and playground facility, to permit a member to lease his home and transfer his membership rights to a black family. The Virginia Supreme Court of Appeals refused to hear the appeal on the ground that the plaintiff's attorney violated a rule of civil procedure by not giving the opposing counsel reasonable written notice of the time and place of tendering the transcript and a reasonable opportunity to examine it. Subsequently, the United States Supreme Court vacated the judgment and remanded the case to the state court for a decision in light of *Jones v. Alfred H. Mayer Co.*[14]

On remand, the Virginia Supreme Court of Appeals rejected further consideration of the case on the ground that it was without jurisdiction. Since the petitioner's appeal was not perfected in a manner prescribed by law, the Virginia court refused to accept the appeal. The state court also admonished the United States Supreme Court for attempting to dictate the state's procedural rules.[15]

Supreme Court were from southern states. Of the ten states having the largest number of cases before the Court, only two were northern states. These ten states were: California (64), Florida (60), New York (41), Virginia (32), Texas (32), Ohio (29), Alabama (28), Georgia (20), North Carolina (16) and Louisiana (16).

12. A 1968 Gallup Poll disclosed that 66 percent of the *South* had an unfavorable attitude toward the Supreme Court with only 23 percent holding a favorable opinion. At the same time, *national* statistics indicated that 45 percent of the people held a positive reaction to the Supreme Court while 46 percent had a negative feeling toward the Court. *See* N.Y. Times, July 10, 1968, at 19, col. 2.

13. 392 U.S. 657 (vacated mem.), *on remand,* 209 Va. 279, 163 S.E.2d 588 (1968), *rev'd,* 396 U.S. 229 (1969).

14. 392 U.S. 409 (1968). In *Jones,* the Court held that it was illegal under the 1866 Civil Rights Act and unconstitutional under the involuntary servitude clause of the thirteenth amendment for one to discriminate on the basis of race in purchasing, leasing or selling public or private property. The 1866 Civil Rights Act provides:

> All citizens of the United States have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

42 U.S.C. § 1982 (1970).

15. The opinion of the Virginia court asserted: "Only this court may say when it does not have jurisdiction under its Rules. We had no jurisdiction in the cases

The Supreme Court again granted certiorari and, in a 5-3 opinion, rejected the rationale of the Virginia court and reversed the judgment.[16] The Court ruled that the public accommodations provision of the 1964 Civil Rights Act did not supercede the provisions of the 1866 Civil Rights Act which prohibited private racial discrimination in leasing, selling and inheriting property. Moreover, the right to lease was protected from discriminatory actions of third parties as well as from the immediate lessor. Although there were no provisions in the 1866 Act for awarding damages, the majority cited several authorities permitting the Court to allow monetary recovery for a denial of a federal right.[17] The Supreme Court also accused the Virginia court of denying a federal right by rigidly applying state rules of procedure. While the procedural rule was not novel, the Court contended that it was applied more stringently to the petitioners in the instant case than in many past cases.[18] To the Supreme Court, the action of the Virginia court was clearly evasive.

Another example of state court evasion was the jury selection case of *Coleman v. Alabama*[19] which was twice appealed to the Supreme Court and twice reversed and remanded to the state supreme court. The petitioner, a black man sentenced to death following his conviction for murdering a white mechanic, based his appeal on the ground that jury selection in Greene County, Alabama, systematically and arbitrarily discriminated against black people in violation of the due process and equal protection clauses of the fourteenth amendment. Although the defendant's attorney failed to raise the issue of systematic exclusion prior to the trial, on appeal the Supreme Court of Alabama exercised its discretionary powers, considered the issue and held that the petitioner

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when they were here before, and we have no jurisdiction now." Sullivan v. Little Hunting Park, Inc., 209 Va. 279, 281, 163 S.E.2d 588, 589 (1968).

16. Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969). With the loss of Chief Justice Warren and Justice Fortas, and the appointment of Chief Justice Burger, the 7-2 decision on the first appeal was narrowed to 5-3 on the second appeal. Chief Justice Burger and Justices Harlan and White, in dissenting, leveled strong criticism against the majority opinion and its assertion of federal supervisory powers over state procedural rules. *Id.* at 241 (dissenting opinion).

17. The majority claimed that "existence of a statutory right implies the existence of all necessary and appropriate remedies." *Id.* at 239. The Court in a previous decision had held that "[t]he power to enforce implies the power to make effective the right of recovery afforded by the Act." Deckert v. Independence Shares Corp., 311 U.S. 282, 288 (1940).

18. *See* Bolin v. Laderberg, 207 Va. 795, 153 S.E.2d 251 (1967); Cook v. Virginia Holsum Bakeries, 207 Va. 815, 153 S.E.2d 209 (1967); Stokley v. Owens, 189 Va. 248, 52 S.E.2d 164 (1949).

19. 276 Ala. 513, 164 So. 2d 704 (1963), *rev'd*, 377 U.S. 129, *on remand state supreme court remanded for hearings on motion for new trial*, 276 Ala. 513, 518, 164 So. 2d 704, 708 (1964) *and aff'd former conviction after hearing*, 280 Ala. 509, 195 So. 2d 800, *rev'd per curiam*, 389 U.S. 22 (1967).

had not met the burden of proving racial discrimination.

The Supreme Court granted certiorari and, after citing a number of precedents prohibiting systematic exclusion from jury service, reversed the judgment and remanded the case to the Supreme Court of Alabama with instructions that the defendant be given the opportunity to offer evidence to support his claim.

The state court, after admonishing the Supreme Court for accommodating a "technicality" and describing the Court's rationale as "sophistical," remanded the case to the Circuit Court of Greene County for a hearing on the issue of whether blacks were systematically excluded from the jury rolls. Although the evidence presented at the hearing showed that blacks comprised 82 percent of the general population and 67 percent of the adult males over 21, the trial court ruled that systematic jury discrimination was not proven by the fact that less than 10 percent of the "qualified" jurors in Greene County were black.[20]

In the second appeal, the United States Supreme Court reversed the conviction on the ground that, absent contrary state evidence, the petitioner had proven systematic jury discrimination. The Court was very critical of the justification advanced by the state for the disparity between the percentage of blacks living in Greene County and the number of blacks currently and historically appearing on its jury rolls. Although the state contended that there were a number of factors explaining the disparity in the number of "eligible" jurors, the only argument advanced to justify the gross disparity was that some Negroes had disqualified themselves by committing crimes or leaving the county. State court action in this case appeared highly evasive. Throughout the litigation of this case, the Alabama Supreme Court seemed deliberately to evade relevant Supreme Court precedents and the implicit mandate of the first remand.

An Arizona loyalty oath case also presents a problem of compliance. In *Elfbrandt v. Russell*,[21] the Supreme Court vacated and remanded a decision of the Arizona Supreme Court upholding the state's loyalty oath requirement for public officers and employees. The Court remanded the case for further consideration in light of the decision in *Baggett v. Bullitt*.[22]

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20. *See* Coleman v. Alabama, 280 Ala. 509, 511, 195 So. 2d 800, 801 (1967). Evidence also indicated that no black person had ever served on the grand jury panels in Greene County and few, if any, served on the petit jury panels. More importantly, no blacks had served on the grand or petit juries which indicted and convicted Coleman. *See* Coleman v. Alabama, 389 U.S. 22, 23 (1967).

21. 94 Ariz. 1, 381 P.2d 554 (1963), *vacated mem.*, 378 U.S. 127, *on remand*, 97 Ariz. 140, 397 P.2d 944 (1964), *rev'd*, 384 U.S. 11 (1966).

22. 377 U.S. 360 (1964). In *Baggett*, the Supreme Court overruled two Wash-

Thereafter, the Arizona Supreme Court, with one member dissenting, reinstated its previous decision upholding the mandatory state loyalty oath which subjected public employees to perjury prosecution and dismissal if, having taken the oath, they knowingly and wilfully became or remained members of the American Communist Party or any other organization advocating the violent overthrow of the government. As scienter was clearly required, the majority saw no conflict with constitutional rights.

Dissenting from the Arizona court's opinion, Justice Bernstein asserted that the membership clause of the oath was unconstitutionally vague and ambiguous since it made it a crime to be a member of any organization having as one of its subordinate purposes the overthrow of the government. According to Justice Bernstein, a scientist could never know whether his association with international organizations and academicians in other countries would result in prosecution from the government or praise from the university.

Accepting the case for the second time, the Supreme Court reversed the state supreme court and declared the Arizona loyalty oath unconstitutional. Writing for the majority, Justice Douglas declared that any law which automatically punished membership without the "specific intent" to further the illegal goals of the organization ran the hazard of punishing "guiltless behavior." The majority declared that only when a member actively participates in illegal activities can he be removed for disloyalty. To do otherwise would constitute guilt by association.

Dissenting, Justices White, Clark, Harlan and Stewart argued that a state had the right to limit state employment to persons not associated with subversive organizations. Although they appeared willing to prohibit criminal penalties for loyalty oath violations, the dissenters were adamant about the right of a state to disqualify persons who belonged to subversive organizations from public employment. At most, they asserted that a remand rather than a reversal should have been issued.

Interestingly, Justice White, who wrote the majority opinion in *Baggett* and the dissenting opinion in *Elfbrandt*, never mentioned or

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ington loyalty oaths for public employees on grounds of vagueness. The first oath prohibited "subversives" from holding public employment. A "subversive" person or organization included one that engaged in or assisted activities intended to "overthrow, destroy or alter" the state or federal governments. The second oath required teachers to swear that they would "promote respect for the flag and the institutions" of the state and federal governments and encourage "reverence for law and order and undivided allegiance to the government of the United States." *Id.* at 362.

Similarly, the Arizona loyalty statute prohibited public employees from aiding "in the commission of any act to overthrow by force or violence the government" or belonging to any organization, "knowingly and wilfully," which has this purpose as one of its objectives. ARIZ. REV. STAT. ANN. § 38-231 (1971).

distinguished the instant case from the former. Although some of Justice White's concerns in *Baggett* were incorporated in Justice Bernstein's dissent from the Arizona court's opinion and again in Justice Douglas' majority opinion in *Elfbrandt*, the Supreme Court dissenters contended that a statute requiring "knowing" membership was not unconstitutionally vague.

In short, because of the sharp 5-4 division on the Supreme Court, the state court action in *Elfbrandt* was probably the least "evasive" in this study. It could be argued that the Arizona Supreme Court had no way of accurately predicting the decision of the United States Supreme Court. On the other hand, the 7-2 remand must have offered some direction.

Chamberlin v. Board of Public Instruction[23] represented a classic example of evasive state court action. The plaintiffs in this case sought injunctions against various religious exercises and requirements—Bible reading, recitation of the Lord's Prayer and other sectarian prayers, sectarian baccalaureate programs, a religious census among children and a religious qualification for teaching—in Dade County public schools. The Florida Supreme Court affirmed the judgment of the trial court denying relief. The United States Supreme Court, in a unanimous per curiam opinion, vacated the judgment and remanded the case for further consideration in light of *School District v. Schempp.*[24]

On remand, the Florida Supreme Court vainly attempted to distinguish the fact situations in *Chamberlin* from the circumstances of *Schempp*. Reinstating their previous decision, the state court justices upheld the constitutionality of the state law on the ground that the primary purpose of Bible reading and prayers was secular—building good citizenship and inculcating morality—not sectarian.[25] In so ruling, the justices refused to take cognizance of another Supreme Court precedent which held that a religious means cannot be used to obtain a secular end.[26] Moreover, the unanimous Florida Supreme Court decision contended that whereas the intent of the Pennsylvania and Maryland Legislatures as seen by the Court in *Schempp* was ambiguous, the intent

23. 143 So. 2d 21 (Fla. 1962), *vacated mem.*, 374 U.S. 487 (1963), *on remand*, 160 So. 2d 97 (Fla.), *rev'd per curiam*, 377 U.S. 402 (1964).

24. 374 U.S. 203 (1963). The *Schempp* case concerned a Pennsylvania Bible reading statute, while the case of *Murray v. Curlett*, which was consolidated in the same opinion, concerned both Bible reading and recitation of the Lord's Prayer in Baltimore, Maryland, schools.

25. Chamberlin v. Board of Pub. Instruction, 160 So. 2d 97, 99 (Fla. 1964). The Florida Supreme Court based its opinion on the "legislative purpose and primary effect" doctrine announced in *McGowan v. Maryland*, 366 U.S. 420 (1962).

26. *See* Torcaso v. Watkins, 367 U.S. 488 (1961).

of the Florida Legislature in the instant case was clear and unequivocal. A closer examination of this claim, however, indicates that this assertion was only half correct. Although the intent of the Maryland Legislature was not disclosed, the appellant's brief in *Schempp* revealed the secular intent of the Pennsylvania Legislature. In addition, the explanatory language used to justify Bible reading by the Pennsylvania and Florida lawmakers was almost identical.[27]

The Florida justices also made the rather flimsy excuse that the separate concurrences in *Schempp* left no "clear course for the state courts to follow."[28] Yet, an analysis of the three concurrences in *Schempp* clearly demonstrates that all eight Justices in the majority strongly subscribed to the belief that government prescribed Bible reading and prayers should not be permitted in public schools. Even Justice Stewart in dissent asked only that the cases be remanded to the state courts to determine if coercion was involved.[29] In finding the fact situations inapposite and rejecting any authority or responsibility to "speculate" on the Supreme Court's philosophy, the state justices appeared to invite federal intervention by denying civil liberties. Speculating on why the Florida Supreme Court refused to follow the clear mandate of the United States Supreme Court, one commentator suggested that the court was trying to avoid a publicly unpopular decision and resist federal intervention.[30]

Following the state court's decision upholding religious practices in public schools, the case was again appealed to the United States Supreme Court where a unanimous Court ruled that devotional Bible readings and prayers were unconstitutional. Although Justices Douglas and Black believed that the issue concerning religious tests for public

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27. For further analysis of this decision see Harris, *Constitutional Law: Religious Practice in Public Schools*, 17 U. FLA. L. REV. 484 (1964).

28. 160 So. 2d at 99.

29. Justice Stewart admitted:

> It is conceivable that . . . school boards . . . might eventually find it impossible to administer a system of religious exercises during school hours in such a way as to meet this constitutional standard—in such a way as completely to free from any kind of official coercion those who do not affirmatively want to participate.

School Dist. v. Schempp, 374 U.S. 203, 320 (1963) (dissenting opinion).

30. Harris, *Constitutional Law: Religious Practices in Public Schools*, 17 U. FLA. L. REV. 484 (1964). The Florida Supreme Court was reprimanded in these words:

> Apparently the Supreme Court of Florida is saying that if the plaintiffs wish to have their civil rights determined they must go to the federal courts. This is strange language from those who most loudly profess a desire to minimize federal intervention.

Id. at 486.

school teachers was also ripe for adjudication, all of the Justices agreed that baccalaureate services and a religious census in public schools did not present substantial federal questions. Subsequent to this decision, the Florida Supreme Court, considering the case for the third time, complied with the decision of the Supreme Court and prohibited government sanctioned Bible reading and prayers in public schools.[31]

Evidence of noncompliance was also discovered in two self-incrimination cases remanded by the Supreme Court in light of *Griffin v. California*[32] and *Chapman v. California.*[33] In *Fontaine v. California,*[34] the defendant appealed his conviction for the sale of marihuana on the grounds that his fifth amendment rights were violated by the comments of the prosecutor and the trial judge concerning his failure to take the stand and testify on his own behalf.[35] Following the Supreme Court remand, the state supreme court reinstated its original judgment affirming the conviction. Although the facts in this case were closely parallel to the *Chapman* case cited in the remand mandate, the California Supreme Court unanimously ruled that the constitutional error in the instant case was "harmless beyond a reasonable doubt" and was therefore not controlled by the *Chapman* dictum.

The Supreme Court, two Justices dissenting, disagreed with the state court and reversed the judgment. Since the state's informer, who allegedly bought marihuana from the defendant, had disappeared and was unable to testify in court, the Supreme Court majority held that Fontaine was being convicted "on the basis of circumstantial evidence."[36]

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31. Chamberlin v. Board of Pub. Instruction, 171 So. 2d 535 (Fla. 1965).

32. 380 U.S. 609 (1965). In *Griffin,* a 5-3 majority held that comments by the judge and prosecutor on defendant's failure to testify were not permissible even when the court had instructed the jury not to draw any inferences of guilt from the exercise of this right.

33. 386 U.S. 18 (1967). The *Chapman* dictum indicated that before a trial error can be held "harmless," the reviewing court must be able to declare that the error was "harmless beyond a reasonable doubt." In this case both the trial judge and the prosecuting attorney had commented on the failure of the defendants to testify in their own defense. Justice Black, writing for the majority, concluded that although there was "strong 'circumstantial . . . evidence' against the petitioners . . . absent the constitutionally forbidden comments, honest, fairminded jurors might very well have brought in not-guilty verdicts." *Id.* at 25-26 (citation omitted).

34. 237 Cal. App. 2d 320, 46 Cal. Rptr. 855 (Dist. Ct. App. 1965), *vacated mem.,* 386 U.S. 263, *on remand,* 252 Cal. App. 2d 73, 60 Cal. Rptr. 325 (Ct. App. 1967), *rev'd per curiam,* 390 U.S. 593 (1968).

35. The trial judge's instructions to the jury suggested that adverse inferences could be drawn from the defendant's silence. His instructions read, in relevant part:

> [I]f he does not testify or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence . . . .

Fontaine v. California, 390 U.S. 593, 595 (1968).

36. *Id.* at 596.

In light of this, the United States Supreme Court could not agree that the state had proven beyond a reasonable doubt that the erroneous comments of the prosecutor and the inappropriate instructions of the trial judge had no relation to the defendant's conviction.

A similar situation occurred in *O'Connor v. Ohio*,[37] with the added issue of the adequacy of state criminal procedures. As in *Sullivan v. Little Hunting Park, Inc.*,[38] the state supreme court originally refused to hear the appeal on the ground that the appeal did not conform to state procedural rules. The United States Supreme Court, however, vacated the judgment and remanded the cause to the state court for a decision in light of *Griffin v. California*.[39] On remand, a sharply divided Ohio Supreme Court reaffirmed its initial judgment. Speaking for the majority, Chief Justice Taft contended that the state supreme court could properly refuse to consider a claim of error that was not raised in or considered by the trial or lower appellate courts. He claimed that the state supreme court did not have the power or authority to decide whether constitutional rights have been violated unless the federal rights had been "seasonably raised" in accordance with the requirements of state law. Moreover, the majority asserted that the *Griffin* dictum was inapplicable in the instant case because it occurred after *O'Connor* had been adjudicated by the state courts.

Dissenting from the state court opinion, Justices O'Neill, Herbert and Brown contended that the *Griffin* rule, although not retrospective in its application, was meant to apply to all cases pending on direct appeal at the time *Griffin* was announced. They argued that *O'Connor* fell "squarely within" the guidelines established by the Supreme Court.

The Supreme Court unanimously agreed with the state court dissenters that the defendant's failure to object to prejudicial comments and instructions by the prosecution and trial judge at the time of his trial did not preclude his right on direct appeal to attack that practice, following its invalidation by the Supreme Court in *Griffin*. Since the defendant could not have anticipated the *Griffin* decision any more than the state could have, the Supreme Court ruled that Ohio's procedural

37. 382 U.S. 286 (1965) (vacated per curiam), *on remand*, 6 Ohio St. 2d 169, 217 N.E.2d 685, *rev'd per curiam*, 385 U.S. 92 (1966).

38. 392 U.S. 657 (vacated mem.), *on remand*, 209 Va. 279, 163 S.E.2d 588 (1968), *rev'd*, 396 U.S. 229 (1969). *See* notes 13-18 *supra* and accompanying text.

39. 380 U.S. 609 (1965). *See* note 32 *supra*.

40. State v. O'Connor, 6 Ohio St. 2d 169, 176, 217 N.E.2d 685, 689 (1969) (dissenting opinion). As noted by the state court dissenters, a precedent had already been established which stated that *Griffin* applied to all convictions which had not become final on the date of the *Griffin* decision. *See* Tehan v. United States *ex rel.* Shott, 382 U.S. 406 (1966).

rule could not negate the defendant's "meritorious federal claim."[41]

In short, there is little doubt that the mandate in both *Fontaine* and *O'Connor* was consciously evaded by the action of the California and Ohio Supreme Courts on remand. Ultimately, however, the Supreme Court prevailed by directly reversing both state court decisions.

Another good example of state court evasion was found in the first degree murder case of *McLeod v. Ohio*.[42] On the ground that no debatable constitutional issue was presented, the Ohio Supreme Court had unanimously dismissed the defendant's appeal and upheld the judgment of the trial court which stated that the oral confession given by the defendant, prior to his arraignment and without the assistance of counsel, was admissible in court. The United States Supreme Court accepted the case, vacated the judgment and remanded the cause in light of *Massiah v. United States*.[43]

Following the Supreme Court remand, the state court reinstated its previous decision affirming the constitutionality of the oral confession made by the defendant. The dissenters from the Ohio Supreme Court decision were highly critical of the majority opinion. They contended that the defendant, indicted on October 3, 1960, and not arraigned until the 14th (three days after his oral confession), was denied due process. Since counsel was not provided until the defendant had confessed and was brought into court, the dissenters argued that counsel for the accused did not have reasonable or sufficient time to examine the indictment and prepare an adequate defense. Citing the precedent suggested by the Supreme Court, the dissenters argued that the clear dictum of *Massiah* suggested that if the state court majority desired to obey the mandate of the Supreme Court and avoid the "embarassment" of being overruled again on appeal, it must reverse its prior judgment.[44]

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41. O'Connor v. Ohio, 385 U.S. 92 (1966).

42. 173 Ohio St. 520, 184 N.E.2d 101 (1962), *vacated mem.*, 378 U.S. 582, *on remand*, 1 Ohio St. 2d 60, 203 N.E.2d 349 (1964), *rev'd mem.*, 381 U.S. 356 (1965).

43. 377 U.S. 201 (1964). In *Massiah*, the Supreme Court overruled a conviction based on a statement elicited by an accomplice cooperating with the police by means of a radio hidden in the auto of the informer. Without reaching the search and seizure issue, the Court held that incriminating statements made by the defendant to the co-defendant, following their indictment and release on bail, and in the absence of an attorney, were not admissible in court due to the fifth, sixth and fourteenth amendments.

44. Citing a recent Ohio Supreme Court decision which had been remanded by the United States Supreme Court in "strikingly similar" language and subsequently reversed by the Supreme Court following the state court's reinstatement of its prior judgment, the two Ohio dissenters declared that "[s]urely no judge of this court can relish being told again, as we were in *Doughty v. Maxwell* (1964), 376 U.S. 202 . . . , upon reappeal that we must reverse our judgment." Ohio v. McLeod, 1 Ohio St. 2d 60, 64, 203 N.E.2d 349, 352 (1964) (dissenting opinion).

In a second appeal to the Supreme Court, the position of the dissenters was adopted by a 6-3 vote of the United States Supreme Court and the case was remanded to the state supreme court.[45]

The final example of evasive state court action was *Sims v. Georgia,*[46] which involved a conviction for forcible rape. The Georgia Supreme Court affirmed the conviction of the defendant, holding that, despite recent Supreme Court decisions, it was not improper to leave the question of voluntariness of a confession to the jurors. Curiously, Chief Justice Duckworth took the opportunity to level some "respectful" criticism at the United States Supreme Court for meddling with the criminal procedures enacted by states. He accused the Warren Court of permitting personal ideology to influence judicial decision-making and contended that the wisdom and integrity of judges were no more reliable than those of jurors.[47] Echoing the sentiments of many state judges, Chief Justice Duckworth asserted that the Supreme Court must respect state laws and remove its "heavy hand" from "the throats of State courts."[48] As an expression of federalism and states' rights, Justice Duckworth commented:

> We yield to no living men in our appreciation of and highest respect for the Supreme Court as a vital part of our Government and its proper supremacy over all courts, including this one. But if those occupying it will not uphold State procedure law that is constitutional and follow their own decisions sustaining those laws, chaos will reign in the lower courts of America. We hope the present Justices will, after more mature consideration overrule Jackson v. Denno . . . and allow State courts to try cases according to law rather than the personal notions of just barely half of the Justices.[49]

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45. McLeod v. Ohio, 381 U.S. 356 (1965).

46. 221 Ga. 190, 144 S.E.2d 103 (1965), *rev'd,* 385 U.S. 538, *on remand state supreme court remanded for hearing on voluntariness of confession,* 223 Ga. 126, 153 S.E.2d 567 *and aff'd former conviction after hearing,* 223 Ga. 465, 156 S.E.2d 65, *rev'd per curiam,* 389 U.S. 404 (1967). Sims, an indigent and illiterate black man, was convicted of raping a white woman and was sentenced to death. The first rape conviction was reversed by the state supreme court on the ground that the defendant was not adequately represented by counsel. *See* Sims v. Balkcon, 220 Ga. 7, 136 S.E.2d 766 (1964). The court noted that since 1930, 58 blacks and 3 whites had been executed for rape in Georgia. *Id.*

47. As stated by the Georgia Chief Justice:

> Justices should remember that they have no monopoly on either wisdom or integrity, and before they indict the reliability of jurors, they should think of the sacred challenge that the guiltless cast the first stone.

Sims v. State, 221 Ga. 190, 203, 144 S.E.2d 103, 113 (1965).

48. *Id.*

49. *Id.*

Although the Georgia Supreme Court majority did not believe they were violating *Jackson v. Denno*[50] in affirming the *Sims* case, Justice Almand contended that Georgia's procedural methods regarding the voluntariness and involuntariness of confessions were the same as those of New York which were declared unconstitutional in *Jackson*.[51]

In the first appeal to the Supreme Court, the case was reversed and remanded to the Georgia Supreme Court with directions that the state judiciary allow the defendant a hearing on the voluntariness of his confession. Justice Clark, writing for the Court, disagreed with the contention of the Georgia Supreme Court that the *Sims* case offered no clear-cut issue of a physically coerced confession. Justice Clark pointed out that the defendant's claim of mistreatment was never contradicted by the police.

On remand, the state supreme court, after directing a hearing on the voluntariness of the confession by the lower court, unanimously affirmed the former conviction after concluding that the confession had been voluntary. The Supreme Court reversed the judgment of the Georgia court for the second time, ruling that the defendant's confession must be considered involuntary in the absence of contradictory state evidence.[52] The Court also found that the process of selecting the defendant's jury was racially discriminatory and unconstitutional.[53] *Sims* was a classic example of state court resistance to a Supreme Court mandate.

In summary, state court action in the eight cases reviewed above demonstrated an obvious conflict in judicial decision-making. In each case the United States Supreme Court expressed an implicit mandate for the state court to follow only to have it rejected subsequently by the state court. Although the state courts attempted either to distinguish their instant cases from the precedents cited or to narrowly interpret the Court's mandate, evidence clearly suggests that the state courts con-

50. 378 U.S. 368 (1964).

51. Sims v. State, 221 Ga. 190, 205, 144 S.E.2d 103, 114 (1965) (dissenting opinion).

52. Sims v. Georgia, 389 U.S. 404 (1967). Since the reconstruction of this case by the state court was based entirely on the printed record of the original trial, the Supreme Court granted certiorari and decided the case for the second time without waiting for new briefs by the state.

53. *Id.* Findings indicated that the grand and petit jury lists were drawn from the county tax digests which separately listed taxpayers by race in conformity with Georgia law. Blacks comprised 24.4 percent of the taxpayers in the county, but only 4.7 percent of the names on the grand jury list and 9.8 percent of the names on the traverse jury list from which the defendants' grand and petit jurors were selected. There was one black on the grand jury indicting the defendant and five on the jury list from which the all-white trial jury was selected. *See* Sims v. Georgia, 389 U.S. 404, 407 (1967).

sciously violated the intent of forthright remands. Nor was the United States Supreme Court sharply divided in most of these mandates. Of the eight cases, five were decided on second appeal by a unanimous Supreme Court; only one case had more than three dissenters.

INSTANCES OF QUASI-EVASIVE STATE COURT ACTION

In addition to the eight examples of "evasive" state court action during the last decade of the Warren Court, there were ten other instances of doubtful state court action which can be classified as "quasi-evasive." As noted above, to minimize subjective classification, cases were not considered "quasi-evasive" unless at least one state court justice and this writer discovered meaningful discrepancies between the Supreme Court mandate and the subsequent state court decision.[54] While, unlike the evasion decisions, the Supreme Court never considered these cases again following the initial remands, these adverse state court decisions at least suggest less than full compliance with the Supreme Court's implicit directions.

The first example of quasi-evasive state court action analyzed in this study involved civil rights demonstrations in Maryland. In *Bell v. Maryland*,[55] the United States Supreme Court vacated the criminal trespass conviction of 12 black students who had staged a sit-in demonstration at a cafe.[56] The case was remanded to the state court to consider

54. *See* note 8 *supra* and accompanying text. For the sake of brevity, the textual analysis of quasi-evasion cases in this study will be confined to four first amendment cases and one sixth amendment case concerning cross-examination. The five quasi-evasion cases not analyzed in this article are: *Hudgins v. California*, 236 Cal. App. 2d 578, 46 Cal. Rptr. 199 (Dist. Ct. App. 1965), *vacated mem.*, 386 U.S. 265, *on remand*, 252 Cal. App. 2d 174, 60 Cal. Rptr. 176 (Ct. App. 1967), *cert. denied*, 390 U.S. 965 (1968) (self-incrimination); *Garner v. California*, 234 Cal. App. 2d 212, 44 Cal. Rptr. 217 (Dist. Ct. App. 1965), *vacated mem.*, 386 U.S. 272 (1967), *on remand*, 258 Cal. App. 2d 420, 65 Cal. Rptr. 780 (Ct. App. 1968) (self-incrimination); *Local 721, United Packinghouse Workers v. Needham Packing Co.*, 254 Iowa 882, 119 N.W.2d 141 (1963), *rev'd*, 376 U.S. 247 (1964), *on remand*, 260 Iowa 908, 151 N.W.2d 540, *cert. denied*, 389 U.S. 830 (1967) (labor-management relations); *McIlvaine v. Louisiana*, 245 La. 649, 160 So. 2d 566 (1964), *vacated mem.*, 379 U.S. 10, *on remand*, 247 La. 747, 174 So. 2d 515 (1965) (search and seizure); *McDaniel v. North Carolina*, 272 N.C. 556, 158 S.E.2d 874, *vacated mem.*, 392 U.S. 665, *on remand*, 274 N.C. 574, 164 S.E.2d 469 (1968) (self-incrimination).

55. 227 Md. 302, 176 A.2d 771 (1962), *rev'd*, 378 U.S. 226, *on remand*, 236 Md. 356, 204 A.2d 54 (1964).

56. Bell v. Maryland, 378 U.S. 226 (1964). Concurring, Justices Douglas and Goldberg contended that the Supreme Court should have decided constitutional issues instead of remanding the case to the state courts. *Id.* at 242 (concurring opinion). Conversely, dissenting Justices Black, Harlan and White asserted that the Court should have limited itself to the issue whether state enforcement of trespass laws violates equal protection of the law under the fourteenth amendment. *Id.* at 318 (dissenting opinion).

the effect of a supervening change in state law which occurred subsequent to the trial and conviction of the defendants but prior to the grant of certiorari by the Supreme Court.[57] According to Justice Brennan, the majority opinion writer, the Supreme Court had refused to consider the constitutional issues in this case because most of the Justices believed that the state court would reverse the convictions in light of the new law which abolished the crime for which the appellants were convicted.

On remand, the Maryland high court upheld the convictions on the ground that neither the Maryland public accommodations law nor the the Civil Rights Act of 1964 was intended to apply retroactively. Most important, the court ruled that the state's "general savings clause" was controlling.[58] In dissent, Judge Oppenheimer argued that the general savings clause was inapplicable when one considered legislative intent and the new meaning of "wanton trespass" following the passage of the public accommodations act. Judge Oppenheimer further noted that the savings clause statute had never before been interpreted as continuing a former law in effect "for the purpose of punishing an offense committed prior to the subsequent legislation where the later act did not either in terms eliminate the criminality of the defendant's action or change the penalties."[59] Evading a libertarian interpretation of the new state public accommodations laws, the Maryland majority effectively avoided the sentiment expressed in Justice Brennan's majority opinion.

A second Maryland case involving quasi-evasive state court action concerned a disorderly conduct arrest of three whites and one black in

57. The public accommodations law went into effect on June 1, 1963—a year and a half after the state court affirmed the trespass convictions and nine days prior to the grant of certiorari by the Supreme Court. It provided that no owner, operator or employee of places of public accommodation (restaurant, hotel) may refuse to serve another person because of the race, creed, color or national origin of the person seeking to be served. The state law applied to the city of Baltimore, where the defendants were arrested, and to 12 of Maryland's 23 counties. MD. ANN. CODE art. 49B, § 11 (Supp. 1963). On March 14, 1964, the Maryland Legislature extended the coverage of the public accommodations law to all areas of the state. Moreover, on June 8, 1962—only six months after the state's high court had affirmed the petitioners' conviction—Baltimore passed an ordinance prohibiting discrimination in public accommodations. BALTIMORE, MD., CODE art. 14A, § 10A (1962).

58. MD. ANN. CODE art. 1, § 3 (1957), provided that any repeal or amendment of a statute should not release, extinguish or change the criminal penalties incurred under such statutes unless expressly indicated in the repealing statute.

59. Bell v. State, 236 Md. 356, 373-74, 204 A.2d 54, 64 (1964) (dissenting opinion). Judge Oppenheimer continued:

> [W]hen the Legislature created new rights in the public accommodations law, it did not intend the savings clause statute, which is only applicable in cases of amendment or repeal, to apply.

Id.

a segregated, privately-owned amusement park. In *Drews v. Maryland*,[60] a unanimous Supreme Court vacated the petitioner's convictions and asked the Maryland Court of Appeals to consider its judgment in light of *Griffin v. Maryland*[61] and *Bell v. Maryland*.[62] On remand, the Maryland court affirmed its previous judgment by distinguishing the facts and issues in *Drews* from those represented in *Griffin* and *Bell*. The majority opinion contended that since the police made no effort to eject the trespassing demonstrators from the park until the manager requested their assistance, the state was not a "cooperative" party in the private segregation policy.[63]

Dissenting, Judge Oppenheimer saw no substantial difference between the facts presented in *Griffin* and those found in *Drews*. He contended that since the demonstrators used no force, the convictions for "disorderly conduct" were highly suspect. Judge Oppenheimer concluded that the case should be remanded to a lower court to determine if the security officer hired by the park was appointed by the Baltimore police; he felt the conviction definitely should be reversed if evidence indicated that the park official was a special police officer.[64]

The United States Supreme Court dismissed a second appeal for lack of jurisdiction. However, Chief Justice Warren and Justice Douglas dissented, believing that the defendants' actions were protected by the 1964 Civil Rights Act and not punishable under the state's disorderly conduct law; they felt that certiorari should be granted.

Quasi-evasion was also found in a Washington loyalty oath case. In *Nostrand v. Little*,[65] the state supreme court upheld the constitutionality of Washington's loyalty oath requirement for public employ-

60. 224 Md. 186, 167 A.2d 341 (1961), *vacated mem.*, 378 U.S. 547, *on remand*, 236 Md. 349, 204 A.2d 64 (1964), *appeal dismissed and cert. denied*, 381 U.S. 421 (1965).

61. 378 U.S. 130 (1964). In *Griffin*, the Supreme Court held that the arrest of civil rights demonstrators by a private amusement park officer licensed by the government to make arrests, as a salaried member of a detective agency or as a non-salaried special deputy sheriff, constituted state action and was therefore prohibited by the fourteenth amendment.

62. 378 U.S. 226 (1964). *See* notes 55-59 *supra* and accompanying text.

63. Drews v. State, 236 Md. 349, 204 A.2d 64 (1964). Since the park had a legal right to maintain a business policy of excluding Negroes, the Maryland judges contended that the arrests were not made because the state desired or intended to maintain a segregated park but because the defendants were inciting the crowd by refusing to obey valid commands to move from a place where they had no lawful right to be.

64. *Id.* at 355, 204 A.2d at 67 (1964) (dissenting opinion).

65. [Nostrand v. Balmer], 53 Wash. 2d 460, 335 P.2d 10 (1959), *vacated per curiam sub. nom.*, Nostrand v. Little, 362 U.S. 474 (1960), *on remand*, 58 Wash. 2d 111, 361 P.2d 551 (1961), *appeal dismissed per curiam*, 368 U.S. 436 (1962).

ment.[66] State law required each public employee to indicate, under penalty of perjury, whether he or she was a member of any organization considered "subversive" by the United States Attorney General. The statute imposed a penalty of automatic dismissal for anyone who refused on any grounds to take the oath.[67] Two professors at the University of Washington were summarily dismissed for refusing to take the loyalty oath.

With two dissents, the United States Supreme Court vacated the judgment and remanded the case to the state court to determine whether state law afforded a public employee an opportunity for a hearing to explain his refusal to take the oath.[68] On remand, the Washington Supreme Court ruled that while the state Subversive Activities Act did not accord public employees the right to have a hearing, the employment contracts of university professors provided for a hearing before a tenure committee. Although the majority interpreted the Supreme Court mandate as merely requiring the state supreme court to determine whether the petitioners were entitled to a hearing before they could be discharged, a strong dissent contended that the state supreme court had violated the mandate of the Supreme Court by narrowly interpreting its command. In dissenting from the state court opinion, Justice Mallery argued that the loyalty oath law should be declared unconstitutional because it did not guarantee a hearing to any or all public employees. In fact, the law itself provided no protection for teachers, much less firemen, policemen and other public employees. As Justice Mallery wrote: "Implicit in the remand is the implication that, if we hold that such a hearing is not afforded by the Act, it is 'violative of due process.' "[69] Indeed, an analysis of the Supreme Court mandate strongly suggests that the Supreme Court intended the state court to determine whether the loyalty statute itself provided for a hearing.[70]

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66. The Washington Supreme Court construed this law as requiring the element of scienter. Nostrand v. Balmer, 53 Wash. 2d 460, 335 P.2d 10 (1959).

67. The Washington loyalty oath statute provides that every public employee must state under oath whether or not he or she is a member of the communist party or other subversive organization, and refusal to answer *on any grounds* shall be cause for *immediate termination* of such employee's employment. WASH. REV. CODE ANN. § 9.81.080 (1961) (emphasis added).

68. Nostrand v. Little, 362 U.S. 474 (1960) (per curiam). Justices Douglas and Black in dissenting considered the remand "useless." They contended that the state supreme court had already resolved any ambiguity in the loyalty oath statute and asked their brethren to consider the constitutional issues raised in the case. *Id.* at 476 (dissenting opinion).

69. Nostrand v. Little, 58 Wash. 2d 111, 138, 361 P.2d 551, 567 (1961) (dissenting opinion).

70. The Supreme Court had stated:

[W]e cannot say how the Supreme Court of Washington would construe

On a subsequent appeal, the Supreme Court dismissed the case for lack of a substantial federal question. When the Supreme Court failed to consider first and fourteenth amendment rights, they left only the administrative relief afforded by a hearing—a relief teachers received only if they refused to take the oath. Dissenting, Justices Douglas and Black thought that the Court should have determined the basic constitutional issue that was tendered—whether a teacher had the right to refuse to take the oath.[71]

The *Nostrand* case is an excellent example of the limited jurisdiction of the federal courts and the deference shown by the United States Supreme Court to the state courts of last resort. As demonstrated in this case, the Supreme Court will generally refuse to strike down a state statute on constitutional grounds until the state courts have had the opportunity to interpret the meaning of the state law in question.[72] Desiring to avoid Supreme Court reversal, the state courts often construe the local statutes to conform with minimal constitutional standards. Given the apparent clarity of the Washington loyalty oath law, the

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this statute [loyalty oath law] on the hearing point.

> The declaratory nature of the case, the fact that the State's statute here under attack supplements previous statutory provisions raising questions concerning the applicability of the latter . . . bring us to the conclusion that we must remand the case for further consideration.

Nostrand v. Little, 362 U.S. 472, 475-76 (1960).

71. Criticizing the majority opinion dismissing a second appeal, Justices Douglas and Black asserted that the action taken by the Washington Supreme Court in dismissing the complaint

> deprives appellants [teachers] of their right to declaratory relief on questions we have never decided. They are remitted to the administrative relief afforded by a hearing . . . . Whether they can preserve in an administrative proceeding, the full array of constitutional questions which they now tender is at least debatable, since the judgment that dismisses their complaint decided all the constitutional questions, except the right to a hearing, against them.

Nostrand v. Little, 368 U.S. 436, 438 (1962) (dissenting opinion).

72. Another fine example of the Supreme Court's unwillingness to decide constitutional questions before the state courts have had the opportunity of ruling on the same issues was *Henry v. Mississippi*, 379 U.S. 443 (1965). In *Henry*, the Supreme Court remanded the case for determination whether the defendant had waived his right to object to tainted search and seizure evidence. Justifying its remand, the majority expressed the following sentiments concerning the proper meshing of the dual judiciary in America:

> By permitting the Mississippi courts to make an initial determination of waiver, we serve the causes of efficient administration of criminal justice, and of harmonious federal-state relations . . . . The court is not blind to the fact that federal habeas corpus jurisdiction has been a source of irritation between federal and state judiciaries. It has been suggested that this friction might be ameliorated if the states would look upon our decisions in *Fay v. Noia* . . . as affording them an opportunity to provide state procedures . . . for a full airing of federal claims. That prospect is better served by a remand than by relegating petitioner to his federal habeas remedy.

Id. at 452 (citation omitted).

initial remand by the Supreme Court is difficult to explain except in light of its policy not to decide a case on its merits until all lower court remedies have been exhausted. There is evidence that the Court was uncertain whether all the constitutional issues were fully argued before the state supreme court. In addition, it is questionable whether the Washington Supreme Court had taken notice of its supervening decision in *Seattle v. Ross*[73] which suggested a change in judicial philosophy to a stricter interpretation of guilt presumption absent a hearing.[74] Although the *Nostrand* ruling of the Washington Supreme Court was never specifically overruled by the Supreme Court, there is little doubt that the state court decision deviated from the judicial intent of the Court's mandate.

Another controversial case illustrating state court avoidance or quasi-evasion was *Watts v. Seward School Board.*[75] In *Watts* two school teachers in Seward, Alaska, who solicited public support to remove the school superintendent were dismissed from their positions on grounds of "immorality"—tending to bring public disgrace or disrespect to the individuals concerned or to the teaching profession. The United States Supreme Court indicated in its initial opinion that public school teachers cannot be dismissed for compiling, reproducing or distributing to the school board a partially inaccurate open letter which is critical of the administration. However, in view of supervening changes in state law which granted teachers the same right as other citizens to criticize public school administrators or other public officials, the Court remanded the case to the state court.[76]

On remand, the state supreme court reinstated its previous judgment upholding the right of a school system to "non-retain" a teacher

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73. 54 Wash.2d 655, 344 P.2d 216 (1960).

74. While *Nostrand* was on direct appeal to the United States Supreme Court, the Washington Supreme Court overruled a Seattle ordinance which prohibited any person from being in any place where narcotics were illegally used, kept or disposed of. The ordinance, in effect, presumed that a person found in a certain place was automatically guilty of a crime. *Id.*

75. 395 P.2d 372 (Alas. 1964), *vacated per curiam*, 381 U.S. 126 (1965), *on remand*, 421 P.2d 586 (Alas. 1966), *vacated mem.*, 391 U.S. 592 (1968), *on remand*, 454 P.2d 732 (1969), *cert. denied*, 397 U.S. 921 (1970).

76. Supervening state legislation limited the definition of "immorality" for purposes of nonretention of public school teachers to criminal acts involving "moral turpitude." ALASKA STAT. § 14.20.095 (1965) provided:

> No rule or regulation of . . . a local school board, or . . . administrator may restrict or modify the right of a teacher to engage in comment and criticism outside school hours, relative to school administrators, members of the governing body of any school . . . to the same extent that any private individual may exercise the right.

Id.

who damaged his own or his superintendent's professional prestige or reflected detrimentally on the teaching profession as a whole. A lengthy and vigorous dissent challenged the majority's original construction of "immorality" in light of supervening legislation enacted while the case was before the state supreme court on remand. Paraphrasing recent state legislation, Justice Rabinowitz contended that a teacher had

> the constitutional right, whether erroneous or not, to be critical of his superintendent; to discuss with his fellow teachers the possibility of effectuating the superintendent's removal and to solicit the support of his fellow teachers for his views.[77]

The case was then appealed to the United States Supreme Court and again vacated and remanded, this time in light of *Pickering v. Board of Education.*[78] The Court ruled that although some of the teacher's statements in an open letter were inaccurate, there was no evidence that they were knowingly and recklessly made. Following the second remand, the Alaska Supreme Court attempted to distinguish *Watts* from *Pickering* and once again reaffirmed its original decision.[79] Thereafter, the United States Supreme Court, with Justice Douglas dissenting, denied certiorari. Thus, after 11 years of hearings and litigation the *Watts* case closed in favor of the government.

The final quasi-evasion case to be discussed concerns the procedural right of cross-examination guaranteed by the sixth amendment. In *Hopper v. Louisiana,*[80] the United States Supreme Court vacated a homicide conviction and remanded the cause in light of *Bruton v. United States.*[81]

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77. Watts v. Seward School Bd., 421 P.2d 586, 623 (Alas. 1967) (dissenting opinion).

78. 391 U.S. 563 (1968). In *Pickering,* the Court upheld the right of a public school teacher to criticize a pending school bond referendum and the mishandling of past revenue bonds by the school board and the superintendent. Although some of the teacher's statements in an open letter were inaccurate, there was no evidence that they were knowingly or recklessly made.

79. Watts v. Seward School Bd., 454 P.2d 732 (Alas. 1969). The majority argued that, unlike *Pickering,* the instant case involved false and reckless statements against an immediate superior resulting in much controversy and an attempt to recall the school board at a special election. Moreover, the false statements in *Watts* did not concern matters of public record which could easily be corrected by the school board. However, a dissenting opinion argued that *Watts,* like *Pickering,* involved public criticism of a superintendent and issues of "public importance." The dissent also asserted that there was no evidence that the defendant knowingly or recklessly made false statements, impeded classroom performance or interfered with administrative operations of the school system. *Id.* at 739 (dissenting opinion).

80. 251 La. 77, 203 So. 2d 222 (1967), *vacated mem.,* 392 U.S. 658 (1968), *on remand,* 253 La. 439, 218 So. 2d 551 (1969), *cert. denied,* 396 U.S. 1012 (1970).

81. 391 U.S. 123 (1968). In *Bruton,* a closely parallel case, the Supreme Court

On remand, the Louisiana Supreme Court reasserted its initial opinion affirming the conviction.[82] The majority argued that although the confessions by the codefendants in joint trials "technically" violated the constitutional rights of both defendants to confront hostile witnesses and thus could not be admitted as evidence, there was no prejudice to either defendant from admission of the confessions. The court concluded that state courts were not required to reverse a judgment of conviction unless the trial error constituted a "substantial" violation of a constitutional right.

However, the dissent countered by arguing that the right to confront witnesses was essential to a fair trial and any deprivation of this right constituted a "presumption of prejudice." Citing the *Chapman v. California* dictum,[83] Justice Barham contended:

> The federal rule . . . does not require a showing of prejudice if a *substantial constitutional right* has been abrogated. It is not the nature or extent of the violation which is controlling but it is only the nature of the right denied which is to be considered.[84]

In other words, the "harmless error" doctrine cannot be invoked when substantial federal rights are involved. On a second appeal, the United States Supreme Court permitted the state decision to stand by denying certiorari without comment.

In summary, the state court dissenters in these five cases, as in all ten quasi-evasion cases,[85] contended that the state courts had violated the mandate of the United States Supreme Court. As Justice Becker, joined by Justice Mason, wrote in *Local 721, United Packinghouse Workers v. Needham Packing Co.*:[86]

> [I]t would appear that every argument now used by the majority was either implicitly or inexplicitly considered by the United States Supreme Court and rejected. On the same facts we now reaffirm our opposite position. I think we should

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held that despite instructions to the jury to disregard the implicating statements in determining the guilt or innocence of Bruton, admission at the joint trial of a co-defendant's extra-judicial confession implicating Bruton violated his right to cross-examination.

82. State v. Hopper, 253 La. 439, 218 So. 2d 551 (1969).

83. 386 U.S. 18 (1967). *See* note 33 *supra* and accompanying text.

84. State v. Hopper, 253 La. 439, 471, 218 So. 2d 551, 562 (1969) (dissenting opinion).

85. *See* note 54 *supra.*

86. 260 Iowa 908, 151 N.W.2d 540 (1967).

follow the clear mandate of the court of last resort on this matter.[87]

Yet in each case, the adverse state court decision following the Supreme Court remand was never reconsidered or overruled by the Supreme Court. Although frequently the Court's mandate was narrowly construed and dubiously applied, the Supreme Court accepted the volition of the state courts and refused to grant certiorari for the second time, partly, perhaps, as a consequence of the burdensome workload of the high Court.

CONCLUSION

Probably the three most important findings in this study are: 1) the increased number of "evasive" state court actions during the last decade of the controversial Warren Court, 2) the concentration of state court evasion and quasi-evasion in non-northern states and 3) the reluctance of the Supreme Court to summarily reverse a state court decision on first appeal. Another informative statistic is that only 7.3 percent of the state cases which were granted certiorari and reviewed by the Supreme Court were affirmed. It appears that the Supreme Court confined its discretionary grant of certiorari to state court decisions it considered doubtful if not unconstitutional.

State court evasion of Supreme Court mandates appears to be at least twice as high during the 1960's as in either the 1930's or the 1940's. While eight instances of state court evasion were found in this study, earlier studies revealed only four instances of noncompliance in the 1930's[88] and no more than two examples of state court evasion in the 1940's.[89] While differences in definition may account for some disparity,

87. *Id.* at 926, 151 N.W.2d at 552 (dissenting opinion).

88. *See* Note, *Final Disposition of State Decisions Reversed and Remanded by the Supreme Court, October Term, 1931 to October Term, 1941*, 55 HARV. L. REV. 1357 (1942). The four "evasive" state court rulings found were: *State ex rel. Anderson v. Brand*, 303 U.S. 95, *on remand*, 214 Ind. 356, 13 N.E.2d 955 (1938); *Coombes v. Getz*, 285 U.S. 434 (1932), *on remand*, 217 Cal. 320, 18 P.2d 939 (1933); *Hartford Accident & Indem. Co. v. Delta & Pine Land Co.*, 292 U.S. 143 (1934), *on remand*, 189 Miss. 496, 195 So. 667 (1940); *Georgia Ry. & Elec. Co. v. Decatur*, 295 U.S. 165, *on remand sub nom., Georgia Power Co. v. Decatur*, 181 Ga. 187, 182 S.E. 32 (1935).

89. *See* Note, *Evasion of Supreme Court Mandates in Cases Remanded to State Courts Since 1941*, 67 HARV. L. REV. 1251 (1954). The two instances of genuine evasion were: *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, *on remand*, 146 Neb. 429, 19 N.W.2d 853 (1945); *Ashcraft v. Tennessee*, 322 U.S. 143 (1944), *on remand second conviction aff'd by state court in unreported opinion, rev'd*, 327 U.S. 274 (1946). *Ashcraft* was the only one of these cases argued before the Supreme Court on the merits for a second time in which there seemed to have been a complete disregard of the Court mandate by the state court.

the criteria for evasive state court action used in this study appear to be no less rigorous than the standards employed in previous studies. Surely a state court action can be considered "evasive" if the Court's mandate is clear and the state court judgment is twice overruled by the Supreme Court. Given the "liberal" activism of the Supreme Court in substantive areas and the emotional overtones of its landmark decisions, it is not surprising that state court resistance to Supreme Court mandates increased during this period of conflict and change.

Despite the rising evasion rate during the 1960's, it is worth noting that although state court justices often disagreed with their Supreme Court brethren, they usually complied with the Supreme Court mandate. In 72.9 percent of the cases, the party successful at the Supreme Court was also successful at the state level following the Court's remand. Only 3.5 percent of the Court's mandates reversing and remanding a state court decision were ultimately evaded or quasi-evaded according to the criteria used in this study. Thus, at a time when disunity, disobedience and defiance persist in many aspects of intergovernmental relations, it is refreshing to find that most state courts of last resort have an admirable record of compliance.

As expected, the instances of state court evasion or quasi-evasion were concentrated primarily in the South and Southwest. Only two of the eight "evasion" cases, three of the ten "quasi-evasion" cases and 18 of the 54 cases receiving an adverse state court decision following the Supreme Court remand came from state supreme courts in the North. The disparity in the geographic origin of doubtful state court action may have been a consequence of greater philosophical differences between the Justices of the Supreme Court and members of the southern courts of last resort. Since southern or southwestern courts accounted for eight of the ten states with the most cases heard by the United States Supreme Court and 11 of the 15 states having more than two cases reviewed by the Court, the Supreme Court Justices must have considered the cases arising from southern state courts to be the best candidates for constitutional scrutiny. Since the Supreme Court accepted a disproportionate share of cases from southern courts and reversed or vacated the judgments of the state supreme courts in 92.7 percent of the cases, the opportunity for evasion was greatest in the South. Moreover, the "conservative," "states' rights" South was generally more critical of the Supreme Court's desegregation, first amendment and procedural rights decisions than other sections of the country.[90] Public opinion, therefore,

90. *See* notes 2 and 12 *supra* and accompanying text. For an excellent four

may have had some influence on judicial decision-making.

Finally, the Supreme Court was very hesitant to summarily overrule a state supreme court without first giving the court a chance to interpret supervening legislation, decide the constitutional issue or provide a new trial. In over two-thirds of the cases, the Supreme Court remanded the case back to the state courts rather than reverse the state decision outright. The Supreme Court side-stepped the constitutional issue and remanded the case to the state courts only to have its mandate ultimately avoided in more than a quarter of the cases which resulted in further litigation. The wide discretion permitted in many Supreme Court mandates allowed state supreme courts to reinstate their previous decisions without technically violating the letter of the Court's command or necessitating further review or reversal by the United States Supreme Court. Only eight of the 54 cases in which the party successful in the Supreme Court lost on remand in the state courts met the criteria established for "evasive" state court action.

In conclusion, it has been the purpose of this research to examine litigation in state cases following Supreme Court remands in an effort to determine the magnitude of state court evasion of Court mandates. No attempt has been made to analyze the general impact of Supreme Court decisions, the implementation or evasion of Supreme Court mandates by lower federal courts or the enforcement of Supreme Court decisions by executive bodies. While the eight instances of state court evasion found in this study represent a disconcerting departure from traditional compliance, on second appeal the supremacy of the Supreme Court ultimately prevailed. It remains for future scholars to determine the impact of evasive state court action on the dual judiciary in particular, and on the political system in general.

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point rationale of why the Warren Court's image was more tainted than the New Deal Court, see Halper, *Supreme Court Responses to Congressional Threats: Strategy and Tactics*, 19 DRAKE L. REV. 292, 325 (1970).