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CONSTITUTIONAL LAW

FIRST AMENDMENT ACCESS RIGHTS TO PRETRIAL PROCEEDINGS

A. INTRODUCTION

In *United States v. Brooklier*,[1] the Ninth Circuit extended the First Amendment right of public access to criminal proceedings beyond the trial proper, to jury voir dire and pretrial hearings.

Petitioners, members of the press, were excluded from portions of criminal proceedings.[2] Defendants, members of La Cosa Nostra,[3] were indicted for violations of the Racketeer Influenced and Corrupt Organizations Act (RICO).[4]

Petitioners challenged four exclusion orders of the district court.[5] These orders closed the voir dire of prospective jurors, a suppression hearing, a hearing on the admissibility of certain evidence, and an order refusing to release transcripts of these in-camera proceedings before the close of trial. Petitioners contended that these orders violated the first amendment right of access as established in *Richmond Newspapers v. Virginia*.[6]

B. BACKGROUND

The closure of judicial proceedings to press and public implicates two constitutional rights. The first amendment guaran-

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1. 685 F.2d 1162 (9th Cir. 1982) (per Browning, C.J.; the other panel members were Kennedy and Hug, JJ.).

2. *Id.* at 1166.

3. United States v. Brooklier, 685 F.2d 1208, 1213 (9th Cir. 1982).

4. 18 U.S.C. §§ 1961-1968 (1976).

5. These orders closed the voir dire of prospective jurors, a suppression hearing, a hearing on the admissibility of certain evidence, and an order refusing to release transcripts of these in-camera proceedings before the close of trail. *Id.* at 1166.

6. 448 U.S. 555 (1980). In *Richmond*, the Supreme Court held for the first time that the first amendment guaranteed the public a right of access to criminal trials. *Id.* at 580.

tees a criminal defendant a fair[7] and open trial.[8] The sixth amendment guarantees the public a right to attend criminal trials.[9] In a series of recent decisions, the Supreme Court has explored the interrelationship of these rights.[10]

In *Gannett v. dePasquale*,[11] the Supreme Court held that members of the public have no independent right of access to pretrial judicial proceedings under the sixth amendment.[12] The Court reasoned that our history of open judicial proceedings was a common law rule neither incorporated nor rejected by the sixth amendment.[13] The Court emphasized that, assuming the public had a constitutional right to attend criminal trials, such a right nevertheless would not attach to pretrial proceedings.[14]

Justice Blackmun, arguing for four members of the Court, noted that a suppression hearing is the functional equivalent of a trial, and therefore should be treated similarly for the purpose of determining constitutionally required access.[15] Justice Blackmun pointed out that while other forms of preliminary hearings were closed at common law, none had the dispositive effect of a suppression hearing.[16] He concluded that the Constitution requires open pretrial suppression hearings in those circumstances where an open trial would be required.[17]

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7. *See, e.g.*, United States v. Hendrix, 549 F.2d 1225, 1229 (9th Cir. 1977).

8. Gannett v. dePasquale, 443 U.S. 368, 379 (1978).

9. *Richmond*, 448 U.S. at 581.

10. *See, e.g.*, Globe Newspapers v. Superior Court, 457 U.S. 596 (1982), Richmond Newspapers v. Virginia, 448 U.S. 555 (1980), Gannett v. dePasquale, 443 U.S. 368 (1978).

11. 443 U.S. 368 (1978).

12. *Id.* at 387. In *Gannett*, members of the press had been excluded from a pretrial hearing on a motion to suppress allegedly involuntary confessions and certain physical evidence in a state prosecution for second-degree murder, robbery, and grand larceny. *Id.*

13. *Id.* at 385-87.

14. *Id.* at 387. This conclusion was justified on the historical ground that pretrial proceedings were not universally open to the public at common law. *Id.* at 387-91. The Court noted that exclusion was routinely allowed to protect defendant's fair trial right. The Court reasoned that pretrial suppression hearings, which did not exist at common law, also implicate the fair trial right, because the evidence suppressed may be especially prejudicial if learned by the jury. *Id.*

15. *Id.* at 436-37. (Blackmun, J., dissenting in part). Although *Gannett* has never been overruled, this dissent has been widely adopted by lower courts. *See, e.g., Brooklier*, 685 F.2d at 1167.

16. 443 U.S. at 436-37.

17. *Id.* at 436.

One year later, the Court held in *Richmond*,[18] that the first amendment affords a right of access to criminal trials.[19] Chief Justice Burger, writing the plurality opinion,[20] began his consideration of the merits by emphasizing that *Gannett* had only applied to pretrial proceedings, implying that the essential constitutional distinction is between trial and pretrial, whether a claim of access is made under the first amendment or the sixth amendment.[21] The Chief Justice found the requirement of open criminal trials in an amalgam of the freedoms protected by the first amendment, including speech, press and assembly.[22] A trial may be closed only where there is an overriding interest in closure as articulated in findings.[23]

Other Circuits

At the time *Brooklier* was decided, only the Third and Eighth Circuits had addressed the issue of *Richmond* rights in a pretrial setting.[24] In *In re United States ex rel. Pulitizer Publishing Co.*,[25] the Eighth Circuit held that in-chambers voir dire of jurors was "inappropriate," absent articulated findings. The Court specifically reserved the question whether closure would have been appropriate had findings been entered that showed a balancing of the interests involved.[26]

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18. 448 U.S. at 580. The eight Justices participating filed seven separate opinions. Justice Powell did not participate. 448 U.S. at 581. Justice Rehnquist filed the only dissent. 448 U.S. at 604.

19. In *Richmond*, the defendant was being tried for the fourth time on a murder charge. The Court closed the trial to the public, ostensibly to prevent those who had seen the previous trials from influencing the jury. *Id.* at 559-61.

20. Joined by White and Stevens, JJ.

21. *Id.* at 563-64. This led Justice Blackmun, concurring in the judgment, to suggest that *Richmond* had limited the *Gannett* holding to the narrow question of the applicability of the sixth amendment to pretrial suppression hearings. *Id.* at 603. In *Globe*, the Court reaffirmed the public's right of access to criminal trials, but made no mention of any right of access to pretrial proceedings. 457 U.S. at 603-06.

22. 448 U.S. at 575. The *Gannett* Court had reserved the first amendment issue, 443 U.S. at 392, with only Justice Powell suggesting that the first amendment guaranteed access to pretrial proceedings. 443 U.S. at 397. In *Richmond*, of course, pretrial proceedings were no longer at issue.

23. 448 U.S. at 581.

24. In 1983, the Fifth Circuit extended a first amendment right of access to pretrial bail reduction hearings. United States v. Chagra, 701 F.2d 354, 365 (5th Cir. 1983).

25. 635 F.2d 676 (8th Cir. 1980). *Pulitizer* was brought on a writ of mandamus which sought to prevent the district court from closing portions of the jury voir dire in a case of attempted extortion of money from United States Senator Thomas Eagleton of Missouri.

26. *Id.* at 679. The court stated that such findings should indicate that the court had

In *United States v. Criden*,[27] the Third Circuit held that a trial court must enter articulated findings before closing a pretrial suppression hearing.[28] Since the Third Circuit found that first amendment access to pretrial proceedings was not definitively decided in either *Gannett* or *Richmond*, the court declined to hold that access was constitutionally required, but adopted a policy of presumptive openness under the court's supervisory power.[29]

C. The Court's Reasoning

1. *Voir Dire*

The *Brooklier* court noted both historical and functional justifications for recognizing a constitutional right of access to jury voir dire.[30] First, voir dire was conducted in open court at common law.[31] Second, the role of public scrutiny is the same for voir dire as for the actual trial: access both heightens public respect for the system and safeguards its integrity.[32]

Noting that a majority of the Supreme Court had failed to agree upon the proper showing necessary to establish the need for closure, the Ninth Circuit adopted the standard articulated by Justice Blackmun in his *Gannett* dissent: an accused seeking closure must establish that closure is "strictly and inescapably necessary in order to protect the fair trial guarantee."[33] Although this standard was formulated to protect a sixth amendment right, and not a first amendment right, the court found this distinction to be immaterial.[34]

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balanced defendant's fair trial rights against the public's access rights. The *Pulitizer* court did not address the possible effect of the proceeding there being pretrial.

27. 675 F.2d 550 (3d Cir. 1982). In *Criden*, the trial court conducted two closed pretrial hearings, during the joint prosecution of four "Abscam" defendants. In one of the hearings, no prior notice was given to the public, and the hearing was not announced in open court.

28. *Id.* at 561.

29. *See* generally, United States v. Schiavo, 504 F.2d 1, 7, n.13 (1974) (regarding the supervisory power); McNabb v. United States, 318 U.S. 332, 341 (1943) (also regarding the supervisory power).

30. *Brooklier*, 685 F.2d at 1167.

31. *Id.*

32. *Id.*

33. *Id.* (citing 443 U.S. at 440-42).

34. *Id.*

The Ninth Circuit described the Blackmun standard as being comprised of a three part substantive test which is to be applied once a two part procedural test has been met.[35] After reaching its determination that the procedural requirements had not been met, the court declined to address the substantive test.[36]

The procedural test requires that those excluded be afforded an opportunity to state their objections,[37] and that the reasons supporting closure be articulated in findings.[38] While noting that a majority of the Supreme Court had adopted this test, the Ninth Circuit emphasized the importance of articulated findings for the purpose of providing the appellate court with a more complete factual basis for the determination of whether the closure order was properly entered.[39] The court stressed that findings must be sufficiently specific to show that the three elements of the Blackmun test have been fulfilled,[40] adding that a mere statement that first and sixth amendment interests were balanced is insufficient.[41]

Having reviewed the reasons for closure stated by the lower court, i.e., that jurors might be less prejudiced by the responses

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35. *Id.* at 1167-68.

36. *Id.*

37. In order to insure the effectiveness of the right to be heard, the Ninth Circuit adopted a limited right to be afforded notice before exclusion is ordered. The district court had taken no steps to notify those excluded. *Id.* at 1168. In *Criden*, the Third Circuit held that, where possible, closure motions must be docketed a reasonable time in advance to afford notice. The *Criden* court noted that in *Gannett*, most of the Justices hypothesized a setting where the closure motion is made in open court, and that individual notice to interested parties would be impractical. That court therefore adopted the docketing requirement under its supervisory power. 675 F.2d at 559. The *Brooklier* court noted the stance taken by the Third Circuit, but merely required that "reasonable steps" be taken to afford the public an opportunity to submit its view. 685 F.2d at 1168. The right to be heard was abridged by the district court's failure to afford notice to interested parties, after the district court had been made aware of those parties' interests. *Id.* at 1168.

38. 685 F.2d at 1168.

39. *Id.* Justice Blackmun, speaking for four Justices in *Gannett*, 443 U.S. at 446, and Chief Justice Burger, speaking for three Justices in *Richmond*, 448 U.S. at 581, both stated that articulated findings are required.

40. The findings must show that the accused has demonstrated a substantial probability that: (1) irreparable damage to his fair trial right will result from conducting the proceedings in public; (2) alternatives to closure will not adequately protect his fair trial right; and (3) that closure will be effective in protecting against perceived harm. 685 F.2d at 1167.

41. *Id.* at 1169.

of the other jurors and might be less candid in public,[42] the Ninth Circuit concluded that the lower court had not made sufficiently specific findings to inform an appellate court on review. The court disregarded the lower court's first reason[43] as unrelated to the presence of the public, who could be present even if other jurors were excluded.[44] The court rejected the lower court's second reason as being both speculative and contrary to the assertion of the Supreme Court in *Globe Newspaper Co. v. Superior Court*[45] that "[o]penness in court proceedings may *improve* the quality of testimony."[46] Hence, the Ninth Circuit concluded that neither reason showed that the trial court found a substantial probability that an open voir dire would have resulted in irreparable damage to defendant's right to a fair trial.[47] Finally, the court noted that the lower court made no findings regarding the alternatives to closure.[48] For these reasons, the Ninth Circuit concluded that the procedural prerequisite of articulated findings had not been met.[49]

2. *Defendant's Motion to Suppress*

The *Brooklier* court found that the trial court improperly had allowed closure of a hearing on a motion to suppress a statement made by one of the defendants.[50] The court noted that the lower court had merely stated that the sixth amendment interests outweighed the first amendment interests,[51] and failed to discuss alternatives.[52] Therefore, the court found it impossible to determine whether the trial court had found a substantial probability that an open suppression hearing would have resulted in irreparable damage to defendant's fair trial right.[53]

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42. *Id.*

43. The court uniformly uses the word "reason" in describing the lower court's conclusions, and studiously avoids the word "finding". *Id.* at 1166-1169.

44. *Id.*

45. 457 U.S. 596, 609 n.26 (1982) (quoting *Gannett*, 443 U.S. at 383).

46. 685 F.2d at 1169.

47. *Id.*

48. When asked by the court for suggested alternatives, petitioner had not offered any. 685 F.2d at 1169. The court nonetheless noted that alternatives other than sequestration did exist. *Id.*

49. *Id.*

50. This motion was filed before trial, but heard after the trial had begun. *Id.* at 1169-70.

51. *Id.* at 1170.

52. *Id.* at 1171.

53. *Id.*

Addressing the issue of whether the public access right extends to suppression hearings, the court noted that no determination could be made on an historical basis for the reason that suppression hearings did not exist at common law.[54] Rather, the Ninth Circuit followed the Third Circuit's approach in *Criden*, finding that the applicability of the first amendment should depend on "societal interests."[55] The court found that a suppression hearing implicated the same interests as the trial itself, and opined that a majority of the Supreme Court would hold the first amendment right of access applicable to suppression hearings.[56]

D. Analysis

1. *Scope of the Richmond Right of Access*

The Ninth Circuit correctly extended first amendment access to pretrial suppression hearings.[57] Although there are argu-

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54. *Id.* at 1170.

55. *Criden*, 675 F.2d at 555.

56. 685 F.2d at 1170. The Ninth Circuit held that this closure had violated the first amendment because the lower court had made insufficient findings showing both that defendant's fair trial rights would be prejudiced by an open hearing, and that there were no available alternatives. *Id.* at 1171.

The third closure order challenged was ordered not to protect the defendant's fair trial right, but to protect a third party's property interest in certain tape recordings of an interview with one of the witnesses. *Id.* The court conceded that protection of a property right may be sufficient justification for abridging the first amendment access right. *Id.* at 1172. However, a closure ordered to protect a property right must at least satisfy those minimum standards required when constitutional rights are involved. *Id.* at 1171. Petitioner was here afforded no opportunity to object to closure, and no findings were entered. *Id.* at 1172. This closure consequently failed to pass constitutional muster. *Id.* at 1171-72.

While the trial was still in progress, petitioner filed a motion for release of the transcripts of the three closed hearings. *Id.* at 1172. This motion was denied. The trial court afforded petitioner an opportunity to be heard on the subject, but articulated no findings explaining why other alternatives would be inadequate. *Id.* at 1172-1173. The Ninth Circuit therefore concluded that the requirement of narrow tailoring had not been met. *Id.* at 1173. Once the danger of prejudice is passed, the Ninth Circuit found denial of the motion to be in itself a denial of access, subject to the same procedural prerequisites as the initial closure. *Id.* at 1173.

57. As Justice Stewart noted in *Richmond*, seven members of the Court have not addressed the question whether the first amendment afforded any right of access to pretrial suppression hearings. 448 U.S. at 599. This number was not increased by the arrival of Justice O'Connor, who stated in *Globe* that she would interpret the *Richmond* decision narrowly, as limited to criminal trials. 457 U.S. at 611. This may indicate that she would not consider pretrial proceedings to be within the *Richmond* rule.

The *Brooklier* court's suggestion that a majority of the Justices would extend first amendment access to pretrial hearings is based on the assumption that the Justices join-

ments against requiring access,[58] given the similarities between a trial and a suppression hearing, it follows that if a trial is open to the public, so should a suppression hearing be open to the public.[59] Unlike other pretrial procedures, a suppression hearing is conducted like a trial—evidence is presented by means of live testimony, and witnesses are sworn and cross-examined. A motion to suppress essentially is an objection to the introduction of constitutionally inadmissible evidence. While objections to evidence on other grounds are made during the trial, motions to suppress are often pretrial, due to the importance of the constitutional rights they protect. Yet they ultimately remain an objection to evidence, and should be given the same first amendment protection afforded to objections made during trial.

Further, the significance of requiring access to suppression hearings is underscored by the fact that many cases never go to trial.[60] However important the need to ensure an unprejudiced jury, the danger of prejudice exists only in the small percentage of cases that do proceed to trial.[61] In those cases that do not reach trial,[62] the suppression hearing will be the only opportunity for the public to observe the judicial process.[63] Therefore,

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ing the Blackmun dissent in *Gannett* would apply the same reasoning under the sixth amendment to find access under the first amendment. 685 F.2d at 1170. Justice Blackmun implies that this is so in his *Richmond* concurrence. *Richmond*, 448 U.S. at 601-604. However, Justice White, who had joined Justice Blackmun's *Gannett* dissent, 443 U.S. at 406, and without whom there would have been no majority, also joined Chief Justice Burger's *Richmond* decision, which implied that there is no first amendment access to pretrial proceedings. 448 U.S. at 558. Any counting of heads is therefore, at best, conjecture.

58. For example, there is an increased danger of publicity; suppressed evidence is likely to be extremely prejudicial; and there are a limited number of alternatives available.

59. The *Criden* court suggested six benefits of openness that would be present in pretrial proceedings: (1) promoting informed discussion of governmental affairs; (2) greater fairness and greater perception of fairness; (3) providing an outlet for community hostility and emotion; (4) inhibiting corrupt practices; (5) enhancing the performance of the participants; and (6) discouraging perjury. 675 F.2d at 556.

60. Such disposition will often turn on the outcome of the suppression hearing. In 1976, for example, the year in which the proceedings in *Gannett* took place, every criminal proceeding in that county was terminated prior to trial on the merits. 443 U.S. at 435.

61. *See supra* note 58 and accompanying text.

62. 443 U.S. at 435.

63. *Id.* at 434. It will in any event be the only opportunity to scrutinize police and prosecutorial misconduct. A motion to suppress typically involves allegations of such misconduct. A decision to admit the challenged evidence will probably result in a guilty plea. A decision not to admit the evidence will render irrelevant any misconduct involved

while public access to pretrial suppression hearings may result in prejudice to the jury, public scrutiny must take place at the hearing level in order to be effective.

The *Brooklier* Court correctly extended first amendment access to jury voir dire, as well as pretrial suppression hearings.[64] However, in rejecting the lower court's contention that potential jurors would testify more freely in private, the court failed to consider the special characteristics of jurors which may require alternatives to complete openness.[65] The finding in *Globe* relied upon by the court, that openness may improve the quality of testimony,[66] can be ascribed to an assumption that psychological pressures will cause a witness to be more truthful in a larger group.[67] However, potential jurors are subjected to different psy-

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in obtaining that evidence. In neither case will police misconduct be raised in a subsequent trial. To protect the public's interest in knowing of such allegations, although they may prove to be unfounded, the hearing must be open to the public. 443 U.S. at 434-36 (Blackmun, J., dissenting in part).

64. There is no mention of jurors in either the *Globe* opinion, 457 U.S. at 611 n.27, or the *Gannett* opinion, 443 U.S. at 383. However, in a subsequent case, Press Enterprise v. Superior Court, 52 U.S.L.W. 4113 (1984), the Court adopted a standard of presumptive openness for jury voir dire. The Court recognized the "legitimate privacy interests of the juror," *Id.* at 4116, but left open the question of when those privacy interests are sufficient to overcome the presumption of openness. *Id.* The Court noted that the trial court had closed six weeks of voir dire without considering alternatives or entering findings. *Id.* This was held not to comport with the requirements of the first amendment, but it is not clear what showing would satisfy the first amendment, as Justice Blackmun makes clear in his concurrence. *Id.* at 4117.

The majority opinion in *Press-Enterprise*, written by Chief Justice Burger, sets out a test which allows closure only where there is an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. *Id.* at 4116. The Court stated that findings must be articulated that are specific enough for a reviewing court to determine whether closure was properly ordered. *Id.* at 4116.

65. As a means to protect fairness and preserve privacy, the Supreme Court in *Press-Enterprise* suggested that the trial judge should inform prospective jurors that they may request in camera hearings. This is essentially the solution advocated by *The Revised Report of the Judicial Conference Committee on the Operation of the Jury System on the "Free Press-Fair Trial" Issue*, 87 F.R.D. 518 (1980), as an alternative to closure that would comport with both the first and the sixth amendments, with the additional requirement that the juror request the in camera hearing to minimize the risk of unneccessary closure. *Id.* at 532-33.

66. 685 F.2d at 1169.

67. *See* FREUD, S., GROUP PSYCHOLOGY AND THE ANALYSIS OF THE EGO 21 (1959):

> There is no doubt that something exists in us which, when we become aware of signs of an emotion in someone else, tends to make us fall into the same emotion; but how often do we not successfully oppose it, resist the emotion, and react in quite an opposite way? Why, therefore, do we invariably give way to

chological pressures than are witnesses, and the holding should not be extended to include them.[68] A witness generally testifies to knowledge he has regarding occurrences and facts exterior to himself and thus not intrinsically related to his personality. In this case, the presence of a larger group where first amendment access is allowed may encourage truthfulness because, by appearing truthful, the witness will hope to gain social acceptance.[69] A prospective juror, on the other hand, often must relate such personal matters as his own opinions, biases, and prejudices. In this case, the impetus to gain social acceptance through truthfulness is overshadowed by the desire to avoid divulging any socially unpopular views.[70] Thus, while in each case the person testifying will seek social acceptance, the presence of the larger group where first amendment access is allowed may result in greater truthfulness in the case of witnesses, and lesser truthfulness in the case of prospective jurors.[71]

Jurors also can be distinguished from witnesses on an historical basis. While trials have traditionally been open, jury deliberations have been closed to the public.[72] Closure of jury deliberations not only ensures that jurors reach a verdict free of

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> this contagion when we are in a group? Once more we should have to say that what compels us to obey this tendency is imitation, and what induces the emotion in us is the group's suggestive influence.

68. *See* Muller v. Oregon, 208 U.S. 412, 419 (1918) (regarding the use of extra-judicial materials in legal analysis).

69. *See* SKINNER, B.F., SCIENCE AND HUMAN BEHAVIOR 418 (1953):

> The forces which shape ethical behavior to group standards are powerful. The group steps in to suppress lying . . . and so on, because of immediate consequences to its members. Its behavior in so doing is eventually a function of certain characteristics of the "good" and "bad" behavior of the controlled individual. Among these is lack of conformity to the general behavior of the group.

70. *Id.*

71. In other words, the pressure exerted by a group in favor of truthfulness is merely one manifestation of the greater pressure for conformity with group standards, and, in the case of prospective jurors, the appearance of conformity depends on the content of statements made by the jurors, and not merely on their appearance of truthfulness. The possible adverse effect of openness on a juror's truthfulness is explicitly recognized in *Press-Enterprise* where Justice Blackmun stated, "the defendant has an interest in protecting juror privacy in order to encourage honest answers to the *voir dire* questions. The State has a similar interest in protecting juror privacy, even after the trial — to encourage juror honesty. . . ." 52 U.S.L.W. at 4117 (concurring opinion).

72. *The Right to Privacy of Prospective Jurors During Voir Dire*, 70 CALIF. L. REV. 708, 719-720 (1982).

fear of retribution, but also protects the juror's independent right of privacy.[73] Justice Blackmun argued in favor of access to suppression hearings on the ground that such hearings differed from other pretrial proceedings, and are analogous to the trial.[74] Conversely, jury voir dire is analogous to jury deliberations, rather than to the trial.[75] Jurors in voir dire therefore should be afforded a similar right of privacy.[76]

2. *The Standards Applied in Brooklier*

The Brooklier court held that there are two procedural prerequisites to closure of a criminal proceeding: an opportunity for those excluded to be heard, and articulated findings.[77] Upon finding that the procedural test had not been met, the court explicitly refrained from addressing the substantive test.[78] While the procedural test specifically does call for articulated findings in support of closure, it prescribes findings without regard for either the number or particular import of those findings. However, the court's conclusion that the articulated findings requirement had not been met would appear to turn entirely on the application of the substantive test. The court's conclusion that the articulated findings requirement had not been met was based on the trial court's failure to demonstrate one of the elements of the substantive test: the substantial probability of irreparable harm arising from the court's refusal to order closure.

Given that the court's determination was essentially substantive rather than procedural, as the court preferred to view it, the question arises as to the rationale behind the court's misleading approach. That is, for what reason did the Ninth Circuit refrain from simply deciding the case on substantive grounds, rather than under the pretext of the procedural test? While the court emphasized the need for articulated findings sufficient to inform an appellate court of the factual circumstances and issues before review, the court was implicitly focusing its analysis on the strength of the arguments, for which the substantive test

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73. *Id.*
74. 433 U.S. at 436-37.
75. *But see* Commercial Printing Co. v. Lee, 262 Ark. 87, 553 S.W. 2d 270 (1970).
76. Note that even if the public is excluded, a potential juror may have to respond in front of a large number of people. 87 F.R.D. 518 (1980).
77. 685 F.2d at 1167-68.
78. *Id.* at 1167.

would appear to have been tailored. But the substantive test was adopted by only four members of the Supreme Court, which raises questions as to its precedential value. The Ninth Circuit, in deciding the *Brooklier* case under the guise of the procedural test, applied standards adopted by a majority of the Supreme Court. Hence, it appears that the Ninth Circuit wished to decide *Brooklier* under the authority of Supreme Court precedent, rather than risk being subsequently overruled on the grounds of its application of a substantive test of questionable precedential value.

The Ninth Circuit cleverly adopted a substantive test without appearing to do so. It is unfortunate that the manner in which the substantive test was adopted seems to have precluded the court from undertaking a more thorough analysis of the substantive test itself, and perhaps from adopting the constitutionally sounder approach espoused by Justice Powell. As Justice Powell noted in his *Gannett* concurrence,[79] by placing the burden on the party seeking closure to show both probable prejudice and a lack of alternatives, the fair trial right is subordinated to the public's right of access.[80]

Justice Powell's approach, which shifts the burden to those excluded to show alternatives,[81] is preferable for two reasons. First, sound constitutional interpretation should give competing constitutional provisions equal weight where possible.[82] Second, as a practical matter, placing the burden of showing alternatives on those excluded is a fairer and more efficient manner of discovering those alternatives.[83]

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79. 443 U.S. at 400.

80. *Id.*

81. *Id.*

82. *See* United States v. Chagra, 701 F.2d 354, where the court stated:

> There is no single divine constitutional right to whose reign all others are subject. When one constitutional right cannot be protected to the ultimate degree without violating another, the trial judge must find the course that will recognize and protect each in just measure, forfeiting neither and permitting neither to dominate the other. The public enjoys a first amendment right of access to pretrial bond reduction hearings. That right, however, must accommodate other constitutional rights.

Id. at 365; *See also* Nebraska Press Association v. Stuart, 427 U.S. 539, 561 (1976).

83. We need only look to the instant case, where counsel for the media was unable to offer any alternatives when requested to do so by the court. 685 F.2d at 1169.

Defendants who must show the negative proposition that *no* alternatives to closure adequately would have protected their rights are placed in the anomalous position of having to first suggest a position contrary to their interests, and then attack that position as not adequately protecting their rights. Apart from any question of fairness,[84] neither party has an incentive to suggest strong alternatives that will protect the rights of both parties. Placing this burden on those excluded, as Justice Powell suggests, would improve the quality of suggested alternatives, and would equally protect both first and sixth amendment interests.[85]

E. Conclusion

The *Brooklier* opinion raises two issues regarding first amendment access to criminal trials: in which proceedings should such access be required; and, where required, in which situations may closure be nonetheless allowed? In each case, the approach adopted by the Ninth Circuit favors maximum expansion of the public access right. This note maintains that in some instances the Ninth Circuit extended this access right beyond that which a majority of the Supreme Court would agree to, and further than the interests served by such access should allow. However, the confused and contradictory opinions of the Supreme Court make it virtually impossible to say with any certainty which Justices would agree to which theories, or even what interests are served by public access. In such circumstances it is neither surprising nor necessarily erroneous that the Ninth Circuit has adopted a test espoused by a dissenting minority of the Supreme Court, in a case that has not been overruled, regarding a different constitutional amendment.

Whatever the merits of the scope of, and standard for access adopted by the Ninth Circuit, the overriding virtue of the

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84. Some of the same interests implicated here are found in the fifth amendment prohibition against self-incrimination. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 460 (1966) (where the Court stated: "[t]o respect the inviolability of the human personality, our accusatory system of justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors. . .").

85. The Supreme Court stated in *Press-Enterprise* that findings must show that closure is essential to preserve higher values and is narrowly tailored to serve an overriding interest. 52 U.S.L.W. at 4116. No indication is given whether this is meant to be a substantive test along the lines of that suggested by Justice Blackmun in *Gannett*. If it is, the question remains open which party has the burden of showing these elements.

Brooklier opinion is that the court has adopted a firm position in a muddled area of the law, which will promote caution and clarity on the part of the district courts in those instances where closure is considered.

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UNITED STATES V. WAYTE: SELECTIVE PROSECUTION AND THE RIGHT TO DISSENT

A. INTRODUCTION

In *United States v. Wayte*,[1] the Ninth Circuit held that government prosecution of a nonregistrant for military conscription who publicly proclaimed his opposition to registration did not constitute wrongful selective prosecution.[2]

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1. 710 F.2d 1385 (9th Cir. 1983) (per Wright, J.; the other panel members were Coughenour, J., and Schroeder, J., dissenting).

2. *Id.* at 1388. The Ninth Circuit also held that 50 U.S.C. § 463(b), the clause in the Military Selective Service Act providing for no "regulation" to be effective until 30 days after publication in the Federal Register, did not apply to presidential proclamations. Section 463(b) provides:

> All functions performed under this title (sections 451 to 471a of this Appendix) shall be excluded from the operation of the Administrative Procedure Act (60 Stat. 237) (sections 551 et seq. and 701 et seq. of Title 5) except as to the requirements of section 3 of such Act (section 552 of Title 5). Notwithstanding the foregoing sentence, no regulation issued under this Act shall become effective until the expiration of thirty days following the date on which such regulation has been published in the Federal Register. After the publication of any regulation and prior to the date on which such regulation becomes effective, any person shall be given an opportunity to submit his views to the Director on such regulation, but no formal hearing shall be required on any such regulation. The requirements of this subsection may be waived by the President in the case of any regulation if he (1) determines that compliance with such requirements would materially impair the national defense, and (2) gives public notice to that effect at the time such regulation is issued.

50 U.S.C. § 463(b). The Ninth Circuit also held the Selective Service requirement of a 60-day notice and comment period before registration regulations become effective does

Brooklier opinion is that the court has adopted a firm position in a muddled area of the law, which will promote caution and clarity on the part of the district courts in those instances where closure is considered.

*Mitchell L. Posin**

UNITED STATES V. WAYTE: SELECTIVE PROSECUTION AND THE RIGHT TO DISSENT

A. INTRODUCTION

In *United States v. Wayte*,[1] the Ninth Circuit held that government prosecution of a nonregistrant for military conscription who publicly proclaimed his opposition to registration did not constitute wrongful selective prosecution.[2]

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50 U.S.C. § 463(b). The Ninth Circuit also held the Selective Service requirement of a 60-day notice and comment period before registration regulations become effective does

On July 2, 1980, President Carter issued Presidential Proclamation 4771, directing all males born in 1960 to register for military selective service during the week of July 21, 1980.[3] The defendant sent letters to the President and Selective Service declaring his intent not to register. The government contacted the defendant twice in 1981, urging compliance and warning him of possible criminal penalties for failure to do so. On July 22, 1982, after continued refusal to register, the defendant was indicted.[4]

After an evidentiary hearing on the issue of selective prosecution, the federal district court dismissed the indictment,[5] holding that the government had failed to rebut the defendant's prima facie showing of wrongful selective prosecution.[6] The government appealed.

B. Background

1. Supreme Court

In *Yick Wo v. Hopkins*,[7] the Supreme Court first applied the impermissible motive test to prosecutions under an otherwise valid statute. In *Yick Wo*, two city ordinances required all commercial laundries in San Francisco housed in wooden buildings to obtain an operating permit.[8] The Supreme Court found that the ordinances, though valid on their face as public safety measures, were impermissibly employed to withhold permits from Chinese owned laundries.[9] The court held that there is an equal protection violation when officials enforce a valid statute in a discriminatory fashion.[10]

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not apply to a regulation based on an executive order. 710 F.2d at 1389.

3. Males born in 1961 were to register during the week of July 28, 1980. Males born in 1962 were to register during the week of January 5, 1981. Males born after 1962 were to register on or about the time of their 18th birthday. Presidential Proclamation 4771, 45 Fed. Reg. 45,247 (1980). The defendant in *Wayte* was born in 1960.

4. 710 F.2d at 1387.

5. United States v. Wayte, 549 F. Supp. 1376 (C.D. Cal. 1982) (per Hatter, J.).

6. *Id.* at 1385. The district court also held that Presidential Proclamation 4771 was invalid for noncompliance with the 30-day notice and comment period requirement of the Military Selective Service Act. *Id.* at 1391.

7. 118 U.S. 356 (1886).

8. *Id.* at 357-58.

9. *Id.* at 362.

10. *Id.* at 373-74.

In *Oyler v. Boles*,[11] which involved the imposition of a mandatory life sentence on persons with three felony convictions, the Supreme Court outlined the standard for determining the discriminatory application of a valid statute.[12] Challenging the application of the statute, the defendant claimed that wrongful selective prosecution had occurred since not all three-time felons were similarly sentenced. In rejecting the defendant's claim, the Supreme Court stated that there was nothing unconstitutional about selective prosecution per se,[13] and added that only selectivity based upon an impermissible prosecutorial motive violated the Equal Protection Clause.[14] The Court explained that selection based on an arbitrary classification, such as race or religion, constituted an impermissible prosecutorial motive.[15] Selection based on the prosecution's ignorance of the determining factors in a case, such as how many times someone had been convicted of a felony, was permissible so long as the prosecution acted in good faith.[16] Accordingly, selectivity exercised on the basis of an honest belief that all known violators of a law were being prosecuted was constitutional.[17]

2. *Circuit Court Decisions*

Although the *Oyler* Court did not enunciate a standard to determine when the prosecution's legitimate discretion becomes wrongful selective prosecution, the circuit courts employing the *Oyler* rationale require the defense to show that a defendant was prosecuted while others in a similar criminal situation were not, and that the prosecution was the product of an impermissible motive.

Though there were no circuit court decisions involving draft registration at the time of the *Wayte* decision, an analogy can be made to decisions involving tax resisters and others who claimed

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11. 368 U.S. 448 (1962).
12. *Id.* at 456.
13. *Id.*
14. *Id.*
15. Other arbitrary classifications have been defined by later circuit court decisions as including political beliefs and peaceful public agitation in support of those beliefs. *See* United States v. Steele, 461 F.2d 1148, 1151 (9th Cir. 1972); United States v. Falk, 479 F.2d 616, 619-20 (7th Cir. 1973).
16. 368 U.S. at 456.
17. *Id.*

wrongful selective prosecution.

In *United States v. Steele*,[18] which involved a public resister of the 1970 census who challenged his conviction for refusing to answer questions on his census form,[19] the Ninth Circuit examined the requirements of the *Oyler* test.[20] The Ninth Circuit, in reversing the conviction, stated that the government initiated the prosecution solely because of the defendant's public opposition to the census.[21] The court focused on the government's ability to identify persons who refused to furnish census information.[22] Although the census information system automatically revealed the identities of all who failed to return completed forms, the government prosecuted only those who protested the census.[23] The defense located six census violators who had not publicly opposed the census and had not been investigated or prosecuted.[24] Since the only difference between Steele and the nonprosecuted violators was his public opposition to the census, the Ninth Circuit determined that governmental retaliation against this opposition provided the only reasonable explanation for charging the defendant.[25] The court, in overturning the conviction, held the prosecutorial motive impermissible since public protest constitutes a legitimate exercise of free speech.[26] The court also held that a prosecution procedure that focuses on protesting offenders is inherently suspect.[27]

The impermissible prosecutorial motive prong of the *Oyler* test provided the basis for rejecting a wrongful selective prosecution claims in *United States v. Wilson*.[28] The defendants, two

18. 461 F.2d at 1148.

19. While *Yick Wo* and *Oyler* dealt with city and state statutes, *Steele* was concerned with federal law. *Id.* at 1150. *Steele* began by using the Due Process Clause of the fifth amendment to apply *Yick Wo* and *Oyler* to a federal defendant. *Id.*

20. *Id.* at 1151. *Steele* did not formally set out the *Oyler* test, but it did use the two prongs of the test as the criteria for its decision. *Id.*

21. *Id.* at 1152.

22. *Id.*

23. *Id.*

24. *Id.* at 1151.

25. *Id.* at 1152.

26. *Id.* The Ninth Circuit subsequently denied *Steele* for rehearing on August 9, 1972. *Id.* at 1148.

27. *Id.* at 1152.

28. 639 F.2d 500 (9th Cir. 1981). *Wilson* was the first Ninth Circuit decision to acknowledge that *Oyler* had set up the standard two prong test by which wrongful selective prosecution claims were judged. *Id.* at 503.

tax violators vocally opposed to the income tax, showed there were no prosecutions of others whose W-4 forms apparently merited investigation.[29] However, they failed to prove that the government prosecuted the defendants as a retaliatory measure against the exercise of free speech.[30] The evidence showed that some prosecutions were undertaken against non-protestors, thus no impermissible selectivity existed.[31] The *Wilson* court, recognizing that public violators represented the strongest nominees for prosecution where willfulness is an element of the crime, stated that some selectivity is necessary where budgetary or other constraints limit the number of cases that may be commenced.[32]

In *United States v. Ness*,[33] the Ninth Court rejected another tax defendant's wrongful selective prosecution claim after he failed to meet either prong of the *Oyler* test.[34] In examining the impermissible motive prong, the court considered the effect that selective investigation of violations had on the prosecution policy. The court concluded that selective investigation taints the prosecution only where the government bypassed normal procedures for selecting cases to be prosecuted, or the prosecutor's independent decision was disturbed.[35] The *Ness* court noted that in *Steele* an apparent abnormal selection of cases for prosecution occurred because the government compiled background reports only on protesting census violators.[36] The court also asserted that the prosecution of those publicly opposing the tax laws would deter all tax violators.[37] Therefore, the court found nothing improper in prosecuting tax violators who were in the public eye.[38]

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29. *Id.* at 504. W-4 forms list the number of exemptions an employee is claiming. They are filed with the employer.

30. *Id.* at 504-05.

31. *Id.*

32. *Id.* at 505.

33. 652 F.2d 890 (9th Cir. 1981); *cert denied* 454 U.S. 1126 (1981).

34. 652 F.2d at 892.

35. *Id.*

36. The *Ness* court compared *Steele*, 461 F.2d at 1152 (where such improper procedures were present), with United States v. Erne, 576 F.2d 212 (9th Cir. 1978) (where the prosecutor's independent decision was not disturbed). 652 F.2d at 892.

37. *Id.*

38. *Id.*

In *United States v. Taylor*,[39] where the president of one of the striking air traffic controller union's locals was prosecuted for involvement in an illegal strike against the government,[40] the Ninth Circuit emphasized the deterrent effect of prosecuting leaders of a group engaged in illegal activity.[41] Citing *Ness*, the court approved prosecuting leaders of an illegal strike for the purpose of deterring other public employees from striking.[42] The Court noted that under *Steele*, where the government investigated only publicly vocal violators and provided no reasonable explanation for the selection policy, retaliation against the violator for exercising his first amendment rights may be presumed.[43] Nonetheless, the court rejected the contention that *Steele* precluded any consideration of a person's public statements in the decision to prosecute.[44] Where the government is faced with an apparently legal act, such as failure to report to work, a defendant's public statements provide the necessary element of willful misconduct, and may be used by the prosecution to establish the intentionality of alleged illegal conduct.[45]

The Seventh Circuit applied the *Steele* rationale in *United States v. Falk*,[46] and scrutinized the government's motive in the prosecution of a publicly vocal draft resister. The defendant in *Falk* showed that the government prosecuted him for failing to possess either a selective service registration card or a draft classification card, though thousands of other registrants who had divested themselves of their cards escaped prosecution.[47] The *Falk* court acknowledged that *Oyler* required a successful selective prosecution challenge to prove a defendant was singled out because of an arbitrary classification.[48] The court determined that the government's retaliation against the defendant's claim of conscientious objector status was an arbitrary classification.

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39. 693 F.2d 919 (9th Cir. 1982).
40. *Id.* at 921.
41. *Id.* at 923.
42. *See Ness, supra* note 33 and accompanying text. The *Taylor* court also relied on *Wilson*, without specifically citing it on this point, in holding that the government may consider whether potential defendants have made their illegal activity clear by their public statements or actions. 693 F.2d at 923.
43. *Id. See Steele, supra* note 25 and accompanying text.
44. 693 F.2d at 923.
45. 693 F.2d at 923, n.5.
46. 479 F.2d at 616.
47. *Id.* at 621.
48. *Id.* at 619.

Here, the defendant proved both that the draft board summarily rejected his claim, and that the Justice Department had explicitly approved his indictment.[49] The *Falk* court accordingly held that where a defendant makes out a valid prima facie case of improper selection, the burden of proof shifts to the prosecution to prove the selection was proper.[50]

In *United States v. Catlett*,[51] where the defendant refused to pay income taxes as part of a protest against the Vietnam War, the Eighth Circuit upheld a government policy of prosecuting publicly vocal violators of the federal tax laws.[52] The defendant in *Catlett* asserted that the government prosecuted him because of his vocal resistance to war taxes.[53] The court, in rejecting the defendant's claim, distinguished between permissible prosecution based on the publicity surrounding a violator's public protest and impermissible prosecution based on retaliation against a violator who refuses to pay taxes because of a personal belief that remains uncommunicated to others.[54] The *Catlett* court held that prosecution based on the publicity a public protester received was proper since it served a legitimate governmental interest in promoting public compliance with the tax laws, an interest absent in cases of uncommunicated violations.[55]

As of the time the Ninth Circuit decided *Wayte*, all but one of the selective prosecutions claims raised by defendants in draft nonregistration decisions had been denied.[56] Only the district court in *Wayte*[57] has gone against the trend. Although the majority of decisions differ as to why defendants had not met their burdens of proof, these decisions all held that no defendant had satisfied the impermissible prosecutorial motive prong of the

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49. *Id.* at 622-23. Interference with the prosecutor's independent decision had the effect of tainting the prosecution, according to *Ness, supra* note 35 and accompanying text.

50. *Id.* at 624.

51. 584 F.2d 864 (8th Cir. 1978).

52. *Id.* at 868.

53. *Id.* at 866.

54. *Id.* at 868.

55. *Id.*

56. *See* United States v. Martin, 557 F. Supp. 681 (N.D. Iowa 1982); United States v. Eklund, 551 F. Supp. 964 (S.D. Iowa 1982); United States v. Ford, Cr. 82-1059 (D. Conn. filed July 30, 1982), for cases denying selective prosecution. *But see* United States v. Wayte, 549 F. Supp. 1376 (C.D. Cal. 1982).

57. 549 F. Supp. at 1385.

Oyler test.[58]

C. ANALYSIS

1. *The Majority*

In reinstating the indictment, the Ninth Circuit held that the defendant failed to establish impermissible government retaliation against his right to speak out publicly against draft registration.[59]

The majority applied the two prongs of *Oyler's* wrongful selective prosecution test; no prosecution of others similarly situated and impermissible prosecutorial motive.[60] The court, relying on *Taylor*, found that the first prong of the test had been satisfied, to-wit, the government admitted at the time the *Wayte* indictment was dismissed that only twelve men were being prosecuted out of over 500,000 total nonregistrants.[61]

With respect to the impermissible motive prong of the *Oyler* test, the defendant argued that since the government realized only vocal nonregistrants would be prosecuted, the passive system enforced against Wayte was tainted.[62] Further, the defendant contended that the government's actual awareness of his protest activities was irrelevant.[63] The court, in rejecting both contentions, noted that the defendant had not demonstrated a link between his activities and the government's decision to prosecute.[64] Without such a link, according to the court, no im-

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58. *See* 557 F. Supp. at 688; 551 F. Supp. at 968.

59. *Wayte*, 710 F.2d at 1388.

60. *Id.* at 1387. *Wayte* used the *Oyler* test, but attributed it to *Ness*. *Id.*

61. *Id.* In *Taylor*, the government had conceded that only two striking air traffic controllers in the Tuscon, Arizona area were prosecuted. 693 F.2d at 921.

62. 710 F.2d at 1387. Under the passive enforcement system, the government made no effort to locate violators, but relied on information it received about violators as its means of identifying candidates for prosecution. D. Lowell Jensen, Assistant Attorney General, Criminal Division, wrote a memorandum entitled "Prosecution of Selective Service Non-Registrants" to United States Attorneys (Mid-Sized Offices) on July 9, 1982. In that memo, Mr. Jensen explained that the passive enforcement policy was "designed to ensure that (1) the refusal to register is willful and (2) only persons who are the most adamant in their refusal to register will be prosecuted." The memo conceded that, with this enforcement policy, the first prosecutions would probably consist mainly of men who publicly refused to register. 549 F. Supp. at 1381-82.

63. 710 F.2d at 1387.

64. *Id.*

permissible prosecutorial motive existed.[65]

With respect to the issue of whether the selection was deliberately based upon an improper standard, the court distinguished the present circumstances from those in *Steele*. The majority noted that in *Steele*, where only those who vocally opposed the census were prosecuted, the census procedure itself identified all those who did not cooperate.[66] Thus, though the government was able to identify all violators of the census, it only prosecuted only those who vocally opposed the census. In *Wayte*, by contrast, selective service registration procedures neither identified violators nor established willful disobedience of the registration law. Thus, the majority found that the government properly investigated those nonregistered men whose names were brought to its attention.[67]

The government contended that the use of the passive system applied to *Wayte* was justified since the identity of other violators was not known at the time. The court, in accepting this argument, noted that the policy of prosecuting violators brought to its attention was "logical."[68] Further, the court pointed out that the government's present use of an "active" enforcement system, whereby both protesting and nonprotesting violators would be identified, was evidence of its good faith.[69]

The court agreed with the rationale in *Taylor* that the use of a violator's public statements to establish willful disobedience of the law constituted a legitimate government act.[70] The majority found nothing impermissible in the prosecution's examination of public protest in order to prove conscious illegal activity.[71]

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65. *Id.*

66. *Id.* at 1388. *See* 461 F.2d at 1152.

67. 710 F.2d at 1388.

68. *Id.*

69. *Id.* The active enforcement system would be based on random selection among all nonregistrants.

70. *Id. See* 693 F.2d at 923.

71. The majority subsequently dealt with the issues of notice and comment period compliance in Presidential Proclamation 4771 and selective service registration regulations. 710 F.2d at 1388-89.

2. *The Dissent*

Judge Schroeder, in dissent, addressed only the selective prosecution issue.[72] After pointing out that the government's passive enforcement policy was by definition aimed only at those nonregistrants who communicated their offense to others, the dissent stated that the policy had the practical effect of exclusively prosecuting public protestors.[73] This fact alone was sufficient to prove the first prong, that is no others similarly situated were prosecuted, was satisfied.[74]

The dissent believed that the defendant had established an impermissible prosecutorial motive, since under *Steele* an enforcement policy focusing on vocal offenders is deemed inherently suspect.[75] The dissent also pointed that under *Falk*, the government had the burden of proving permissible selectivity when it only prosecuted protesting violators.[76] The dissent concluded that the government failed to prove a permissible motive for singling out the defendant.[77]

The dissent rejected prosecution arguments that the passive enforcement system was justified because the government could not identify non-protesting violators.[78] Unlike *Wilson*, here no financial constraints limited the government in investigating violators.[79] The dissent noted that a law student working for the defense in *Wayte*, using only a telephone book, obtained lists from various randomly chosen states of persons legally required to register.[80] By comparing those lists with the government's records on actual registrants, there existed a simple method of identifying all violators.[81] The dissent maintained that the recent implementation of an active identification system demon-

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72. *See supra* note 71.
73. 710 F.2d at 1389.
74. *Id.*
75. *Id.* at 1390. *See* 461 F.2d at 1152.
76. 710 F.2d at 1390. *See* 479 F.2d at 621.
77. 710 F.2d at 1390.
78. *Id.*
79. *Id. See* 639 F.2d at 505.
80. 710 F.2d at 1390. The student phoned Iowa, Michigan, Texas, and Colorado, and found that lists of eighteen-year-old persons were readily available. 549 F. Supp. at 1381 n.6.
81. 710 F.2d at 1390.

strated the availability of alternative enforcement methods.[82] The dissent found no reason why the active identification policy was not in effect at the time of the defendant's indictment and claimed that the present implementation of the active policy did not satisfy the first prong of the *Oyler* test.[83]

The dissent rejected the government's contention that it needed the defendant's statements to establish willfulness,[84] asserting that *Taylor* was distinguishable from *Wayte*, since in *Wayte* it was unnecessary to use the defendant's statements to show willful disobedience of the law.[85] In both cases the failure to report to work and the failure to register were acts that could have an innocent explanation.[86] However, in *Wayte* the government wrote to all suspected nonregistrants requesting compliance, and only prosecuted those who still refused to register.[87] The presence of this method of establishing willfulness independent of violators' public protests and letters to the government expressing refusal to comply distinguished *Taylor* from *Wayte*.[88] Accordingly, the dissent voted to affirm the dismissal of the indictment.[89]

D. CRITIQUE

The majority correctly found that the government was unaware of the identities of any nonregistrants other than those already being investigated at the time the defendant was indicted. The passive identification system, in force at the time of *Wayte*'s indictment, relied either on reports from third parties about those disobeying the registration law, or on statements from nonregistrants themselves.[90] The registration forms failed to furnish information that would serve to locate violators. In

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82. *Id.*
83. *Id.* David Alan Wayte was indicted on July 22, 1982. 710 F.2d at 1387.
84. *Id.*
85. *Id. See* 693 F.2d 919.
86. *See generally* Comment, *Presumption of Notice: Mens Rea and Draft Registration - Ignorance of the Law Is an Excuse*, 1982 WIS. L. REV. 234 (1982) (Criminal liability for nonregistration requires proof of notice of the duty to register and an intentional failure to perform that duty).
87. 710 F.2d at 1390.
88. *Id.*
89. *Id.*
90. *Id.* at 1389.

contrast, under the active enforcement system presently operating, the federal government uses vehicle registration records provided by the states to determine whether an eligible man has registered. The names of nonregistrants are kept on file, and investigation is based on random selection.

The dissent properly focused on the government's ability to identify nonregistrants who remained silent about their disobedience. The dissent apparently misread the majority's finding that the government did not identify quiet nonregistrants as a determination that the government could not identify them.[91] The majority did not question the government's ability to identify all nonregistrants. However, the dissent correctly phrased the issue of violators' identities in terms of government ability to investigate nonregistrants regardless of their public communications about their crime. *Steele* held that an enforcement policy focusing only on vocal offenders in inherently suspect.[92] The use of the active enforcement policy in *Wayte* justified greater judicial scrutiny of the government's motives than the majority exercised. With the prima facie case of wrongful selective prosecution established at the district court level, the burden was on the government to prove its selection policy was nondiscriminatory.[93] This burden was not satisfied by a mere showing that the government made no effort to locate nonvocal violators when it had the means to do so.

Both the majority and the dissent in *Wayte* chose to ignore the fact that there may have been improper interference by government officials in the prosecutor's independent decision. There may have been a link between the White House, Selective Service and the Justice Department[94] through Edwin Meese.[95] Government documents made available to the defendant showed that Mr. Meese and the White House were concerned with prosecution of nonregistrants.[96] Following the *Ness* reasoning,[97] there is a strong inference of improper involvement by Mr.

91. *Id.*
92. 461 F.2d at 1152.
93. 710 F.2d at 1390; 479 F.2d at 621.
94. *See Wayte*, 549 F. Supp. at 1382.
95. *Id.*
96. *Id.*
97. The district court in *Wayte* did not cite *Ness*, although it followed the *Ness* disposition of this issue. 549 F. Supp. at 1382. *See* 652 F.2d at 892.

Meese and others in the decisions of local prosecutors to move against individual defendants.[98] Enough evidence of impropriety appeared in the record presented to the court to require a response, if only to dismiss the notion of improper interference. By failing to address this issue, the Ninth Circuit ignored the *Ness* holding and left unresolved the question of executive branch involvement in the decision to prosecute the defendant.

The dissent in *Wayte* correctly observed that violators' communications were unnecessary to show willful disobedience of the law.[99] An alternative means of establishing willfulness existed through the government writing letters to nonregistrants warning them of the likelihood of legal action if they persisted in their refusal to register.[100] The dissent regarded continual disobedience by any nonregistrant who received a warning letter as proof of willfulness regardless of any public statements. Therefore, the dissent correctly reasoned that *Taylor's* rationale of using defendants' public statements to show willfulness did not control in *Wayte*. Since the government only prosecuted those who received warnings and still refused to register, the dissent seemed to be attacking a phantom flaw in the prosecution's case. However, only vocal violators who would not register after receiving warnings were prosecuted, so the government either used the willful public protest criteria despite the presence of an alternative, or it only warned vocal violators in the first place. Either way, the alternative method of proving willfulness existed even though the government did not use it.[101]

Another justification for sanctioning a prosecutorial policy that only punishes the vocal protestor is the deterrent effect it has on the multitude of nonregistrants who remain silent. The Ninth Circuit had ample precedent for applying this rationale to *Wayte*.[102] Unfortunately, the deterrence theory is self-defeating. Prosecuting the most notorious members of the class of violators may achieve some publicity which in turn informs all nonregis-

98. 549 F. Supp. at 1382.

99. 710 F.2d at 1390.

100. *Id.*

101. *Wilson* would also not merit consideration of defendant's public statements to establish willfulness, since no budgetary or other constraints hampered the government investigations in *Wayte*. 639 F.2d at 505. *See* 710 F.2d at 1390.

102. *See Ness supra* note 37 and accompanying text; *Taylor, supra* note 42 and accompanying text.

trants that the government will prosecute violators of the law. However, the exclusive focus of the passive enforcement strategy by protestors sends a message to the community of eligible men that they must not express their belief that registration is wrong, or if they do express that belief, they must already have registered for the draft. A prosecutional policy that rewards silence discourages dissent from government policy, and weakens its deterrent value against the covert violators who remain relatively immune from prosecution. Thus, the government ends up stifling public criticism more than it promotes public compliance with the law. The Ninth Circuit's decision in *Wayte* thus served to erode the citizen's constitutional right to free speech while it failed to promote a legitimate active prosecution policy using random selection of all violators.[103]

*Chris Bluemle**

UNITED STATES V. STEARNS: THE NINTH CIRCUIT PLACES THE DOUBLE JEOPARDY CLAUSE IN JEOPARDY

A. INTRODUCTION

In *United States v. Stearns*,[1] the Ninth Circuit held that a felony-murder prosecution was not barred by the Double Jeopardy Clause[2] despite an earlier prosecution for the underlying felony. The court's holding marked the first time a circuit court has sustained a second prosecution based upon a 'due diligence' exception to the double jeopardy rule.[3]

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103. For a different treatment of the wrongful selective prosecution issue in the context of draft nonregistration, *See* United States v. Schmucker, 721 F.2d 1046 (6th Cir. 1983).

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1. 707 F.2d 391 (9th Cir. 1983) (Per Wright, J.; the other panel members were Browning, C.J., and Wallace, J.).

2. U.S. CONST. amend. V.

3. The court permitted an exception to the double jeopardy bar "[w]here the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge . . . have not been discovered despite the exercise of

trants that the government will prosecute violators of the law. However, the exclusive focus of the passive enforcement strategy by protestors sends a message to the community of eligible men that they must not express their belief that registration is wrong, or if they do express that belief, they must already have registered for the draft. A prosecutional policy that rewards silence discourages dissent from government policy, and weakens its deterrent value against the covert violators who remain relatively immune from prosecution. Thus, the government ends up stifling public criticism more than it promotes public compliance with the law. The Ninth Circuit's decision in *Wayte* thus served to erode the citizen's constitutional right to free speech while it failed to promote a legitimate active prosecution policy using random selection of all violators.[103]

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1. 707 F.2d 391 (9th Cir. 1983) (Per Wright, J.; the other panel members were Browning, C.J., and Wallace, J.).

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3. The court permitted an exception to the double jeopardy bar "[w]here the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge . . . have not been discovered despite the exercise of

FACTS

In July of 1974, defendants Stearns and Walker sailed into Palmyra, an island 1,000 miles south of Hawaii. The defendants arrived in an unseaworthy boat,[4] low on food, supplies and money.

At about the same time Eleanor and Malcolm Graham sailed into Palmyra. The Grahams travelled abroad the *Sea Wind*, a 37-foot boat equipped with state-of-the-art technology, which was stocked for a planned two-year cruise.

By late August only the Grahams and the defendants remained on the island. On August 28th, the Grahams made their last communication with their regular radio contact in Hawaii.

In October, the *Sea Wind* was spotted in Hawaii with Stearns and Walker as its crew. The vessel had been renamed, its figure-head removed and its blue trim repainted lavender. When questioned by the FBI, Stearns claimed that she and Walker had found the Graham's dinghy overturned along the beach and had assumed the Grahams had drowned.[5] Stearns and Walker were arrested for the theft of the *Sea Wind*.

Within three days of the arrest a search team set out for Palmyra. The nine-person group included two FBI agents, three Coast Guard divers, a Coast Guard officer, and a man who had been on Palmyra while the Grahams were there. The ten-hour search produced little evidence to support the government's suspicion of foul play.[6]

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due diligence." Brown v. Ohio, 432 U.S. 161, 169 n.7 (1977).

4. Defendant's boat leaked substantially and was towed into the island's lagoon since its engine did not work. *Stearns*, 707 F.2d at 392.

5. Walker told the jury and the FBI that the Grahams had probably drowned while fishing and had left a will on board giving him the *Sea Wind*. Brief of the United States at 8, U.S. v. Stearns, 707 F.2d 391 (9th Cir. 1983). The defendants told conflicting stories to their friends. Walker first told a friend that he won the *Sea Wind* in a chess match. Stearns told another friedn that she and Walker had purchased the *Sea Wind* from the Grahams, who were tired of maintaining it. Stearns later stuck to the story that the defendants found the Graham's dinghy overturned and assumed that the Grahams had drowned. They took the *Sea Wind* because they thought that Malcolm Graham's statement, "make yourself at home" meant that she and Walker could have the *Sea Wind*. *Id.* at 7.

6. 707 F.2d at 394. The FBI tested the Grahams dinghy and found it could not be

Stearns and Walker were convicted of theft. Walker's conviction was vacated as a result of an erroneous jury instruction. His second theft indictment was dismissed on speedy trial grounds.

In February 1981, skeletal remains of Eleanor Graham were discovered by a couple visiting Palmyra. Her skull and bones were found on a coral reef and another bone was found nearby in an overturned metal box.[7]

Stearns and Walker were indicted for the felony murder of Eleanor Graham. The underlying felony charge was theft. The defendants moved for dismissal on grounds of double jeopardy.[8] The district court held the felony murder prosecution permissible, applying the due diligence exception to the double jeopardy rule.[9]

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overturned even though four men tried to do so. Experts advised the government that the outboard motor showed no sign of having been immersed in salt water. The last two pieces of evidence cast considerable doubt on the defendants' story of finding the dinghy overturned. Defendants gave contradictory and false statements to friends and authorities regarding the disappearance of the Grahams. Defendants were the only other people on the island at the time that the Grahams disappeared. Testimony of four persons who shared the island at various times with the Grahams and defendants told of the developing hostility toward each other. Appellant Stearns Opening Brief at 4, 5, 21, U.S. v. Stearns, 707 F.2d 391 (9th Cir. 1983).

7. The box had been closed with electrical wire. 707 F.2d at 392. The box and bones had been subjected to very high temperatures. *Id.* This fact casts doubt on defendants' story of an accidental drowning.

8. Walker also moved to dismiss the felony murder indictment on grounds of res judicata. Walker pointed out that his theft indictment was dismissed (with prejudice) on constitutional and statutory speedy trial grounds. He claimed that the principles of res judicata forever barred the government from charging Walker again with the felony of theft.

However, Walker was not retried on the identical cause of action. Walker now seeks to preclude trial on the charge of theft, not felony murder, and collateral estoppel, not res judicata applies. Collateral estoppel may only be successfully applied when the issue was litigated and decided on the merits. *See* Ashe v. Swenson, 397 U.S. 436, 443-4 (1970).

Walker's felony indictment was dismissed on speedy trial grounds. Thus the Ninth Circuit ruled that collateral estoppel did not bar the present prosecution.

Walker argued that if he is retried on the greater offense the speedy trial protections afforded the defendant would be substantially weakened and easily evaded. This, however, is a speedy trial issue, not a double jeopardy issue. *Cf.* United States v. Stricklin, 519 F.2d 1112, 1120-21 (5th Cir), *cert. denied,* 444 U.S. 963 (1979). The court does not have jurisdiction to hear a speedy trial motion before the case is litigated. *Id.*

9. United States v. Walker, 546 F. Supp. 805, 813 (D.Hawaii 1982), *aff'd.*, U.S. v. Stearns, 707 F.2d 391 (9th Cir. 1983).

B. BACKGROUND

The Double Jeopardy Clause of the fifth amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb."[10]

Disagreement in the Supreme Court concerns the definition of the term "same offense."[11] The traditional Supreme Court approach has been to employ the 'same evidence' test.[12] The test provides that if one statute requires proof of a fact which the other statute does not, then the two offenses charged are not the same.[13]

In *Ashe v. Swenson*,[14] a minority of the Court, led by Justice Brennan, maintained that the double jeopardy clause requires the prosecution in one proceeding, except in extremely limited circumstances, of "all the charges against a defendant that grow out of a single criminal act, occurrence, episode or transaction."[15] While advocating a broader conception of 'same offense', Justice Brennan took note of potential practical and

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10. U.S. CONST. amend. V.

The purpose underlying the clause was most articulately stated by Justice Black:

> The State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187-88 (1957).

11. *See* Note, *Double Jeopardy: Multiple Prosecutions Arising from the Same Transaction*, 15 AM. CRIM. L.R. 259, 260-62 (1979).

12. The test is also known as the "Blockburger test." *See Brown*, 432 U.S. at 166.

13. "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. . ." Blockburger v. United States, 284 U.S. 299, 304 (1932). Critics argue that this test has provided little protection from multiple prosecutions. In Ciucci v. Illinois, 356 U.S. 571 (1958) the defendant murdered his wife and three children. He was first tried for the murder of his wife and received a twenty-year sentence. He was then charged and convicted of the murder of one of his daughters and was given a forty-five year sentence. The prosecution then brought a third trial for the murder of one of his sons, and Ciucci was sentenced to death. Since each charge required proof of a fact which the other charge did not the government was able to bring multiple prosecutions. *See* Note, *Double Jeopardy: Multiple Prosecutions Arising from the Same Transaction*, 15 AM. CRIM. L.R. 259, 281-85 (1978).

14. 397 U.S. 436 (1970).

15. *Id.* at 453-54.

procedural exceptions to this compulsory joinder rule.[16]

In *Brown v. Ohio*,[17] the Supreme Court suggested in a footnote that "[a]n exception may exist where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain the charge . . . have not been discovered despite the exercise of due diligence."[18]

Prior to *Stearns, U.S. v. Allen*[19] was the only decision which applied the due diligence exception suggested in *Brown*.[20] *Allen* involved a kickback scheme,[21] in which four defendants were initially charged with mail fraud and conspiracy to commit mail fraud.[22] The government submitted a list of witnesses. At the trial the prosecution attempted to call a witness not on the list, arguing that at the time of the submission of the list this witness' role in the kickback scheme had not been "adequately catalogued."[23] The court denied the government's attempt to call the witness.[24] Allen was then acquitted.[25]

The government subsequently subpoened documents from Allen.[26] He was reindicted for mail fraud and conspiracy to commit mail fraud.[27] Allen moved for dismissal on grounds of double jeopardy. The government argued, *inter alia*, that its subsequent discovery of the documents, plus the availability of the witness constituted additional facts necessary to invoke the due dili-

16. Other exceptions included where a crime has not been completed until after commencement of the initial prosecution, if no court had complete jurisdiction of all alleged crimes, and where defendant's motion for severance of charges is granted at the initial proceeding. 397 U.S. at 453 n.7 & 454 n.11.

17. 432 U.S. 161 (1977).

18. *Id.* at 169 n.7.

19. 539 F. Supp. 296 (C.D. Cal. 1982).

20. The exception had been noted, though never relied upon, by other courts. *See* Illinois v. Vitale, 447 U.S. 410, 420 n.8 (1980); Jeffers v. United States, 432 U.S. 137, 152 (1977); United States v. Solano, 605 F.2d 1141, 1144 n.1 (9th Cir.), *cert. denied*, 444 U.S. 1020 (1980); United States v. Stricklin, 591 F.2d 1112, 1123-24 & n.5 (5th Cir.), *cert. denied*, 444 U.S. 963 (1979).

21. 539 F.Supp. at 300.

22. *Id.* at 300-01.

23. *Id.* at 301.

24. *Id.*

25. *Id.* at 301-02.

26. *Id.* at 302.

27. The second indictment cited different dates than the first for these criminal transactions. *Id.* at 302.

gence exception to the double jeopardy bar.[28]

The *Allen* court rejected the government's contention, holding that the due diligence exception applied only if the government was *unaware* of the latter charge at the time of the first prosecution.[29]

C. The Court's Analysis

The government conceded that the thefts charged were lessor included offenses[30] of the felony-murder charge. As such, these offenses constituted the 'same offense' for double jeopardy purposes.[31]

The court employed a balancing test to determine whether the due diligence exception to the double jeopardy bar should apply.[32] The Ninth Circuit concluded that defendant's interest in avoiding the burdens of multiple prosecutions was outweighed by society's interest in punishing the guilty.[33]

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28. *Id.* at 318.

29. The *Allen* court held that "lack of proof, however, does not invoke the due diligence exception. The exception applies only if, at the time of the first trial, the government was not *aware* of the offenses which it failed to join." (Emphasis in original) *Id.* at 319. This approach has been advocated by commentators who have addressed the due diligence exception. *See* Friedland, *Double Jeopardy and Unreasonably Splitting a Case*, U. Toronto L.J. 249 (1969). Friedland wrote that the proposed due diligence exception "would encompass situations . . . in which the prosecutor could not at the time of the first trial, have known . . . of the commission of the offenses subsequently charged." Friedland at 276. In Justice Brennan's concurring opinion in *Ashe* where he first advanced the due diligence exception, he referred to Friedland's comprehensive examination of double jeopardy. Ashe v. Swenson, 397 U.S. 436, 453 n.5 (1970) (Brennan, J., concurring). *See also* Model Penal Code: "[a defendant should] not be subjected to separate trials . . . if such offenses are known to the appropriate prosecuting officers at the time of the commencement of the first trial." Model Penal Code 1.07(2) (Proposed Official Draft 1962). *See also* ABA Standards for Criminal Justice comment 2.3(c) Chapter 13 (1980). "The subsequently charged offenses must be know to the prosecutor . . ."

30. In *Stearns*, theft was a lesser included offense of felony murder. In Harris v. Oklahoma, 433 U.S. 682 (1977), the Court found that "when, as here, conviction of a greater crime, murder, cannot be had without conviction of the lesser charge crime, robbery with firearms, the double jeopardy clause bars prosecution for the lesser crime after conviction of the greater one." *Id.* at 682.

31. 707 F.2d at 393.

32. *Id.* at 393.

33. The court relied on Howard v. United States, 372 F.2d 294 (9th Cir.) *cert. denied*, 388 U.S. 915 (1967), for the application of this balancing test. In *Howard*, the defendant's first trial ended in a mistrial due to the inability of one jury to reach a verdict. *Id.* at 296. The government's second indictment included eight counts from the first in-

The court then examined whether the due diligence exception was satisfied. They found that the government's search was aimed at every area of Palmyra likely to contain evidence of the Grahams disappearance. Although a more thorough search might have been possible, the court noted that "due diligence did not require extraordinary methods at this remote site."[34] The Ninth Circuit found that the government's search at Palmyra produced no evidence of the Graham's fate. The court held that the district court's determination that the government did not have the facts necessary to sustain the murder charge was not clearly erroneous.[35]

The Ninth Circuit concluded that the felony-murder prosecutions were not barred if the government was unable to prosecute the greater charge at the outset because "the facts to sustain"[36] that charge were not discovered despite the exercise of due diligence.

D. CRITIQUE

In *Stearns*, the Ninth Circuit reduced the core constitutional protection of the Double Jeopardy Clause first by employing an inappropriate balancing test to determine whether the due diligence exception applied; secondly, by inadequately addressing one of the exception's central requirements and finally, by failing to provide adequate guidelines for the future implementation of the due diligence exception.

Stearns was a case of first impression. Although noted by other courts, the due diligence exception was merely a suggestion contained in a footnote in the Supreme Court opinion of *Brown v. Ohio*. The *Brown* Court had provided no guidelines or safeguards for courts to weigh in deciding whether the exception should be employed.

The Ninth Circuit employed a balancing test to determine

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dictment and six new counts. *Id.* Defendant's motion to dismiss on double jeopardy grounds was denied and the defendant was found guilty on eleven counts. *Id.* at 297. The defendant appealed, arguing the double jeopardy applied. *Id.*

34. 707 F.2d at 394.

35. *Id.*

36. *Id.* at 393.

whether the exception should be considered. The court never stated the reason for its use of this balancing test. The court may have believed that the test was appropriate due to the ambiguity of the exception as precedent, or perhaps as a safeguard for defendants' double jeopardy protection.

Relying on *Howard v. United States*, the court balanced defendants interest in avoiding multiple prosecutions against society's interest in punishing the guilty. However, *Howard* predated the procedural rules allowing a double jeopardy appeal prior to the second trial.[37] In *Howard*, the defendant was convicted in a second trial and then appealed the double jeopardy ruling. The *Howard* court weighed society's interest in punishing the guilty because the defendant's guilt was established.

In *Stearns*, the guilt or innocence of each of the defendants on the charge of felony murder had not yet been determined. The Ninth Circuit's assumption of defendants' guilt is contrary to the constitutional presumption of innocence. The use of guilt as a factor in the balancing test will virtually guarantee that the scales will weigh against the defendant. Rather than providing a safeguard, this balancing test will insure that defendants' double jeopardy protection will be circumvented.

With respect to the due diligence exception, its application is contingent upon the satisfaction of an essentially two-pronged test. The first prong requires that the government exercise due diligence in its initial investigation. The courts should not condone prosecutorial negligence by allowing a second prosecution, when evidence which clearly should have been found is later discovered. In addition, the due diligence requirement will discourage unscrupulous prosecutors from not fully investigating a greater charge, knowing that after trial on the lesser charge a second investigation could turn up the necessary facts to sustain a second prosecution.

As *Stearns* indicates, the requirements of due diligence will often be easily satisfied. The nine-person government team spent ten hours searching the island. Their initial investigation was not a model of thorough and complete police work. Due to

37. Abney v. United States, 431 U.S. 651, 660-62 (1977).

high costs and extra time needed the government did not thoroughly search the lagoon where the Grahams' dinghy was found and where the skeletal remains were later discovered. The court reasonably concluded that due diligence requires no more than ordinary diligence, and inasmuch the government's initial investigation satisfied the requirements of the first prong.

The second prong of the due diligence exception requires that the facts later discovered be necessary to sustain the greater charge. If the prosecutor possessed the facts necessary to sustain the greater charge at the time it prosecuted the lesser charge then any facts later discovered, no matter how relevant, would be merely cumulative, and the exception could not be invoked. Applying the second prong to facts of *Stearns*, the determinative issue for the Ninth Circuit should have been whether the government could have sustained the felony murder charge in 1974.

The *Stearns* court's analysis of the requirements of the second prong was done in a perfunctory manner. The only factor the court recognized was that the search of Palmyra produced no concrete evidence of the Graham's fate. The court did not deem it necessary to analyze the felony murder evidence which the government possessed prior to the first trial.

If the government could have sustained the felony murder charge in 1974, then the due diligence exception would not apply. In order to sustain a felony murder charge, the following must be proven: (1) the defendant committed a felony; (2) the defendant had the requisite intent to commit this felony;[38] and (3) a death resulted from this act.[39] In 1974 the government had sufficient facts necessary to sustain the first two conditions of the felony-murder charge. The discovery of a body is not necessary to prove the third condition; "[A]ll that is required to prove death is circumstantial evidence sufficient to convince the minds of reasonable men of the existence of the fact."[40]

The circumstances surrounding the disappearance of the

38. United States v. Lilly, 512 F.2d 1259, 1261 (9th Cir. 1975).
39. Perkins, *Corpus Delecti of Murder*, 48 VA. L.R. 173, 1183 (1962).
40. People v. Scott, 176 Cal. App.2d 458, 469 (Cal. 1959).

Grahams' was analogous to murders on the high seas,[41] in which bodies are rarely found.[42] The government possessed circumstantial evidence to support the charge that the Grahams were dead.[43] and that this death resulted from defendants' actions.[44]

Was this evidence sufficient to sustain a felony murder charge? The ambiguity of the language of the second prong makes this determination uncertain. Neither the Supreme Court nor the Ninth Circuit provided adequate guidelines to determine what 'necessary to sustain the charge' required. However, three different approaches may be advanced to establish guidelines for the application of this prong. The first can be called the 'prosecutorial discretion' standard; the second the 'discovery of a charge' standard; and the third the 'prima facie case' standard.

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41. In order to sustain the charge of murder, the government had to prove that the Grahams' death had occurred either on an uninhabited island or in the 1,000 miles of ocean that separate Palmyra and Hawaii.

42. In a famous opinion Justice Story wrote that:

> In the case of murder on the high seas, the body is rarely if ever found; and a more complete encouragement and protection for the worst offenses of this sort could not be invented than a rule of this strictness. It would amount to a universal condonation of all murders committed on the high seas.

United States v. Gilbert, 25 F. Cas. 1287, 1290 (C.C. Mass. 1834).

43. The Grahams had not been heard from for over three months. They had stopped communicating with their regular radio contact in Hawaii. The Grahams stopped communicating with friends and relatives with whom they corresponded regularly. Appellant Sterns Opening Brief at 5, U.S. v. Stearns, 707 F.2d 391 (9th Cir. 1983).

44. *See infra* n.5 and 6. There is case law which suggests that the government's circumstantial evidence was sufficient to sustain a murder charge. In United States v. Williams, 28 Fed. Cas. 636 (C.C. Me. 1858) seven sailors set out in a boat on July 7th. Nothing further was heard from them until September 2nd when three of them were found on the high seas in an open boat. They claimed that a storm had washed the others overboard. Later one of the sailors confessed. He died shortly thereafter. The other two sailors then confessed. At trial there was doubt whether the confessions were voluntarily made and whether they should have been considered by the court. The court examined the circumstantial evidence to see if the corpus delecti of murder was proven. The court found that the following evidence "strongly implicated the prisoners." *Williams* at 645. (1) The defendants and the missing men all left together in the same boat. (2) Neither the vessel nor the men arrived at their destined port. (3) The boat that the defendants had been found in (it originally was attached to the larger boat) had been tarred on the inside strongly, indicating preparation for a long voyage, thus disproving the claim of a hasty departure. (4) The defendants were found with the possessions of the missing men. (5) The defendants gave contradictory and false accounts of what happened. *Id.* at 645.

The court found that this evidence, independent of the confessions, tended to "prove, not only that the crime had been committed but that it had been committed by the prisoners." *Williams* at 645.

Under the prosecutorial discretion standard, if the prosecutor was not reasonably sure of a high probability of conviction on the greater charge at the commencement of trial on the lesser charge, then a second prosecution would be allowed when the facts needed for the successful prosecution were discovered.

This standard would create a great potential for governmental abuse of defendants' double jeopardy protection. The court would be forced to determine whether initially the evidence in the prosecutor's possession was sufficient to sustain the greater charge. Inevitably great deference would be given to the prosecutor's judgment.

The *Stearns* court employed such a standard. *Stearns* indicates the government would now be allowed to reprosecute the same offense when the discovered facts are among those merely important in proving the greater charge, rather than necessary to sustain it.[45] The possibilities for the discovery of additional facts are limitless. Additionally, the government has a forum to 'test the waters.' The government may be able to judge the probability of a successful prosecution of the greater charge by the outcome of the trial for the lesser charge. Hence, under the prosecutorial discretion standard the restrictions on prosecutorial abuse are so narrow that the due diligence exception may loom larger than the double jeopardy rule.

A second approach would be one where the government must be unaware of the greater charge at the time of the first prosecution. This approach has been advocated by both the *Allen* court and commentators who have addressed the due diligence exception. By being unaware of the greater charge at the time of the commencement of the first trial, the facts discovered amount to the discovery of the charge.

The purpose underlying this approach is clear: by requiring that the government be completely unaware of the greater charge at the time of the first trial there is little potential for

45. At one point, the court stated that the discovered facts need only be "relevant" to the greater charge. *Stearns* at 393. Later, when stating the requirement of the exception, the court omitted the word 'necessary'. *Id.* at 393. This may have been an oversight, but it typified the flaws in the court's analysis of this requirement.

46. *See infra* n.29.

government abuse of able defendant's double jeopardy protection. Once the government is aware of the greater charge, they are obliged to perfect their case during the trial on the lesser-included charge.

Courts considering the implementation of the due diligence exception may find neither the discovery of a charge nor the prosecutorial discretion standard viable. The former standard provides manageable guidelines, but its narrowness may render the exception largely meaningless. The latter standard, while according broad scope to the exception, may not only be unmanageable, but may grant the exception more scope than the rule itself.

A final approach to the second prong of the due diligence exception can be called the 'prima facie case' standard. Under this approach, the government must first prove that it fully investigated the charges in accordance with the first prong. If the government was aware of the greater charge which it did not join with the lesser charges, then the government must prove that it could not have supported a prima facie case of the greater charge when the lesser charge was tried. The defendant would be able to rebut the same.

The guidelines for the 'prima facie case' standard should prove manageable; the due diligence exception would be viable in the unusual circumstances which call for its implementation, and defendant's double jeopardy protection from purposeful government abuse would be secured.

E. Conclusion

The due diligence exception to the double jeopardy rule was suggested by the Supreme Court to provide a workable system in which prosecutors would be compelled to join charges of the 'same offense' in one proceeding. The outcome in *Stearns* encourages the opposite result.

In *Stearns* the government elected not to prosecute the felony murder charge in 1974. Instead it prosecuted only the underlying felony. Seven years later, the government elected to charge the defendants with first degree felony murder of Mrs.

Graham. Even then, the prosecutor decided that the government did not possess the necessary facts to charge the defendants with the felony murder of Mr. Graham. Thus, after the government's second crack at the defendants, it will be allowed a third opportunity to charge them (if some additional fact used to sustain the charge is discovered). This type of sequential prosecution undermines the protection of the Double Jeopardy Clause.

*Steven H. Rosenthal**

OTHER DEVELOPMENTS IN CONSTITUTIONAL LAW

A. *Diaz v. San Jose Unified School District: What Constitutes Segregative Intent?*

In *Diaz v. San Jose Unified School District*,[1] the Ninth Circuit held that a school district's refusal to bus for desegregation purposes was insufficient to prove segregative intent.

Plaintiffs, the parents of Spanish-surnamed children attending public school in the San Jose Unified School District, alleged that defendants were operating a segregated school district.[2] The district court initially determined that the school district acted without segregative intent.[3] The Ninth Circuit reversed and remanded the case with instructions that defendants' neighborhood school policy was not a complete defense to charges of segregative intent, but instead given the same weight as any other evidence.[4] On remand, the district court again found insufficient evidence to support a finding of segregative intent.[5] The plain-

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* Golden Gate University School of Law, Class of 1985.

1. 705 F.2d 1129 (9th Cir. 1983) (per Kashiwas, J., sitting by designation; the other panel members were Anderson, J., and Farris, J., dissenting).

2. *Id.* at 1130.

3. Diaz v. San Jose Unified School District, 412 F. Supp. 310.

4. Diaz v. San Jose Unified School district, 612 F.2d 411. *See* Columbus Board of Education v. Penick, 443 U.S. 449, Dayton Board of Education v. Brinkman, 443 U.S. 526.

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tiffs appealed to the Ninth Circuit.

The Ninth Circuit first addressed the district court's finding that the defendants displayed no segregative intent in maintaining a non-integrated school system.[6] After finding that the defendants knew the school district was racially imbalanced, but took no action to correct that imbalance, the Ninth Circuit examined several of the policy decisions made by the defendants over the past twenty years.[7] Analyzing the district court's treatment of these policy decisions, the majority found that the defendants' actions, although continuing the racial imbalance in the district, were legitimate attempts to accommodate the district's changing demographic and historical school attendance patterns while following a policy of assigning children to their nearest neighborhood schools.[8] Therefore, the Ninth Circuit found no segregative intent behind defendants' actions.[9]

The panel then turned to the issue of the defendants' refusal to use busing between school attendance areas as a means to achieve district-wide integration.[10] Although the defendants were aware that busing would be necessary to integrate the school system, they nonetheless refused to use busing to desegregate. The majority was "disturbed"[11] by the defendant's refusal to bus, but found no clear error in the district court's holding.[12]

The plaintiffs argued that the district's policy of no busing to desegregate was comparable to the impermissible racial classi-

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6. *See* Keyes v. School District No. 1, 413 U.S. 189, 198 (1973). *Keyes* set forth the rule that segregative intent must be shown in de facto segregation situations.

7. 705 F.2d at 1130. These policy decisions included (1) site selection and school construction, (2) adoption of a neighborhood school policy with board designated attendance areas, (3) reconstruction of Field Act schools, (4) school closures and student reassignments, (5) location of portable classrooms and maintenance of double sessions, (6) student transportation, (7) presentation of materials supporting school bond elections, (8) response to integration proposals by a San Jose citizens committee, (9) faculty and staff assignments, and (10) failure to integrate despite a state statutory duty and a publicly issued board policy to relieve ethnic imbalance. The Field Act was enacted to provide for earthquake-safe schools. *Id.* at 1130-31.

8. *Id.* at 1131.

9. *See* Pullman-Standard v. Swint, 456 U.S. 273 (1982).

10. 705 F.2d at 1131. The San Jose Unified School District routinely bused students within attendance areas, and also bused throughout the district for special schools and programs. *Id.*

11. *Id.*

12. *Id.*

fication found in *Washington v. Seattle School District No. 1.*[13] In *Washington*, an initiative approved by the voters that effectively banned busing to achieve racial integration was struck down by the Supreme Court as an unconstitutional attempt to change the political process to prevent racial minorities from achieving their goals.[14] The Ninth Circuit distinguished *Washington*, noting that instead of interfering with the local school board's discretion, the school board in *Diaz* was allowed too much discretion to determine where children would be assigned.[15]

Finally, the plaintiffs argued that where a school district has a state imposed duty to integrate,[16] a presumption of segregative intent arises from evidence of conduct with forseeable segreative consequences.[17] The Ninth Circuit stated that the presumption the plaintiffs argued was in fact only a burden on the defendants to show that actions perpetuating the segregated system served legitimate ends, a finding already made by the district court.[18] Additionally, the majority noted that in a federal court a duty imposed by state constitutional law served only as circumstantial evidence of segregative intent.[19]

Judge Farris, dissenting, asserted that the defendants acted to perpetuate segregation rather than promote integration. The dissent noted several instances where the defendants willfully rejected proposals to rectify the racial imbalance in the district.[20] The dissent deemed the defendants only paid lip service

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13. 458 U.S. 457.

14. *Id.* at 486. In striking down the initiative in *Washington*, the Supreme Court relied on the principle enunciated in Hunter v. Erikson, 393 U.S. 385 and Lee v. Nyquist, 318 F. Supp. 710 (W.D.N.Y. 1970), that statutes preventing state officials from drawing school district lines to achieve racial balance were an unconstitutional violation of equal protection. 705 F.2d at 1132.

15. 705 F.2d at 1132.

16. Until 1979, the California Constitution empowered state courts to order desegregation in cases of both de jure and de facto segregation. The *Diaz* case was brought in 1975. *See* Crawford v. Board of Education, 17 Cal. 3d 280, 130 Cal. Rptr. 724, 551 P.2d 281 (1976).

17. *Id.* The plaintiffs based their argument as to presumption of segregative intent upon *Columbus* and *Dayton*. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 1135. The dissent specifically mentioned the defendants rejection of proposals for magnet schools, open enrollment, and voluntary busing, among other actions. *Id.*

to desegregation as their actions were diametrically opposed to integration.[21] In light of the defendants' long history of rejecting practical integration measures, the dissent found sufficient evidence of segregative intent.

21. *Id.* at 1134. The defendants had, since 1963, repeatedly proclaimed that they recognized the racial imbalance in the school district and that they were determined to correct it. 412 F. Supp. at 315.