Foreword: Even When a Nation Is at War

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ONE among the many paradoxes presented by the Supreme Court of the United States is that while it is assuredly the most interesting institution American law and politics have developed, it stubbornly resists discussion as an institution. Indeed one suspects that discussion of it in such terms, despite helpful recent commentary, admits by and large of half-truths correcting each other, or better, of exaggerations of important truths, as Robert MacIver once observed of the theories of Karl Marx.

The reason underlying this difficulty is all too well known: the Supreme Court is not simply a court; it is an important part of the American political process. Because the key phrases of the Constitution have such grand ambiguities, the Court has wide discretion in passing on matters with a constitutional dimension, and because such matters are likely to concern and affect the larger issues of American life, the Court, in passing on them, exercises great political power.

The Court thus has a hybrid role; and the arresting thing is that were its role to be purified in either direction—by having it become more simply a court and nothing more, or by having it become, bluntly, a political agency and nothing more—it would lose its power and its purpose. The special burden of the Court,
then, is to exercise great political powers while still acting like a court, or if we prefer, to exercise judicial powers over a wide domain while remaining concerned, realistic, and alert as to the political significance of what it is doing.

With this dual role the Court resembles the jury, which must both find facts and inject common sense and equity into the application of the law. For institutions with such mixed functions there can be no simple blueprint against which to measure performance. What makes it so difficult to discuss the Court as an institution, then, is that we lack such a blueprint and, perhaps as a consequence, have yet to develop any consensus on how to evaluate its full performance in its hybrid role.

These well-worn observations are called forth by the challenge of introducing this survey of the work of the Court during the 1970 Term. In recent years many facing this annual task have chosen to offer a specific substantive perspective on one aspect of the complex, untidy mass of new data contained in the decisions of a Term. But this year, although the new data is assuredly no less complex or untidy, the times impose a somewhat different, but inescapably compelling task upon us. For the 1970 Term marked the first year in which there had been a fully manned Court under the new Chief Justice. Thus, as a practical matter, the 1970 Term was the first of the Burger Court. The question that rises irresistibly is: how different is the Burger Court from the Warren Court? Answering the question leads to an unfortunate preoccupation, requiring the construction of a framework for analysis which oversimplifies the enterprise of the Court and, in so doing, somehow demeans it. Nevertheless, it cannot easily be escaped, and this essay will, almost against my will, spend time keeping score and comparing the two Courts.

Perhaps because I had taken the political advertisements of change too seriously, I had expected dislocations in the work of the Court. But as I read through the work of the Term I was relieved to find, with the uncertain exceptions of criminal procedure and reapportionment, less change than I had anticipated. I found, too, that measuring change of this sort, given the com-

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5 For a less hesitant view of the changes reflected in such cases, see, e.g., infra pp. 43–44.
6 For a quite different set of reactions to the Term, as it stood on May 7, 1971, see Kurland, The Burger Court Shows its Stripes, 18 The Law School Record 7 (Spring, 1971) (University of Chicago Law School).
plexities of the work of the Court, was an exceedingly difficult task.

In any event, the continuities impressed me more than the discontinuities. The theme against which this review of the Court's work during the 1970 Term will be played, therefore, is the diffuse and non-glamorous one of the continuity of institutions, or perhaps, in the light of all the circumstances attending the entry of the Burger Court on the national scene, the stamina and vitality of institutions.

Some of the factors supporting such continuity are quickly identifiable as we look at the Supreme Court in terms of its roles as political agency and court. There is first the simple point that a "new" Court never starts from scratch with a fresh batch of Justices—that might really produce striking changes. Rather the process of personnel change permits only the addition of new Justices to a larger group, who have been working together for years. Justice Marshall apart, the six Justices whom Justices Burger and Blackmun came to join had been working together since 1962. Second, a "new" Court never starts de novo with a wholly new set of ideas. It inherits not simply decisional precedent, but also the intellectual apparatus—the framework of concepts and vocabulary—developed along with that precedent. Admittedly, these basic concepts rise and fall over time (indeed, watching that phenomenon is one of the fascinations of constitutional law), but that is always a long-term process. Third, the sources of the Court's business are likely to persevere. These enduring sources include: the expectations of litigants generally; the presence in the society of organized and durable commitments towards specific litigation, such as the current campaign challenging the death penalty on constitutional grounds; and the continuing power of some institutions to champion specific values, such as that of the New York Times towards freedom of speech. Fourth, there is the objective logic of many problems, which must be perceived the same way no matter who happens to be on the Court. And, of course, there is the decisive fact that the Court must continue to give public reasons for its actions.

With all these factors providing powerful pressure towards continuity, changes in the performance of a Court in the throes of personnel change are likely to involve subtle shifts in style, direction, and momentum, falling far short of what the public—and, indeed, of what the President himself—may have expected.\(^7\)

\(^7\)Professor Kurland had projected three possibilities for what he called a Nixon Court: that the Court would change its views under the impact of the new appointments; that the President would change his views; or that both President and Court would stand firm, creating the possibility of a joinder of forces between
Such subtle shifts may not become visible for years. For this reason, one or two Terms can provide, in spite of the vast amounts of business the Court handles, only an imperfect barometer of the direction and degree of change which may be underway. Yet we cannot for that reason avoid at least a tentative exploration of the changes which may be in process, concealed beneath a busy, important, and turbulent Term.

As a matter of format, the strategy for properly undertaking that exploration will be to cut first horizontally and then vertically; to proceed to sweep across the Term on horseback, to borrow Karl Llewellyn's metaphor, and then take up a series of three case studies, or better, vignettes, which between them allow a further look at the question of continuity and frame the perplexities in the contemporary business of the Supreme Court of the United States. The real information as to what the Court did during the Term will, as always, be left to the extended Note that follows.

I. Across the Term on Horseback

We begin with some statistical gossip.

One obvious continuity is in the sheer workload of the Court, which compared favorably to other Terms. There were, memorandum orders apart, some 122 decisions with opinions, with the nine Justices together producing some 283 opinions. The business, as in prior years, continued to cluster heavily in certain areas: race, criminal procedure, freedom of speech, church and state, and the election process. These five rubrics accounted for some 68 cases, or over one-half the total workload. The Term may well have been the most productive first amendment year in the Court's history; I count 23 freedom of speech decisions, a number which can best be appreciated by the reminder that when Zechariah Chafee first published his classic Freedom of Speech in 1920 he had fewer cases to cover. One further datum, purely subjective, which may add a nuance to this gross profile: on my scorecard some 81 of the 122 decisions were rated as of special interest.

A statistical look at the new Court provides some indication

President and Congress to curtail the Court. P. KURLAND, supra note 1, at 49-50. Arguably, none of these possibilities has yet fully eventuated, suggesting that perhaps even the President cannot so readily tell whether he has won or lost.

8 Llewellyn, Across Sales on Horseback, 52 HARV. L. REV. 725 (1939).

9 Many of the numbers concerning the 1970 Term which follow are taken from the statistical summaries which appear infra at 344. The rest are my own compilations. For data supporting the comparisons made in this section with past Terms, see, e.g., The Supreme Court, 1969 Term, 84 HARV. L. REV. 1, 247-55 (1970); The Supreme Court, 1968 Term, 83 HARV. L. REV. 7, 277-82 (1969).
of its voting patterns, one which is suggestive of the extent to which it is replacing the Warren Court. (i) As the press detected early, and nicknamed the "Minnesota Twin" phenomenon, the two new Justices voted as a pair. In a Court which was unanimous less than a fifth of the time, the Chief Justice and Justice Blackmun joined in the same opinion 107 times and voted together on 113 of 119 occasions. On 100 of those instances they were voting with the majority, leaving 13 other instances in which they were paired in dissent. (ii) Justices Brennan, Douglas, and Marshall appeared to emerge as the core of the old Warren Court. They voted together some 90 times. On no less than 18 of those occasions the trio was voting together in dissent. These 18 cases together with the 13 Burger-Blackmun dissents furnish qualitative yardsticks for measuring the impact of the new Court on the old. (iii) Justice Black complicated


11 Of course, Justice Marshall was scarcely an "old" member. He was appointed to the Court in 1967, only two years prior to Chief Justice Burger.

12 The three Justices were alone in dissent in only 5 of these 18 cases; they were joined 7 times by Justice Black and 6 times by either Justice White, Stewart, or Harlan.

any neat drawing of battlelines; he joined forces with the Brennan-Douglas-Marshall bloc on 70 of the 90 occasions when the trio voted together. But on nine occasions when the trio was part of a majority, Justice Black was in dissent. More strikingly,

approve federally financed low-income public housing) (Brennan & Marshall, JJ., dissenting; Douglas, J., not participating); McGautha v. California, 402 U.S. 183 (1971) (approving unitary trial for determination of guilt and sentencing, and standardless jury determinations, in death penalty cases);
California v. Byers, 402 U.S. 424 (1971) (upholding state hit-and-run laws against fifth amendment challenge);
Nelson v. O'Neil, 402 U.S. 622 (1971) (rejecting confrontation clause challenge to admission of hearsay when declarant has testified);
Whitcomb v. Chavis, 403 U.S. 124 (1971) (upholding multi-member legislative districts);
Palmer v. Thompson, 403 U.S. 217 (1971) (upholding closing of municipal swimming pools after federal desegregation order);
McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (refusing to require jury trials in juvenile delinquency proceedings);
United States v. Harris, 403 U.S. 573 (1971) (lowering requirements for affidavits to obtain search warrants);

Compare also Perez v. Ledesma, 401 U.S. 82 (1971) (barring federal intervention in state obscenity prosecution), where all three dissented, but on different grounds.

(ii) The Burger-Blackmun "yardstick" includes the following cases:
Oregon v. Mitchell, 400 U.S. 112 (1970) (upholding Congressional grant of eighteen-year-old vote in federal elections);
Wisconsin v. Constantineau, 400 U.S. 433 (1971) (invalidating statute allowing police to bar sale of liquor to "excessive drinkers" without notice or hearings);
Baird v. State Bar of Arizona, 401 U.S. 1 (1971) (disallowing questions relating to mere membership in subversive organizations in screening of bar applicants);
In re Stolar, 401 U.S. 23 (1971) (disallowing demand for blanket disclosure of organizational memberships in screening of bar applicants);
United States v. Randall, 401 U.S. 513 (1971) (holding that claim for federal taxes cannot receive priority over costs of administering bankruptcy proceeding); Whitely v. Warden, 401 U.S. 560 (1971) (invalidating arrest based on police bulletin issued without probable cause);
United States v. United States Coin & Currency, 401 U.S. 725 (1971) (giving retroactive effect to Court decisions invalidating gambling tax return requirements);
Coates v. City of Cincinnati, 402 U.S. 611 (1971) (invalidating ordinance barring public assemblies accompanied by "annoying" conduct);
Perez v. Campbell, 402 U.S. 637 (1971) (overturning, as conflicting with federal Bankruptcy Act, state statute which required suspension of drivers' licenses until judgment resulting from accident satisfied);
Cohen v. California, 403 U.S. 15 (1971) (upholding first amendment protection for use of profanity);
on the 18 occasions when they were in dissent, Justice Black was with the majority 11 times, four of those times as the author of the majority opinion.\(^\text{14}\)

In these somewhat over-simplified statistical terms the picture is that of a Court with two wings: one, the new wing, consisting of Chief Justice Burger and Justice Blackmun, joined not infrequently by Justice Black; the other, the old wing, consisting of Justices Brennan, Douglas and Marshall.

We come now to what I find the most interesting of the voting patterns. Not infrequently in a group of nine with two opposed subgroups, a middle group will exercise considerable power as a swing group. Last Term that role was played by Justices Harlan, Stewart and White. They voted together 77 times, which is substantially less than the frequency shown by the Chief Justice and Justice Blackmun or by the trio of Justices Brennan, Douglas and Marshall, and hence were arguably not a true bloc. But the telltale fact is that whenever they voted together, they formed part of the majority; there were literally no occasions during the Term when this trio found itself in the minority.\(^\text{15}\)

The numbers simply confirm an impression one gets while reading the cases, namely, that the critical votes were in the hands of Justices Harlan, Stewart and White. Unless at least one of the three went along, there could be no majority. This meant that modification of the law and doctrine handed on by the Warren Court was subject to a veto from these three Justices.\(^\text{16}\)

Particularly striking was the special place these circumstances gave to Justice Harlan, underscoring his role as "professional conscience." He produced only eight majority opinions, several in minor cases. But he also furnished 18 dissenting opinions and, what is most distinctive about his 45 opinions for the Term, 19 concurring opinions. Several were major efforts to rationalize rapidly expanding sets of precedents and will undoubtedly receive major attention from commentators: the retroactivity dissenting opinion in Mackey v. United States;\(^\text{17}\) the probable cause dissent in United States v. Harris;\(^\text{18}\) the concurring opinion on

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\(^\text{15}\)But see Hickel v. Oil Shale Corp., 400 U.S. 48 (1970), where Justices Harlan and White did not participate and Justice Stewart dissented.

\(^\text{16}\)I do not, of course, suggest that Justices Harlan, Stewart, and White literally had the power to control the Court at their whim; their influence obviously depended on their retaining their doctrinal positions.

\(^\text{17}\)401 U.S. 667 (1971).

\(^\text{18}\)403 U.S. 573 (1971).
confrontation and the hearsay rule in *Dutton v. Evans*;\(^{19}\) the concurring opinion on self-incrimination in *California v. Byers*;\(^{20}\) and a majority opinion in *Cohen v. California*,\(^{21}\) which will endure as a helpful, and remarkably gallant, contribution to first amendment theory.

It may seem ironic that the fate of the Warren Court should have rested with the three Justices who were the least enthusiastic about its work. But a chief lesson from the 1970 Term may be that the fate could have been in far less congenial hands. And the dramatic fact about the Term, underscored by the 6–3 vote in the second *New York Times* case,\(^{22}\) was the inability of the Chief Justice to win over steadily the three Justices.

The Term produced other ironies for the new Chief Justice. Like Earl Warren, he was given a great case early in his term on the Court; but, unlike Warren, he was unable, and unwilling, to make the case his trademark as the segregation case was to become Warren's. Moreover, he gave the impression of strong leadership primarily in the school desegregation cases and in *Griggs v. Duke Power Co.*,\(^{23}\) the Civil Rights employment case, occasions on which, speaking loosely, he was following in the footsteps of the Warren Court.

I turn now to a limited look at the substantive decision patterns summarized by the preceding statistical data. Without aspiring to be exhaustive, I suggest two dimensions along which many cases from the Term can readily be lined up: (i) cases showing a reaffirmation of old values and principles; (ii) cases in which the Court declined to take the next step. The first category can, if we wish, be read as one measure of the degree to which the Burger Court has followed the Warren Court; similarly, the second category can be viewed as one measure of the degree to which the new Court has differed from the old.

Two illustrations of the reaffirmation of old values and principles will suffice. In the series of school cases,\(^{24}\) a unanimous Court reaffirmed the objective of eradicating dual school systems in the South and held that when busing was an indispensable means toward this end, compulsory busing was a proper part of a school desegregation plan. A lot has happened since *Brown I*, and

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\(^{19}\) 400 U.S. 74 (1970).


\(^{21}\) 403 U.S. 15 (1971).


\(^{23}\) 401 U.S. 424 (1971).

a formidable expertise and idiom has been built up about school plans, making the contemporary desegregation case read somewhat like the corporate reorganization case of the thirties; but the Court in the recent cases has shown itself comfortable with the almost non-judicial nature of the issues and with the special data brought to bear on them. One cannot, I think, confidently predict what will happen when the scrutiny moves from dual school systems in the South to de facto dual school systems in the North.\textsuperscript{25} For thus far the Court has relied heavily on the fact that Southern dual school systems were initially a result of state-dictated segregation.

Possibly more impressive, therefore, as evidence of the Court's commitment to eradicating the consequences of slavery was its handling of \textit{Griggs v. Duke Power Co.},\textsuperscript{26} which presented under the Civil Rights Act the question of employee tests. In another unanimous decision, with a strong opinion by the Chief Justice, the Court meticulously worked its way through a difficult problem\textsuperscript{27} to hold invalid an intelligence test which was neutral on its face and used in good faith by the employer. It did so because in operation the test had barred a disproportionate number of Negroes and because no valid business necessity or function for the test had been shown. The Court was thus applying the "freezing principle," which it had first fashioned in the voting cases,\textsuperscript{28} to employment.

But the nature of the problems the Court faced precludes any sure generalizations about its position on race. An appreciation of the complexity of the Court's interaction with the race issue during this single Term requires taking into account: \textit{Griffin v. Breckenridge},\textsuperscript{29} where the Court, again unanimous, overruled the state action requirement of \textit{Collins v. Hardyman}\textsuperscript{30} and construed the old Civil Rights Acts to reach racially motivated pri-
inate conspiracies to commit violence; Johnson v. Mississippi,\(^3\) where a unanimous Court upset a Mississippi court's contempt citation of a civil rights worker; James v. Valtierra,\(^4\) where a sharply divided Court upheld a provision requiring local referenda on low-cost public housing projects; and especially Palmer v. Thompson,\(^5\) where the Court, again deeply divided, upheld the closing of municipal swimming pools that had been ordered integrated.\(^6\)

A second illustration of reaffirmation of principle by the new Court is its adherence in four cases this term to the precedent of New York Times Co. v. Sullivan,\(^7\) which I have praised elsewhere as one of the greatest of the Court's freedom of speech cases.\(^8\) The precedent, which has during its short life survived challenges from Justices Black and Douglas on the one hand and from Justice Harlan on the other,\(^9\) may now face a new challenge in Rosenbloom v. Metromedia, Inc.\(^10\) from Justices Marshall and Stewart, who urged the Court to proceed with its reform of the law of defamation, not by modifying the rules as to strict liability, but by modifying the rules as to the measure of damages. The Rosenbloom case also marked two extensions of the New York Times doctrine. It was applied to broadcasting and to the defamation of an essentially private person whose affairs somehow became the public's concern.\(^11\)

As already noted, it was in general an exceptional first amendment Term, even without the historic second New York Times case: one can find not only the gallant decision in Cohen but also reaffirmations of such precedents as Shelton v. Tucker,\(^12\) Freedman v. Maryland,\(^13\) and Cox v. Louisiana.\(^14\) But in matters of free speech, as in matters of race, the Court did not move in

\(^3\) 403 U.S. 212 (1971).
\(^5\) 403 U.S. 217 (1971).
\(^6\) In Valtierra and Palmer the majority opinions were by Justice Black. The Palmer case, richly interesting as a doctrinal problem, was made additionally memorable by an eloquent and passionate dissent by Justice White.
\(^7\) 376 U.S. 254 (1964).
\(^10\) See Kalven, supra note 37.
\(^11\) 384 U.S. 479 (1966); in In re Stolar, 401 U.S. 23 (1971).
\(^12\) 380 U.S. 51 (1965); in Blount v. Rizzi, 400 U.S. 410 (1971). See also United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971), where the Court, to avoid constitutional doubts generated by Freedman, executed an heroic construction of the statute.
a simple straight line to a desired value. There was during the Term a counter-development, perhaps best described as the chilling of Dombrowski v. Pfister. Dombrowski had provided for federal court injunctions of threatened state criminal prosecutions when circumstances demanded such relief to prevent the "chilling" of the exercise of first amendment rights. In a series of six cases, the Court declined to apply Dombrowski, and did so in a manner so emphatic as to indicate that the growth prospects of Dombrowski as a precedent, which had seemed promising, were being deliberately blunted. Dombrowski was not overruled, but indications are that it may suffer the famous fate of International News Service v. Associated Press. Whatever the problems of bounding it as a precedent, there could be no doubt that Dombrowski had reflected an important idea and had armed lawyers in first amendment cases with a powerful weapon. Dombrowski exemplified the astute and admirable touch of Justice Brennan in first amendment matters, yet the Court disposed of it in such a way that the Justice, who found over 30 occasions for dissent during the Term, concurred specially in each of the cases which did the most damage to the reputation of Dombrowski, inviting the suspicion that the cases could have been, uneventfully, distinguished. The majority opinions in the three basic cases were written by Justice Black, who had expressed his misgivings about Dombrowski on prior occasions.

While the new Court generally reaffirmed the commitments of the Warren Court in matters of race and freedom of speech, there were other cases where, despite striking invitations, it refused to take the next big step. And it is in these cases that I suggest it perhaps looks different from the Warren Court. Here I attempt no more than to name the case and the step. In

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43 380 U.S. 479 (1965).
45 248 U.S. 215 (1918) (unfair competition found in appropriation and resale of news taken from early editions of papers subscribing to competitor's wire service). Judge Learned Hand made a prestigious attempt to limit it to its facts in Cheney Bros. v. Doris Silk Corp., 35 F.2d 279, 280 (2d Cir. 1929) (copying of dress styles), observing:

While it is of course true that law ordinarily speaks in general terms, there are cases where the occasion is at once the justification for, and the limit of, what is decided. This appears to be such an instance; we think that no more was covered than situations substantially similar to those then at bar.

States v. Vuitch 47 the Court rejected the contention that a statute making abortions criminal unless necessary for the preservation of the mother's life or health was unconstitutionally vague. In Dutton v. Evans 48 it resisted an effort to treat all exceptions to the hearsay rule as denials of the right of confrontation and hence subject to constitutional evaluation. In McKeiver v. Pennsylvania 49 it declined to extend the right of jury trial to juvenile court proceedings. In Law Students Civil Rights Research Council, Inc. v. Wadmond 50 the Court deflected a challenge to New York bar procedures as a whole for screening new applicants. In United States v. Reidel 51 and United States v. Thirty-Seven Photographs, 52 read together, the Court declined to hold that there was no longer a constitutional basis for prohibiting the distribution of obscene materials to consenting adults. In Gillette v. United States 53 the Court refused to extend conscientious objector status to the selective objector, even though it was willing to concede that such objections were religiously based. And, finally, in McGautha v. California 54 it declined to hold the death penalty unconstitutional where its application was by a jury not supplied with standards for deciding the question.

Although this list of non-steps may be the best measure of the difference between the Warren Court and the Burger Court, the difference is again more subtle than may be popularly supposed. These are steps the Burger Court did not take; they are for the most part steps that the Warren Court just possibly might have taken. But whatever the possibility of making accurate distinctions between the Courts on the basis of such early returns, one conclusion about the Term as a whole is incontrovertible: any hope of lowering the visibility of the Court in American life, which had seemed an aspiration of the Administration and the new Chief Justice, had by the end of June failed wonderfully. The Burger Court found itself deciding its last case of the Term with the whole world watching. Moreover, as a result of an understandable and not unprecedented tendency of the Court to

49 403 U.S. 528 (1971).
50 401 U.S. 154 (1971). By the time the controversy reached the Court, there was only a small step left to take in order to overturn the procedures. Many aspects of the original scheme had been knocked out below, leaving only a remnant that verged on the absurd for the Court to pass on. The Court ratified the constitutionality of the decimated scheme, and the bar was able to retain its own special "flag salute."
hold difficult opinions for the end of the Term, it kept at least a quarter of its decisions for the final few weeks. The result was that a Court which began the year notably unbusy and cautious exited in a flood of excitement and headlines. Indeed, on one day it so bunched matters as to announce a major denial of the constitutionality of state aid to parochial schools, a reversal of the death sentence for Richard Speck, who had been convicted of multiple murders in an extravagantly publicized crime some five years earlier, and a reversal of the draft conviction of Muhammad Ali bringing to mind David Riesman's observation, made during the days of the Warren Court, that the Supreme Court could use a public relations counsel. However deeply entrenched the Court might be in the American political structure, the 1970 Term makes it evident once again that the Court is no politician.

Indeed the formula that the Court is no politician could provide a text for an essay on its distinctiveness and usefulness as a political forum. The current Term furnishes rich material for such a venture. There are not only the major facts that in the second New York Times case the Court, while we were at war, withstood all the pressures of patriotism and of Government, and that in the series of school desegregation cases, the Court could hardly be said to have supported a "Southern Strategy"; there is also the evidence from less salient cases such as Groppi v. Wisconsin and Mayberry v. Pennsylvania. In the first, the Court upheld the right to a change of venue for misdemeanors, thus upsetting the conviction of a well-known, aggressive organizer of mass demonstrations; and in the second it upheld the right to trial by an independent judge in a case of contempt for improper courtroom behavior, knowing that the ruling would impeach the contempt convictions levied by Judge Hoffman in the Chicago Conspiracy trial. The moral is not that the Court is

28 Clay, aka Ali v. United States, 403 U.S. 698 (1971). In light of the longstanding furor over Ali's position on the draft, the Court's last sentence bears quoting: "The long established rule of law embodied in these settled precedents clearly requires that the judgment before us be reversed." Id. at 705.
29 400 U.S. 505 (1971).
31 On March 25, 1971, on the basis of Mayberry, the United States Attorney for the Northern District of Illinois moved to reverse the contempt citations of Dellinger, Davis, Hayden, Hoffman, Rubin, Weiner, and Froines and to set them for hearing before a judge other than the one who entered judgment in the court below.
insensitive to political pressures and considerations but that, relieved of running for office and informed by role and tradition, it continually makes moves that no politician would be imprudent enough, or disinterested enough, to make.

The vigorous reassertion of its place on center stage of American life tempts one to go again to de Tocqueville's oft cited observation, made a century and a half ago, that "[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." While it might be a fruitful exercise to inventory the key issues of the day to see how many still fall beyond the Court's reach, we shall pause for a moment only on the narrower question of the Court's willingness to grapple with the issues of the Vietnam War.

In *Massachusetts v. Laird* the state sought leave to file a complaint asking for declaratory judgment that the war was unconstitutional and for an injunction to prevent the Secretary of Defense from sending any inhabitant of Massachusetts to Indochina for the purpose of participating in combat or supporting combat troops in the Vietnam War. The frontal attack, to no one's surprise, failed. The Court summarily denied the motion for leave to file, without setting it down for argument. The disposition was not unanimous; Justices Douglas, Harlan, and Stewart would have set the motion down for argument, and Justice Douglas filed an extended dissent analyzing the issues of standing and political questions.

The Court could not, however, escape other issues which impinged sharply on the legitimacy of the War. In *Gillette v. United States* it confronted what might be conceptualized as an effort to hold a referendum on the justice of the war among those subject to service in it. It decided, with only Justice Douglas in dissent, that those objecting to service in the Vietnam War but not to war in general were not entitled under the Selective Service statute or the Constitution to be relieved of the obliga-

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62 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 280 (Bradley ed. 1945). Although de Tocqueville is throughout his book much impressed with the role of the Supreme Court, the famous sentence can be read equally as commentary on the role of the lawyer in America. Compare, however, Justice Frankfurter's recollection of the de Tocqueville observation:

Tocqueville, in 1832, when he wrote his great book, had the discernment to see what later writers have so often not seen, that by the very nature of our Constitution practically every political question eventually, with us, turns into a judicial question. The question may become somewhat mutilated in the process, but come before the Court it will.


64 400 U.S. 886.
tion to serve. In *Cohen v. California* it confronted another variant of the efforts to impeach the war and the draft, expressed this time with blunt vulgarity, and upheld the protest as an exercise of free speech. And, in the second *New York Times* case, the Court confronted a situation resulting from an effort to impeach the war in the public forum and declined to interfere. In so doing, the Court not only demonstrated anew its high degree of visibility on the center stage of American life, but also reaffirmed, in its resistance to governmental pressure, the distinctive nature of its political role.

II. THREE VIGNETTES

Holmes said that the courts made law, but only interstitially. I would add that lawyers philosophize about law, but only interstitially. The legal mind is most comfortable when moved to reflection by a concrete instance held before it, like Hamlet with Yorick's skull. The three concrete instances which we take up for the remainder of this essay are suggestive, if not indeed paradigmatic, of the nature of the Court's task and of the pressures and perplexities that accompany it.

Each instance involved a social issue of importance — access to the courts for indigents, the death penalty, freedom of the press. Each showed something of the intellectual demands made by the Court's work. For example, in *Boddie v. Connecticut*, Justice Harlan was pushed to a sustained effort to probe the fundamentals of the due process ideal, while, by contrast, Justices Douglas and Brennan found a similar result in the already charted realms of equal protection doctrine. In *McGautha v. California*, the Justices were forced to speculate publicly about profound aspects of discretion and the rule of law — a level of intellectual exercise rarely required of others in the political process. And in *New York Times Co. v. United States*, the Justices, under severe time pressures and intense scrutiny, had to face the task of resolving a dispute touching concurrently on the security of a nation at war and on the meaning of the tradition of a free press in America.

The instances will, I trust, speak for themselves; even so, I note briefly various dimensions on which they can be arrayed: the novelty of the social issue as a matter for resolution by constitutional means; the potential for resolving the issue by political means other than through appeal to the Court; the salience to

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69 403 U.S. 713 (1971).
the public of the Court's work in each instance; and finally the light the instances may throw on the voting patterns of the new Court.

A. Case Vignette: Boddie v. Connecticut

Perhaps it is simply a reflection of a new impetus from "poverty law," but a lawyer Rip Van Winkle awakening for the 1970 Term would, I think, have been most surprised by the new corners into which contemporary social criticism has poked a constitutional yardstick. The heritage of the Warren Court extends not only to a set of decisions in the United States Reports, but also to a climate of opinion generated in prospective litigants and their counsel, who may be slower to change their minds than the new Court. Thus it seems likely that the Burger Court will continue to get Warren Court business for some years to come. The interaction of Boddie with these new winds of constitutional challenge produces an illuminating situation.

Connecticut law charges conventional entry and service fees in divorce cases totaling, in most cases, $45 to $60. Plaintiffs challenged the constitutionality of this requirement as applied to them and to others in their situation, alleging that since they were indigent, the fees operated to deny them access to the courts for the purpose of seeking divorces. The Court upheld the plaintiffs' challenge on constitutional grounds by an 8–1 vote.

There were four opinions: a majority opinion by Justice Harlan, a dissenting opinion by Justice Black, and concurring opinions by Justices Brennan and Douglas. The four opinions engaged each other in a lively dialogue. All Justices agreed, as they had to in light of prior cases, that at some point the consequences of indigency are constitutionally relevant. But they offered premises of differing scope for handling the case before them, thus charting a battlefield on which much future constitutional controversy will

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70 This is especially true because of the unwritten rule that the votes of four Justices are sufficient for granting a petition for certiorari. See generally Rogers v. Missouri Pac. R.R. Co., 352 U.S. 500, 559–62 (1957) (Harlan, J., concurring and dissenting).


72 See also Tate v. Short, 401 U.S. 395 (1971), in which the Court invalidated imprisonment of an indigent criminal unable to pay a fine where the fine was the only sanction. The majority predicated the decision on a violation of the equal protection clause. The Court found the case easy because the facts were similar to those in Williams v. Illinois, 399 U.S. 235 (1970).

73 401 U.S. at 372.

74 Id. at 372.
surely take place. The narrowest was that of Justice Black, who would have restricted the Court's scrutiny to criteria furnished by the due process clause and to challenges made by criminal defendants; the next in scope was the majority position of Justice Harlan, who also limited scrutiny to due process criteria but extended protection to some civil litigants under specially defined circumstances; then there was Justice Brennan who argued that due process criteria required extending the protection to all litigants, civil and criminal, and who acknowledged the possibility of appeal also to the equal protection clause; and finally there was the position of Justice Douglas who, reminded too much of Lochner v. New York, would have rejected due process criteria and, by appealing to the equal protection clause, would have extended judicial protection of indigents beyond access to the courts to all fee requirements imposed by government action.

This level of debate was crossed by another, between those best of adversaries, Justices Harlan and Black, about the nature of constitutional criteria. The debate resonates against recent popular preoccupations with “strict constructionists.” Justice Harlan gave powerful expression to the slow working out by the Court of the meaning of the “central” principle of due process, evoking “[t]hese due process decisions, representing over a hundred years of effort by this Court to give concrete embodiment to this concept . . . .” And again, “It is upon this premise that this Court has through years of adjudication put flesh upon the due process principle.” As counterpoint, there was the stern and familiar admonition from Justice Black that all this brooding over due process leaves us in the end with “a shocking to the conscience” test of constitutionality. “Such a test,” he added, “willfully throws away the certainty and security that lies in a written constitution . . . .”

The drama of the case for our present purposes is that the Court found itself unable to resist the challenge of the particular case before it, but may soon find it is unable to limit the consequences for other situations of what it decided. Justice Harlan, in a closely argued opinion, aspired to move the Court forward just an inch without committing it to starting down the road to a
small social revolution. He relied on the circumstance that the state does not permit citizens to adjust their marital differences their own way and privately rescind their marriage contract; they must litigate their dispute in a court. This monopolization by the state of the sole means for dissolving a marriage was for him the crucial fact about the plaintiffs' grievance, and the fact to which he was responding in granting them relief. The combination of state monopolization and fee requirement operated "to foreclose a particular party's opportunity to be heard," something akin to a procedural right, and there was no compelling state interest justifying this denial.

Whether the Court will be able to hold the Harlan line as other cases arise rests with the future. Perhaps, as he can be said to have done on other occasions, Justice Harlan was resting on too subtle a distinction. Clearly, Justices Brennan and Douglas already find his line drawn in too niggardly a fashion. Justice Brennan argued forcefully that he could see no difference between the plight of the Boddie plaintiffs and the plight of other indigent plaintiffs who find themselves unable to settle their differences and hence need the binding arbitration of the courts if they are to have their rights declared. Justice Douglas argued that all classifications directly tied to poverty are "suspect." The future may not be long in coming. On May 3 the Court addressed itself to eight cases pending review on appeal or on petition for certiorari in which an effort was made to invoke Boddie as a precedent. The Court noted probable jurisdiction in one, denied review in five, and remanded two for reconsideration in light of Boddie. Justices Black and Douglas appended separate opinions to the order, contending that this new batch of cases, harbingers of cases to come, had already impeached the line drawn in Boddie. Justice Black raised the specter of providing counsel for indigents in all civil litigation, and Justice Douglas offered the battle cry: "Courts ought not be a private preserve for the affluent."

In light of these difficulties and since, whatever the general urgency of access to the courts for indigents, divorce for those

\[\text{\textsuperscript{83} Id. at 380.}\]
\[\text{\textsuperscript{84} See, e.g., Lerner v. Casey, 357 U.S. 468, 470-79 (1958) (distinguishing between discharging an employee for claiming the fifth amendment and for refusing to answer).}\]
\[\text{\textsuperscript{85} 401 U.S. at 387.}\]
\[\text{\textsuperscript{86} 401 U.S. at 385.}\]
\[\text{\textsuperscript{87} For a list of the cases, see Meltzer v. C. Buck LeCraw & Co., 402 U.S. 954 (1971) (Black, J., dissenting from denial of certiorari).}\]
\[\text{\textsuperscript{88} Id. at 955-60 (Black, J.), 961 (Douglas, J.).}\]
\[\text{\textsuperscript{89} Id. at 961.}\]
on welfare may not pose in itself an urgent social problem, we may ask why Justice Harlan was willing to risk pushing the new Court "into this thicket." The answer is that the clarity of his perception of grievance and the integrity of his logic left him, and the Court, no way to deny the merits of the plaintiffs' challenge. It was another instance of the Court showing itself to be no politician.

B. Case Vignette: McGautha v. California

"The quality of mercy," Portia admonished Shylock, "is not strained." We have all at one time or another puzzled a little over that odd use of "strained." McGautha v. California, in which the Court wrestled with the death penalty, suggests new insights into its meaning.

For many years the Supreme Court has been passing upon issues of criminal procedure in the shadow of the death penalty and in such a context has shown a special sensitivity to alleged errors. More recently, however, at a time when legislative reform of the death sentence has not been without promise, there has been mounted, as a complement to action on the legislative front, a sustained attack on constitutional grounds. There seems to be a consensus that sooner or later the death penalty will be abolished throughout the United States, as it has been now in seventy-three other nations. The question remains whether the projected change will be made by jury leniency, executive clemency, legislation, or judicial review in the Supreme Court.

The Court has been placed under unusual pressures, not only by the large number of appeals which have steadily thrust the issue upon it, but by the fact that executions have come to a halt while the country awaits a judicial response. The last execution was in 1967, and there are now about 650 prisoners waiting on Death Row. This may be an instance in which the very existence of constitutional litigation will prove more significant than its outcome, underscoring the importance for the dynamics of American political life of the forum provided by the Court. What-

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91 W. Shakespeare, Merchant of Venice, Act IV, Sc. i, Line 184.
94 The death penalty has, in recent years, been a target of major litigation by the NAACP Legal Defense and Education Fund. There was a meeting in New York on May 15, 1971, of lawyers from 33 states who have Death Row clients to discuss strategy in light of the McGautha decision.
ever the Court ultimately decides about the penalty, the moratorium engendered by the pending litigation, by building up that awesome population in Death Row, may render it politically impossible to carry out so many executions.

The attack in the McGautha case went not to the constitutionality of the death penalty as such or to the familiar debate on its merits, but simply to the standards by which it was imposed in California. The question has wide leverage, however, because American statutes in the past century, while reducing the categories of crime for which the death sentence was permissible, have generally not made it mandatory within categories. The result is that its actual allocation has been delegated by the legislature to the trier of the case, and in many instances that has meant the jury. The major focus of the challenge to the death penalty during the 1970 Term, then, was on whether it was constitutional to give the jury complete discretion in handling it. A decision against the California procedure would have impeached the law in many other states which still retained the penalty.

There are five further points to note about the posture of the issue as the Court confronted it: (i) the jury's discretionary power over the death penalty extended only to judgments among a narrow, sharply defined group, those whom the statute had made eligible for it; (ii) a decision striking down the challenged procedures would force legislatures to choose between either providing suitable standards for deciding who was to die or giving up the death penalty altogether; (iii) the constitutional debate among the Justices would have to be couched entirely in the idiom of due process; since there was no legislative classification, there was no possibility of equal protection analysis; (iv) the instruction given in McGautha left no doubt that the jury was not given standards: "Now, beyond prescribing the two alternative penalties, the law itself provides no standard for the guidance of the jury in the selection of the penalty, but, rather, commits the whole matter of determining which of the two penalties shall be fixed to the judgment, conscience, and absolute discretion of the jury"; (v) if the Court were to reject the constitutional chal-

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97 The Court stayed the decision in McGautha pending disposition on a petition for rehearing. 39 U.S.L.W. 3566 (1971). More important, the Court has granted certiorari, 403 U.S. 952 (1971), on four cases which challenge the death penalty on the ground that it violates the eighth amendment prohibition against cruel and unusual punishment.

98 This attack on standardless sentencing had been maturing for some years. See Note, A Study of the California Penalty Jury in First-Degree Murder Cases, 21 STAN. L. REV. 1297 (1969).

99 See id. at 1432-38 (inventory of capital sentencing procedures in all states).

100 402 U.S. at 190.
lenge, it would risk appearing to assert that the "rule of law" governed all legal issues except this ultimate one.

In a 6 to 3 decision the Court upheld the standardless jury charge. The majority opinion was by Justice Harlan. There were dissenting opinions by Justice Douglas and Justice Brennan, who was joined by Justice Marshall, and a concurring opinion by Justice Black. The basic debate on standards was joined by Justices Harlan and Brennan, who both did honor to the profundity of the question before them.

The standards challenge contained a paradox. The state could meet the due process objection by being less merciful. That is, it could eliminate jury discretion and make death mandatory for a given class of offenses. Justice Harlan reviewed the history of legislation on the death penalty and established, among other things, that standardless jury sentencing came into existence to provide for legitimate dispensations of mercy. Presumably, although Justice Harlan did not stop to spell it out, the point is that the jury as an agency for dispensing mercy satisfies due process.

Petitioners, however, made a brilliant rejoinder to this argument from history. Relying on the empirical proposition that the number actually sentenced to death is far less today than those made eligible to die by statute, they argued that we are no longer dealing with the rare case of mercy. Rather, they insisted, the exceptional case today has become the one in which the death sentence is given. Legislative tolerance of this scheme indicates an implicit legislative judgment that the majority of those guilty of capital crimes should live. Hence, they urged, it is "constitutionally intolerable" for the legislature to delegate to the jury the total task of selecting the minority who dies. The jury is no

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101 Not all the discussion was devoted to the issue of death sentencing standards. A companion case disposed of in the same decision, Crampton v. Ohio, required the Court to decide whether a unitary trial for the determination of both guilt and punishment was constitutional. A good part of the Harlan opinion and all of the Douglas dissent were devoted to the unitary trial challenge. Moreover, Justice Black confined his brief concurring opinion to voicing again his distaste for the "shock of conscience" test of due process and to indicating, by way of anticipation of a cruel and unusual punishment challenge to the death penalty, that he saw nothing in the eighth amendment that invalidated the death sentence.

102 402 U.S. at 185-225.
103 Id. at 226-48.
104 Id. at 248-312.
105 Id. at 225-26.
106 Id. at 297-203.
107 Id. at 203-04.
108 Id. at 204.
longer being asked to dispense mercy, so the argument ran, it is being asked to select candidates for death.

Justice Harlan, in turn, met this challenge by arguing convincingly that experience has shown there is no adequate alternative. To identify death cases "before the fact" and to state the criteria in an intelligible formula "appear to be," as he put it, "tasks which are beyond present human ability." Due process, then, is satisfied because the legislature has done all that is humanly possible under the circumstances to provide guidance. We have here, apparently, a case which falls beyond the reach of the rule of law.

For Justice Brennan there could not be such a case in the Anglo-American legal order. He wrote a remarkable, personal essay to contest the Harlan thesis. His opinion is notable not only for its concern and its level of generalization but for the wide range of materials brought to bear in argument. From a major attempt to "restate" the law of due process, he derived two core components: (i) "the fundamental policy choices underlying any exercise of state power are explicitly articulated by some responsible organ of state government"; and (ii) "due process of law is denied by state procedural mechanisms that allow for the exercise of arbitrary power without providing any means whereby arbitrary action may be reviewed or corrected." He could not see why the policy choices as to the death penalty are so different from other intractable problems — many of which he surveyed — which the law has been able to deal with in a less arbitrary fashion. And above all, he could not see why the state should not be required to try to be creative and devise ways to moderate the power granted the jury — and, at the very least, why the state should not be required to articulate which objectives it seeks to achieve by the imposition of the death penalty.

The issue of the death penalty, then, as it came to the Court in the 1970 Term, implicated ultimate questions about the place of discretion in the legal order. The Court's decision commits

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109 Id.
110 Id. at 270.
111 Id.
112 Id. at 273–81.
113 Id. at 280–87.
114 See generally K. Davis, Discretionary Justice (1969). There is also the question of the function of the jury as a legal institution. In the context of the present discussion, I call attention to some concluding observations in H. Kalven & H. Zeisel, The American Jury 498–99 (1966):

The jury thus represents a uniquely subtle distribution of official power, an unusual arrangement of checks and balances. It represents also an im-
it explicitly to placing the greatest reliance on the wisdom and strength of the jury. "The States are entitled to assume," Justice Harlan said, "that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision and will consider a variety of factors . . . ." 115 There is a note of praise for the jury system sounded here that has not been prominent in recent speeches by the Chief Justice about reforms in judicial administration.116

In the end I am inclined to agree with Justice Harlan that the allocation of the death penalty is an agonizing matter which cannot be regularized. That, at any rate, is the conclusion Professor Zeisel and I came to in our study of the jury when we compared decisions of the judge about the death penalty with those of the jury in the same case.117 Thus Justice Harlan would seem right that there was no constitutional oversight in failing in McGautha to provide standards for the jury.

But I do not think this exhausts the argument. Might one not argue that Justice Harlan's defense of the administration of the death penalty in California discloses a fatal flaw, a kind of reductio ad absurdum in the death penalty itself? What does it mean about the nature of the death penalty that either it cannot, so we are told, be administered through a set of rules guiding its allocation or that no responsible organ of government is willing to take on the burden of allocating it? What, that is, does it mean about the death penalty that its administration must depend so heavily on the quality of mercy?

C. Case Vignette: New York Times Co. v. United States

New York Times Co. v. United States 118 is the supreme instance this Term of the continuities in the work of the Court. The new Court could not avoid being involved centrally in a great national political struggle and spectacle. The Court's role with respect to freedom of speech and freedom of the press, forged in the

pressive way of building discretion, equity, and flexibility into a legal system . . . .

. . . . In the end an evaluation [of the jury system] must turn on one's jurisprudence, on how, given the limitations of human foresight, experience, and character one hopes to achieve the ideal of the rule of law.

115 402 U.S. at 207-08.
117 H. Kalven & H. Zeisel, supra note 114, at 448. The book also compares the patterns of executive clemency with those of judge and jury in allocating the death penalty. See also Note, supra note 98.
118 403 U.S. 713 (1971).
half century since Schenck v. United States, could not be cast aside. Everyone on all sides looked to it to arbitrate the controversy. The Justices themselves seemed to acknowledge that they were performing on a great national occasion: Justice Harlan in his dissent referred to "these great issues — as important as any that have arisen during my time on the Court"; the Court held an unprecedented Saturday session to accommodate argument and, in effect, held the Term open to accommodate decision; and each of the nine Justices paid homage to the stature of the controversy by filing a separate opinion.

Both Justices Harlan and Blackmun found it appropriate to quote Justice Holmes' dictum that "great cases . . . make bad law," a dictum which if taken literally would mean the Court must make a lot of bad law. The rejoinder in this instance is, I think, that at least in matters of the first amendment, great cases can make great contributions to a tradition, to that aura of importance which goes beyond the profile of technical doctrine. This time there was no way for the Court to narrow the impact a decision in favor of the Government would have had on that tradition. In this respect, New York Times Co. v. United States was an unqualified success and achievement.

The stresses generated by the first amendment issue in the context of the War were evident even among the Justices. There were rhetorical explosions from Justices Black and Blackmun. Justice Black stated: "And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell. . . . In revealing the workings of the government that led to the Vietnam war, the newspapers nobly did precisely that which the Founders hoped and trusted they would do." Justice Blackmun stated: "I hope that damage already has not been done. If, however, damage has been done, and if, with the Court's action today, these newspapers proceed to publish the critical documents and there results therefrom 'the death of soldiers, the destruction of alliances, the greatly increased difficulty of negotiation with our enemies, the inability of our diplomats to negotiate,' to which list I might add the factors of prolongation of the war and of

\[\text{Vol. 85:3} \quad \text{HeinOnline} \quad \text{85 Harv. L. Rev. 26 1971-1972}\]
further delay in the freeing of United States prisoners, then the Nation's people will know where the responsibility for these sad consequences rests." 125

The case arose, as everyone knows, as a result of an effort by the United States to enjoin two national newspapers, the *New York Times* and the *Washington Post*, from publishing, as the Court put it, "the contents of a classified study entitled 'History of U.S. Decision-Making Process on Viet Nam Policy'" 126 A difference in disposition between the Courts of Appeals for the Second Circuit and for the District of Columbia had left the *Post* free to publish and the *Times* enjoined from publishing pending a remand to the District Court for further hearings. Thus both the United States and the *Times* had reason to appeal to the Supreme Court.

To some extent the outcome was foreshadowed in the Court's order granting certiorari and setting the cases for argument. Justices Black, Brennan, Douglas, and Marshall announced that they would have denied certiorari in the *Post* case and vacated the interim restraint in the *Times* case, without setting the matter down for argument. 127 In the end the vote was 6 to 3 in favor of the newspapers, with Justices White and Stewart, pulled by the charisma of the first amendment, joining their Warren Court colleagues.

A brief per curiam order stated the governing syllogism: any system of prior restraints bears a heavy presumption against its constitutional validity; in these cases of prior restraint, the Government has not overcome that presumption. 128

Each Justice added an opinion. But the historic event did not produce historic opinions. The strain of the sudden emergence of the dispute and of the extraordinary time pressures under which the Justices were forced to act is visible; 129 such a case so late in a busy Term could only have imposed an intolerable burden on them. Although Justice Frankfurter had suggested that in important cases it would be well to follow the practice of seriatim opinions, in this instance the practice did not prove felicitous. The multiple opinions did not generate, as they did in *Boddie* or *McGautha*, a complex dialogue; there was little agreement as to

126 403 U.S. at 714.
127 *Id.* at 943-44.
128 *Id.* at 714.
129 The extraordinary strain stands in marked contrast to the lead time available to the Court in *Boddie*, which had been held over from the 1969 Term for reargument, and in *McGautha*, where there had been long advance warning that the standards challenge was coming.
what the issues were or as to the appropriate framework for analyzing and handling them. The difficulties arose, not only because of the time pressures on the Justices and the political spotlight in which they were asked to deliberate, but also, I would add, because the issues posed were genuinely novel and genuinely difficult.

No prior cases, so far as I know, had dealt with the issue of publication by the press of truthful information about government action challenged by the Government on security grounds. The World War I cases under the Espionage Act dealt with efforts to cause insubordination in the armed forces, to obstruct the recruiting service, or to publish false reports "with an intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies." Act of June 15, 1917, ch. 30, § 3, 40 Stat. 217, 219. Several newspapers were prosecuted criminally. Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 38-100 (1941). There have been innumerable cases upholding in varying degrees government screening of its employees on loyalty-security grounds against challenges by the employee. A major purpose of such programs has been to protect the regime of classified information.

The sparse legal commentary evidences the novelty of the precise constitutional question. See Z. CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 13-14 (1947) (discussing the issue entirely in terms of policy to be set by Congress); T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 112 (1966) (discussing the issue in terms of the policies to be set by the legislature and the executive). For a useful critique of existing policies by a political scientist, see F. Rourke, SECRECY AND PUBLICITY: DILEMMAS OF DEMOCRACY (1961).

In 1967 Congress enacted the Freedom of Information Act, 5 U.S.C. § 552 (1970), placing a duty on government agencies to make records "promptly available" and providing some measure of court enforcement. 5 U.S.C. § 552 (a)(3). The act was designed to create better access to the massive data in the files of administrative agencies and does not express a policy with respect to claims of national security. There are various exceptions from the statutory duty, including section 1(b)(1), 5 U.S.C. § 552 (b)(1), which covers matters "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy." See Davis, THE INFORMATION ACT: A PRELIMINARY ANALYSIS, 34 U. CHI. L. REV. 561 (1967); T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 671-73 (1970).

The most precisely on-point commentary is that provided in 1967 by Professor Davis in the course of his discussion of the Information Act, which deserves to be quoted in full:

In late 1961 President Kennedy and his advisers conferred about adding a military force of 15,000 men to the few hundred "military advisers" in Vietnam. Undersecretary George Ball said this would commit the prestige of the United States to the war and asked whether the others were prepared to commit 300,000 Americans to achieve a military solution. Ball said he was not. As Reston tells the story, "Rusk and McNamara both conceded that Ball's question was fair but also said yes, they were prepared to see it through. But the American people were not told that. The decision was seen by the public as a modest increase of the noncombatant American force, signifying no significant change in American policy...." Representatives of the press believe that such a policy choice should not be concealed but should be publicly understood and debated. This is a sample of the belief by the press that is a main political force behind the Information Act.

Yet the Act does precisely nothing to carry out the point of view of the
There is no doubt that it was a great case. Yet the precise issue as defined by the Court was narrow and likely to arise only infrequently. The existence of the case as legally framed depended upon the circumstances that the material bulked large and the Times decided against publishing it all in a single issue, although apparently that had been considered. Had it elected to do so, as Justice White noted, the Government would not have had opportunity to intervene in advance of publication, and the great concerns about prior restraints would not have been stirred. Next time, if there is a next time, the material may not be so bulky or the press may well decide to follow a different strategy.

Among the astonishingly large number of issues which the controversy touched — the case seems like an invention of press with respect to national defense and foreign policy. Instead, it strengthens the President's hand in withholding information on those subjects. The first exemption relieves from required disclosure "matters that are specifically required by Executive order to be kept secret in the interest of national defense or foreign policy." Under the Act the President may withhold information about national defense or foreign policy with the formal approval of Congress, previously lacking.

Davis, supra at 784-85 (footnotes omitted).

131 403 U.S. at 733.

132 There may also be a special difference in the facts of the Times case, since it involved use of actual documents rather than a paraphrase of their contents. The normal procedure has been to report the substance of documents as historical facts without relying so much on the verbatim form. For example, in Townsend Hoopes' book, The Limits of Intervention, there is a dramatic and detailed account of a crucial top-level meeting of Presidential advisers at which Clark Clifford is reported to have presented an extended argument against the Vietnam War. T. Hoopes, The Limits of Intervention 218-21 (1969). The propriety of such an account seems to have been taken for granted. The special feature of the Pentagon History was that it supplied, as it were, a transcript. It was, of course, part of the rhetoric of impeaching the Vietnam War to use the original documents rather than their contents. But one can only wonder how much it would have altered the controversy had less emphasis been placed on original document and how much this experience may affect future strategy of the press in such matters.

133 There is the matter of statutory construction on which several opinions, and especially that of Justice Marshall, dwelt. There is the important difference between discipline of government employees and discipline of the press. There is the great question of inherent Executive power, to which Justice Harlan was sympathetic. There is the relevance of the circumstance that the material had been officially classified. There are the analogies from the private law of copyright, trade secrets, and unfair competition. There is the analogy, which the Solicitor General made in argument, to International News Service v. Associated Press, 248 U.S. 215 (1918), in which, after all, the dissemination of news was enjoined. There is the analogy of Zemel v. Rusk, 381 U.S. 1 (1965), in which an audience was kept away from material rather than the converse and in which Chief Justice Warren observed: "The right to speak and publish does not carry with it the unrestrained right to gather information." Id. at 17. There is the analogy from cases like United States v. Reynolds, 345 U.S. 1 (1953), im-
Professors Hart and Sacks to instruct us in the complexities and calibrations of the legal process — two stand out in the responses of the Justices: (i) the matter of how much time the Court was entitled to in disposing of the controversy; (ii) the degree to which the concept of prior restraints provided the right key for disposition of the controversy.

The need for a prompt disposition and the consequent haste with which the case was handled were the result of a real dilemma. If the Government contentions about national security were correct, one act of publication would have done much of the harm the Government was seeking to forestall; hence, questions of freedom of the press apart, the case was appropriate for interlocutory relief to preserve the status quo until the courts had time to deliberate on the merits. But, of course, questions of freedom of the press could not be kept apart and the fact is that the interlocutory relief had the dramatic consequence of holding up publication by the press.\(^\text{134}\) The Court, in a firm line of cases,\(^\text{135}\) had stressed that restraints to preserve the status quo pending judicial resolution must be limited to “the shortest fixed period compatible with sound judicial resolution.”\(^\text{136}\) And the Court had reiterated this stress on promptness only this Term in Blount v. Rizzi\(^\text{137}\) in invalidating certain postal regulations.

The issue of promptness, or haste, divided the Justices sharply. Justices Douglas\(^\text{138}\) and Brennan\(^\text{139}\) in particular protested against the “interim restraints” that preserved the case for adjudication by the Supreme Court. The Chief Justice\(^\text{140}\) and Justice Blackmun\(^\text{141}\) were appalled at the haste with which they were called upon to decide, but seemed disposed to blame the need for it on the newspapers rather than on the architecture of the problem before them. It is, I think, a symptom of the pressures the

\(^{134}\) See 403 U.S. at 724–27 (Brennan, J., concurring).


\(^{138}\) 403 U.S. at 722–24.

\(^{139}\) Id. at 724–27.

\(^{140}\) Id. at 748–52.

\(^{141}\) Id. at 760–61.
Court was operating under that more attention was not paid to *Freedman v. Maryland* as a source of guidance. Justice Brennan, the author of the *Freedman* opinion, dismissed it in a footnote as not relevant because dealing with obscenity; Justice Harlan did not invoke it in support of his angry last sentence: "I cannot believe that the doctrine prohibiting prior restraints reaches to the point of preventing courts from maintaining the status quo long enough to act responsibly in matters of such national importance as those involved here." *Freedman* might have provided the Court with a common framework for arguing about "the shortest fixed period compatible with sound judicial resolution" for a case of this sort. It would, I think, have turned out to be far shorter than that contemplated by the three dissenting opinions.

The arguments over the timetable did produce one turn which may inadvertently epitomize the flaws in the Government's security case. Justice Blackmun, chafing at the speed, could not understand why the *Times* was in such a hurry to publish. "[T]he most recent of the material," he points out, "dates no later than 1968 . . . ." The per curiam opinion rested, as I noted, on the failure of the Government to meet the special burdens imposed by the presumption against prior restraints. In one sense, since the Government was seeking to enjoin the publication of materials that had never been published, there was an issue of restraint in advance of publication. But the reliance on prior restraint, although it had benign consequences for which we are to be grateful, seems awkward. The *Times* facts do not, as I see them, fit the doctrine easily, and it will require a few words of explanation to indicate why.

The institution of prior restraints has come down to us through English history with a bad name; it is one of those "dirty" words in the vocabulary of constitutional law like "test oaths," "taxes on knowledge," and "attainders." It was prior censorship against which Milton directed his *Areopagitica.* And it was long thought, as reflected in Blackstone, that freedom of

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142 380 U.S. 51 (1965).
143 403 U.S. at 726.
144 Id. at 759.
145 Indeed, the Court has at least once in recent years applied *Freedman* by name to a situation other than obscenity. *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 181-82 (1968). See also *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 162 (1969) (Harlan, J., concurring) ("The *Freedman* principle is applicable here.").
146 403 U.S. at 761.
147 The controversy over the Blackstonian definition of freedom of speech is
the press resided exclusively in protection from prior restraints. But England had employed a general scheme of administrative licensing of the press, and once we depart from this all embracing model, it is not altogether clear just what a prior restraint is or just what is the matter with it.

In recent years the Court has had occasion to write extensively and repeatedly on the principles governing prior restraints and has clarified considerably the reasons for its historic bad name. The occasions have involved movie licensing or permits for the use of public places. Such prior restraints have been imposed by administrative officials, and not court action. These modern opinions, although continuing to show a concern with the substantive standards provided to guide the discretion of the administrative licensor, have emphasized that the vices in prior restraints were the likely administrative bias towards censorship, the allocation of the burden of proof, and, above all, the absence of a prompt adversary judicial determination of the merits. *Times* assuredly did not involve these evils.

The great precedent on prior restraints by court action was *Near v. Minnesota*, in which the Court upset a Minnesota statute providing for enjoining defamatory newspapers as a nuisance. Chief Justice Hughes stressed that the banning of prior reviewed with wit and power in Z. Chafee, *Free Speech in the United States* 9-11 (1941). Cooley's comment on the controversy, which Chafee characterizes as "unanswerable," is worth quoting:

> [The mere exemption from previous restraints cannot be all that is secured by the constitutional provisions, inasmuch as of words to be uttered orally there can be no previous censorship, and the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a byword, if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications. . . . *The purpose of the free-speech clauses* has evidently been to protect parties in the free publication of matters of public concern, to secure their right to a free discussion of public events and public measures, and to enable every citizen at any time to bring the government and any person in authority to the bar of public opinion by any just criticism upon their conduct in the exercise of the authority which the people have conferred upon them. . . . *The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.*

2 J. Cooley, *Constitutional Limitations* 885-86 (8th ed. 1927). While Cooley was responding to the proposition that protection from prior restraint in itself made for a sufficient freedom of speech, his logic, I think, carries over to the narrower position, possibly involved in the *Times* case, that there may for the same material be greater immunity from prior restraint than from subsequent restraint.


149 283 U.S. 697 (1931).
restraints was a primary purpose of the first amendment, and analogized the Near injunction to a prior restraint, although it did not come into play until after publication. What bothered the Court in Near was the effort to enjoin as yet unwritten issues of the newspaper, in effect placing the paper under the personal censorship of the judge.\(^{150}\) The Times case, however, involved an effort to enjoin the publication of existing, readily identifiable material and did not present the special flaw that had triggered the response in Near. Moreover, in Kingsley Brooks v. Brown,\(^{151}\) the Court had upheld a scheme for enjoining the publication and distribution of obscene books, magazines, and, presumably, newspapers after an adversary judicial hearing.

One might well have thought then that on modern view there was little left to the bugaboo of prior restraint other than procedural defects in administrative licensing schemes, procedural defects which were not present in the adversary judicial hearing provided in Times. Perhaps because the recent prior restraint doctrine had been primarily tested in obscenity cases, the Court has not intended to have these general principles cover other areas. But it remains unsatisfying that the Justices made so little use in Times of their recent analyses of prior restraints.\(^{152}\)

In any event, three considerations suggest that counsel and Court were in the end correct in resting the case on prior restraint grounds. First, as a matter of advocacy there is undoubtedly much "good" language in the cases about the presumption against prior restraint;\(^{153}\) it is still a great label to be able to attach to what one is opposing. Second, it left the Court free, if necessary, at some later time in a criminal prosecution to deal with the true and difficult merits, namely, a determination of the kinds of truths about government activity to the dissemination of which government may for security reasons apply sanctions to keep them out of the reach of public opinion. Despite explicit dicta of Justices White and Stewart to the contrary,\(^{154}\) the Times Court, in hold-

\(^{150}\) See Z. CHAFEZ, FREE SPEECH IN THE UNITED STATES 375–81 (1941).

\(^{151}\) 354 U.S. 436 (1957).

\(^{152}\) Justice Harlan, for example, did not utilize the essay on prior restraints in his dissent in A Quantity of Copies of Books v. Kansas, 378 U.S. 205, 215 (1964), which argued that "prior restraint" was not a "talismanic test" and sought to isolate "the reasons for the historic distrust." \textit{Id.} at 222.

\(^{153}\) To take an example from this Term, see Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971) (Burger, C.J.) ("Any prior restraint on expression comes to this Court with a ‘heavy presumption’ against its constitutional validity.").

\(^{154}\) "I concur in today’s judgments, but only because of the concededly extraordinary protection against prior restraints enjoyed by the press under our constitutional system." 403 U.S. at 730–31 (White, J., concurring, joined by Stewart, J.).
ing that prior restraints were not justified, was not deciding, and could not have been deciding, under what circumstances subsequent restraints would be permissible. The jurisdictions of the two kinds of restraints as applied to the press may well turn out to be the same; the Court was simply answering the easier question first.

The third point is the most important: what the Court appears to have decided in *Times* is that there is a constitutional requirement that everything, or virtually everything, is entitled to be published at least once. The material at issue had never been published, not even once. Thus the injunction, unlike that in *Near* or *Kingsley Books*, would have restrained prior to any publication. The very point had arisen in the *Times Film* case over movie censorship.\(^{155}\) There the Court rejected the idea that every movie was entitled to be shown at least once. But arguably the *Times Film* precedent, too, was viewed as limited to a special category of cases.

Assuming the Court has not yet committed itself on the subsequent restraints issue, the disposition in *Times* suggests another value. It is, I think, reasonably clear that Daniel Ellsberg, and also the *New York Times* and *Washington Post*, were engaged in a kind of political action, akin to civil disobedience. Their belief in the value of what they were doing was so high that they were willing to publish and take the consequences. The point was to get the message to the public. Therefore in this context prior and subsequent restraints are not coterminal. No politically tolerable scheme of subsequent restraints would have prohibited the principled disobedience of the newspapers. But presuming the papers were not ready to frontally defy an injunction,\(^ {156}\) in forbidding the prior restraint, the Court can be seen as protecting the chance for civil disobedience, thus providing another instance of the interlocking of its work with the political process.

What *Times* then has left officially undecided as yet, because of the preoccupation with prior restraints, are the ultimate merits of the controversy: what truthful information about government policy and process may, for security reasons, be kept out of the


\(^{156}\) It is puzzling why sanctions for violating an injunction might have inhibited a party who intended disobedience as a political gesture more than criminal sanctions. Perhaps—and assuming that my interpretation of the state of mind of the various parties is correct—it depended on the quality of direct, personal command of the injunction; perhaps on the different procedural risks involved, as, for example, the loss of a chance to appeal to a jury; and perhaps on the fact that, in this case, the existence of an applicable criminal statute was in doubt. In any event, it seems clear that in the circumstances of the *Times* case, an injunction would have stopped publication.
public forum by the use of government sanctions, that is, what belongs to that "uninhibited, robust, and wide-open" discussion of public issues so staunchly underwritten by the Supreme Court in the first *New York Times* case.\(^{\text{157}}\)

At this stage I cannot say where the line should be drawn between the claims of national security and the claims of public opinion. In the absence of more experience with the kind of data involved it is difficult even to conceptualize the issues. And for reasons suggested earlier, it may well be that the issue will not soon again be put to the Court. As in so many instances perspective will depend upon the corner from which one comes at the problem, on whether one sees it as a matter of adjusting security considerations in order to allow information into the domain of public opinion, or as I would incline, as a matter of withdrawing information from the public domain on security grounds.

One thing is clear to me. It is touched on eloquently by Justices Black and Stewart in their opinions.\(^{\text{158}}\) In a democracy the merits of war, even while we are fighting it, must be kept in the public forum.\(^{\text{159}}\) It has been a great American achievement of the past two decades, whatever the vexations, that so vigorous, searching, and uncharitable a critique of our wars has gone on while we were fighting them.\(^{\text{160}}\) This can never have happened before in the history of civilized peoples.


\(^{\text{158}}\) For example, Justice Stewart stated:

In the governmental structure created by our Constitution, the Executive is endowed with enormous power in the two related areas of national defense and international relations. This power, largely unchecked by the Legislative and Judicial branches, has been pressed to the very hilt since the advent of the nuclear missile age. For better or for worse, the simple fact is that a President of the United States possesses vastly greater constitutional independence in these two vital areas than does, say, a prime minister of a country with a parliamentary form of government.

In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government. For this reason, it is perhaps here that a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment. . . ."


\(^{\text{159}}\) Compare Mr. Justice Holmes in *Schenck*:

When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no Court could regard them as protected by any constitutional right.


\(^{\text{160}}\) As a measure of the progress made by the Supreme Court and by public opinion in the past fifty years in securing a place for public discussion on the merits of a war that is still being fought, the decision in *New York Times Co. v. United States* should be placed alongside two deservedly forgotten Supreme Court decisions from World War I. *Schaefer v. United States*, 251 U.S. 466 (1920);
It is the special gift of the Supreme Court from the 1970 Term, made possible by its continuing role in American political life, that it offered so substantial a gesture in support of this unprecedented tradition of dissent.

Pierce v. United States, 252 U.S. 239 (1920). Justice Brandeis wrote devastating dissents in each, in which Justice Holmes joined.