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THE CONSTITUTION IS ALSO FOR THE POOR

ANDREW KOPKIND

on the Battle of Newark

IRVING BRANT

on the Fourth Amendment

WILLIAM CRAIN

on the Eighth Amendment

POLITICAL AND CIVIL RIGHTS IN THE U. S.

Reviewed by

Leonard B. Boudin

Editorial

Is Personal Security Reserved to the Affluent?

Among radicals and dissenters unreasonable searches and seizures are commonplace, as every libertarian knows. Recently we've been reminded that invasions of privacy by the authorities, as well as by the world at large, are one of the indignities we heap on our poor. Negro and Latin Americans bear more than their share of personal insecurity under the law—as part of their unequal share of poverty. Our youth, always victimized by pryers and snoopers because of their second-class citizenship, are being stripped of what little privacy they ever had as they become more rebellious. But today there's a new challenge: the dispossessed are demanding respect along with jobs and bread. Our country had best resurrect Fourth Amendment rights, at the peril of deeper rips in the social fabric.

Rampant materialism, buttressed by neo-colonialism and counterrevolution, has impelled even some of the most fortunate middle class suburbanites to disaffiliate. Unlike the Beats, the Hippies—more descriptively known as Flower Children, the Love Generation, and the New Community—no longer amuse the Establishment. Under the cry of “sex and drugs” the police are urged to clean up these bearded and sandaled rascals, even if all must be stopped, frisked, and hauled into court on vague charges. (The fishing expedition is momentarily stopped when ballet stars happen to get caught in the net.) Granted occasional anti-social behavior on the part of some Hippies and pseudo-Hippies, is it this or their search for communal love that outrages the respectables?

But the Flower Children are relatively helpless, at least in the short run. So too might seem a poor Negro, especially a young and radical one—how many cards can a human being have stacked against him? But recent events would suggest otherwise, as Andrew Kopkind's article on the “battle of Newark” makes clear. True, Governor Hughes' expeditionary force carried the day, but were the “rebel forces” suppressed? Perhaps we should face the emergency by returning to the humanitarianism of Jane Addams and George Norris—and to the libertarianism described by Irving Brant in his essay on the Fourth Amendment.

BATTLE OF NEWARK

by Andrew Kopkind

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At high noon Tuesday, in Plainfield, New Jersey, the bells of a church began to chime *Onward Christian Soldiers*. Down the street, an armoured vehicle crunched over layers of broken glass and stopped in the driveway of a cluster of small neat cottages. The army militiamen on board clicked open the safety-catches of their weapons, then jumped to the ground. "Get your ass on the double," a sergeant shouted. The troops charged into the houses. State and local policemen, armed and helmeted like the soldiers, took up positions in the streets and gardens, behind cardoors and trees. The militiamen battered down doors and scrambled through rooms full of black people, looking for "snipers." But they found none, and in half an hour the whole crew moved on to play the war game elsewhere.

It is a brutal war and an absurd game that has afflicted northern New Jersey in this summer season. In downtown Plainfield (a city about 35 miles from New York), whites went busily about their affairs in the shops and banks, only a few hundred yards from the war-zone. Along its perimeters, past the chiming bells, a teeny-bopper couple in an open red MG glided from checkpoint to checkpoint, surveying the scene. They could smell the danger but felt safe from it, like runners far ahead of the bulls in the streets of Pamplona. Inside the "riot area," in occupied Plainfield, Negroes stood in small crowds. Whites who ventured past them in cars were taunted with angry obscenities. The few stores—it is primarily a residential section—were stripped and burned. Cars and motorcycles lay smashed and overturned in the streets, and glass covered everything, sparkling on the streets and sidewalks like precious stones of every color. By Tuesday, one young Negro girl had been killed.

Plainfield seems only a skirmish in the shadow of Newark. There, for five days and nights, the city's 250,000 Negroes (the majority of the population) were in total "insurrection," as Governor Richard Hughes admitted. It began as a protest against the beating, by police, of a Negro taxi-driver who had been arrested for "tailgating"—following too closely—an unmarked plainclothesman's car. That first night there was looting of liquor stores, and a group of Negro youths threw a fire-bomb at the wall of a police precinct station. But the city officials, who have been fearing a riot for three years, played it cool. They did not gas the crowd or fire upon it. By dawn, the ghastly ghetto which is Newark's Central Ward was quiet and the mayor announced that it was all a "minor incident" with no racial implications.

The next night was different. Thousands of Negroes poured into the streets, looting and burning white-owned stores. The primary targets were those which were known for overcharging ghetto-dwellers. White government officials found the scene unimaginably mad, but there was more rationality than they would admit. For the most part the Negroes concentrated their attacks on shops carrying highly-prized merchandise—liquor, clothing, drugs, car parts. Even more rationally, they left alone those few businesses in the area owned by Negroes. Not one which had

posted the shibboleth "Soul Brother" on the windows and doors was touched.

When the big night of looting was over, the insurrection—or rebellion, as other officials were now calling it—had little to feed on. Half the shops in the Newark ghetto had been attacked. But Governor Hughes—a "liberal" Democrat with respectable credentials in the run of civil rights legislation—either did not believe it was finished, or did not want to. He activated the National Guard and moved into Newark himself to take control of the city. The local Administration, which had been playing a role in the middle between white anxiety and black anger, retired helplessly before the military power of the state.

From then on there was a war of revenge in Newark, with the army and police on the offensive. So far, only three people (all Negroes) had been killed. But the troops came in guns blazing. Governor Hughes toured the ghetto and decided, in (perhaps) unconscious parody of a white colonial governor in Africa, that "the line between the jungle and the law might as well be drawn here as any place in America." The troops were told: "Use your shotguns and revolvers—that's what you have them for." They followed orders meticulously. In the course of looking for "snipers," the police and guardsmen killed 23 Negroes. Not one sniper was arrested, not one killed. Many of the dead were women and kids.

There were probably a few (professional) snipers in the battle but they were certainly insignificant. Others fired back in self-defense or in counter-attack if their homes were attacked by the troops. But the police rampaged through the ghetto, spraying public-housing blocks with bullets up the walls for six floors. Houses and apartments were ransacked and bystanders beaten. Some of the Negroes fought back, but not many—not nearly enough, people thought later. In any case, if there were snipers, they were impossibly poor shots—only one policeman and one fireman were killed, the latter probably by a police bullet. When it was all over, a Negro who had been fighting and trying to organize the community told me sadly: "What can you say to a kid who asks why they got 23 of us and we got only two of them?"

Early this week it began to occur to Hughes and his staff (which includes a former director of the Ford Foundation) that the occupation of the black city of Newark was producing something close to a guerrilla war. Some of the militants who met with him suggested that its logical consequence would be mutual massacre or concentration camps, or an entire state in "insurrection." He hardly knew how to respond, but after a day of flip-flopping on strategy, he suddenly pulled out the army on Monday afternoon. Crowds on the sidewalks cheered as the troops marched off, as if it were Liberation Day.

The battle of Newark was less than a revolution but more than just a cry of frustration. If its politics were primitive and ambiguous, it was still a mass uprising in which tens of thousands—perhaps half the black people of the city—participated in some way. Governor Hughes was appalled at the holiday air he felt in the ghetto, but to anyone who understands what it means to be black in the white American century, that was a liberating spirit.

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FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

THE BACKGROUND OF THE FOURTH AMENDMENT

by Irving Brant

The background of the Fourth Amendment is particularly important because it is not a total prohibition of the practices dealt with. Only "*unreasonable* searches and seizures" are forbidden, but there is no definition of what is unreasonable except by inference drawn from the limitations placed on warrants. The scope of the protection is to be measured by what was considered unreasonable at the time the amendment was adopted, and by the growth—if any—of the concept of the affected rights since that time. To measure it by any shrinkage of the concept would open the way to total emasculation.

The demand for this amendment grew naturally and forcefully out of American experience with "writs of assistance" just before the Revolution. These were actually rather moderate in scope, primarily authorizing the examination of merchant vessels and their personnel, to discover smuggled goods. The protests, however, covered the whole field. James Otis described the writs as "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book." And John Adams wrote about Otis's speech: "Then and there the child Independence was born."

The writs of assistance were based on almost dormant Stuart laws to check smuggling. Otis denounced these laws as unconstitutional because they violated the natural rights of Englishmen. But the particular rights involved were older than England. Cicero said in one of his orations: "What is more inviolable, what better defended by religion than the house of a citizen. . . . This place of refuge is so sacred to all men, that to be dragged from thence is unlawful." Roman law said the same: "*Nemo de domo sua extrahi debet.*"

This doctrine, however, did not come down the centuries unscathed. In 1670 the Quaker William Penn was put on trial at Old Bailey, along with his follower William Mead, on a charge of "tumultuous assembly." Forbidden to preach under roof, Penn had delivered an orderly sermon in the street. Twelve jurors defied the judges, acquitted the two men, and were committed to prison for their temerity. Penn's published account of the trial, widely circulated in America, opened with a sweeping foreword denouncing those "who at will and pleasure break open our locks, rob our houses, raze their foundations, imprison our persons, and finally deny us justice to our relief; as if they then acted most like chris-

tian men, when they were most barbarous, in ruining such, as really are so." Penn's trial was cited (without being named) by John Page of Virginia in the congressional debate on the first ten amendments.

Higher judges freed Penn's jurors, but arbitrary officials continued to "break open our locks, rob our houses" at their will and pleasure. This denial of "the natural rights of Englishmen" started in the savage religious conflicts of the Tudor period. In 1593 the Court of the Star Chamber authorized the king's messengers to "enter into all houses and places" containing suspected persons, seize them and their papers, and put "to the torture in Bridewell" all who refused to confess.

Sir Edward Coke, a ruthless Star Chamber prosecutor, "got religion" when he was promoted to the bench and turned Roman law into the English maxim that "every man's house is his castle." Sir Matthew Hale, the great Chief Justice, resisted Stuart pressure and held that general warrants to arrest unnamed suspects were void. In 1780 Parliament (mostly for bad reasons) impeached the infamous Chief Justice Scroggs, validly accusing him, among other things, of issuing general warrants for the arrest of persons and attachment of goods "not named or described particularly" in the warrants. But this "natural right" continued to be violated by king's ministers, Hanoverian as well as Stuart.

Their arbitrary practices reached a climax in 1763, when Secretary of State Halifax issued warrants for discovery and seizure of the unknown author of a publication called *North Briton* No. 45, assailing the king for his address to Parliament. Thomas Erskine May described the procedure in his *Constitutional History of England*: "Armed with their roving commission, [the king's messengers] set forth in quest of unknown offenders. . . . In three days, they arrested no less than forty-nine persons on suspicion, many as innocent as Lord Halifax himself." Among them was a printer who identified John Wilkes, a member of the House of Commons, as publisher of the paper. Wilkes was seized, his desks were broken open and all his papers, including his will and his pocketbook, were dumped into a sack and carted off.

Wilkes was expelled from the House (six times), convicted of seditious libel, and sent to prison. But he sued Undersecretary Wood for trespass and won a verdict of £1000. Arrested printers won lesser amounts. Chief Justice Charles Pratt (about to become Lord Camden), in holding the warrants illegal, told the jury that "To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition."

The subject came before Lord Camden far more broadly in 1765, in an action for trespass by John Entinck against Nathan Carrington and three other messengers of the king. The messengers had spent four hours in Entinck's house, breaking open doors, boxes and chests, and carrying off hundreds of papers. This action did not involve a *general* warrant, but one ordering a "strict and diligent search" for Entinck himself, who was to be brought "together with his books and papers in safe custody before the Earl of Halifax."

The Entinck jury returned a special verdict of £300 damages, subject to a ruling by the court on the legality of the warrant. This verdict was argued before Lord Camden, who said that if the warrant should be upheld "the secret cabinets and bureaus of every subject in this kingdom

will be thrown open to the search and inspection of a messenger, whenever the secretary of state shall think fit to charge, or even to suspect, a person to be the author, printer or publisher of a seditious libel." This power of search and seizure, said Camden, "took its rise from a decree of the Star-Chamber" in 1636. It "is not supported by one single citation from any law book extant." It had never been assumed by the Court of King's Bench, "Chief Justice Scroggs excepted." (That exception, as well as its origin, damned it.)

"Lastly," said Lord Camden, "it is urged as an argument of utility, that such a search is a means of detecting offenders by discovering evidence. I wish some cases had been shown, where the law forceth evidence out of the owner's custody by process. . . . It is very certain, that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it should seem, that search for evidence is disallowed upon the same principle."

The Wilkes case and writs of assistance dominated American public opinion when the Fourth Amendment was in the making. Lord Camden's words in *Entinck* have ruled judicial interpretations of the amendment (with some slippages) down to the present day. Their combined effect became manifest in state Bills of Rights adopted in 1776 and the next few years. General warrants and unreasonable searches and seizures were outlawed in New Hampshire, Massachusetts, Pennsylvania, Maryland, Virginia and North Carolina and were forbidden by the Connecticut courts without a legislative mandate.

Such then is the background of the Fourth Amendment, clear, definite and comprehensive, but with one question left unanswered by the historical record: Does the amendment forbid the use, in court, of evidence obtained through violation of these constitutional rights? That question did not arise in the English cases because they were civil suits for trespass. But Lord Camden's final point, linking unreasonable search and seizure with the privilege against self-incrimination, applies with equal logic against the use of testimony unlawfully obtained. No court that *believes* in the Fourth Amendment will permit so blatant a narrowing of it.

Mr. Brant, author of The Bill of Rights, Its Origin and Meaning (which has recently been issued in paperback), is currently teaching at the University of Oregon.

Kentucky Anti-Sedition Statute Unconstitutional

Five Kentuckians jailed under a 47-year-old anti-sedition statute have won their plea to have the law held unconstitutional. The federal District court in Lexington, Kentucky, held that protection against sedition had been preempted by the federal government with the enactment of the Smith Act. A similar ruling had been made by the U.S. Supreme Court in 1956, but Kentucky and some other states have tried to get around it.

Freed by the decision were Mr. and Mrs. Carl Braden and two other workers for the Southern Conference Educational Fund and the field director of the Appalachian Volunteers. Their attorneys were Dan Jack Combs of Pikesville, Kentucky, and William M. Kunstler and Arthur Kinoy of New York.

The Eighth Amendment: Its Increasing Relevance and Inherent Limitations Vis-a-vis the Struggle of the Poor for Equal Justice

by William Crain

The fact that many of us are not even sure what the Eighth Amendment proscribes ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted") suggests that this section of the Bill of Rights has received relatively little attention from those persons in America who are interested in civil rights and liberties. Although the origins of the Amendment date back to the excesses of the Stuarts,¹ legislative history is scant and inconclusive.² It is clear that the limitations placed upon bail, fines and punishments by the Eighth Amendment to the Constitution derive from the same sources; nevertheless, it will be convenient to consider herein each of the three general areas separately.

"EXCESSIVE BAIL SHALL NOT BE REQUIRED . . ."

In every criminal case that is not immediately disposed of, the question whether or not the accused will return to court on the adjourned date arises. "A bail bond or the deposit of a sum of money subject to forfeiture serves as an additional assurance of the presence of the accused [during the court proceedings]. Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive under the Eighth Amendment.'"³ The pristine simplicity of this holding of the U.S. Supreme Court, as well as the courts of most states, is in harsh contrast to the reality of the role played by the bail system as it operates, particularly at the state level.⁴

As mentioned in Emerson, the fact that the bail system discriminates against the indigent has been clearly documented. Even under the most enlightened standards recently established by the federal government,⁵ the following criteria guide the judge in setting bail:

The amount [of bail] shall . . . insure the presence of the defendant, having regard to the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail and the character of the defendant. (Rule 46-c, Federal Rules of Criminal Procedure.)

In New York, it is also the rule that the "purpose of bail is to insure the defendant's presence at trial."⁶ Nevertheless, it is common practice for bail to be set at \$250 at the request of the Family Court, irrespective of the reliability of the spouse who had been accused of violating the Family Court Act.

The real gravamen of the problem of the pre-trial incarceration of the

¹ *Weems v. U.S.*, 217 U.S. 349, 368-369 (1910).

² 1 *Annals of Congress* 782-3 (1789).

³ *Stack v. Boyle*, 342 U.S. 1, 5 (1951).

⁴ See Foote, *The Coming Constitutional Crisis in Bail*, 113 U. Pa. L. Rev. 958 (1965), and numerous sources cited in Emerson, Haber and Dorsen, *II Political and Civil Rights in the United States* 1798-1799, Note 2 (1967).

⁵ 18 U.S.C.A. sections 3146-3152 (Bail Reform Act of 1966).

SOURWINE ORDERED TO PAY SCEF COURT COSTS

The U.S. Supreme Court has ordered Julien G. Sourwine, chief attorney for the Eastland Committee, to pay \$772 in court costs to the Southern Conference Educational Fund (SCEF).

This is believed to be the first time that an official of one of the investigating committees has had to pay such costs to a civil-rights organization.

"This represents a real change in the civil-liberties climate in this country," said Arthur Kinoy, one of SCEF's attorneys in its fight with Sourwine and Sen. James Eastland of Mississippi. "It is further proof that employees of these committees are not above the law and shall be held to account for their actions."

SCEF sued Eastland and Sourwine for \$250,000 each as a result of raids on offices and homes of its officers in New Orleans, La. in October, 1963. Two SCEF officers were arrested.

The civil-rights organization charged that Eastland and Sourwine helped plan the raid, in which all of SCEF's records were taken by police. Eastland later had the records moved across the state line into Mississippi at midnight, and then to Washington.

The U.S. Supreme Court killed all charges resulting from the raids and arrests, and ordered return of the records. The court later ruled that Eastland could not be sued for his actions but that Sourwine could. Last week the court ruled that Sourwine would have to pay SCEF for court fees and the cost of printing the record in the case. Hearing of the \$250,000 suit is due to start soon.

presumed-innocent accused, however, is the product of our society rather than constitutional error: (1) the large majority of petty crimes are committed by those who do not have the benefits of the "American Way of Life" (and are therefore unable to make bail) and (2) a major factor in the setting of bail is the arrest record of an accused. The poor in the American city, especially the black or Puerto Rican ghetto dweller, is often the subject of improper arrests.⁷ Thus, notwithstanding the fact that studies have shown that shoplifters and other petty criminals can be given summonses and be expected to appear if their community roots are substantial,⁸ a large percentage of indigent defendants either do not have such roots (e.g., a steady job, several years at residence, or even a friend with a telephone to verify such information) or have been previously arrested.

The Eighth Amendment cannot alleviate either of the two factors that

underpin the inherent inequality of the bail system. It could well be argued, however, that the forfeiture of a given sum of bail money means much greater deprivation to an indigent (and to the friends and family that help him raise the bail) than to a person of means. It would therefore follow that a lower bail for the indigent (assuming similar crime, community roots and background) is constitutionally compelled by the Eighth Amendment.⁹

Militating against this, however, is the possibility that the poor defendant, often not knowing the court-appointed lawyer and viewing him as part of the "system," may have less confidence in Justice than his middle class counterpart, and for this reason may be more likely to jump bail or parole for fear of conviction and incarceration. This fear is all the more real when the poor defendant knows that if he receives an alternative fine or jail terms he will have to go to jail.

"NOR EXCESSIVE FINES IMPOSED . . ."

Although the federal courts have made substantial progress in alleviating the inherent inequality of the fine system,¹⁰ the present status of state law remains: a person may be imprisoned one day for every one, three, or five dollars of fine.¹¹ In the landmark case of *People v. Collins*,¹² the court stated:

. . . at the time that the sentence is imposed, the man with the means has the power to limit the amount of time that he must spend in jail to the maximum one year by his willingness and his ability to pay the fine. On the other hand, the indigent defendant, at the time of the imposition of the same sentence upon him, though he be willing, has not the ability to curtail the time that he must actually spend in prison to the period of one year which is the maximum period of detention which the Legislature provided.

It is only if we equate the payment of the fine with the additional period of detention in prison that both men can be said to stand equal before the law. An equation of one day of a man's liberty in jail for every \$1 of the fine, in this enlightened era, should be examined very carefully before this form of equality of treatment is indorsed.

It should be noted that the original statutory provision of one day for every \$1 of fine unpaid dates back to 1876 (L. 1876, ch. 61; Code Crim. Pro., sections 484, 718).

In my opinion, in view of the fact that the only justification heretofore advanced by the courts for the additional detention of the defendant is to enforce the collection of the fine, and in view of the statements by the courts that this additional period of detention is thus left within the control of the defendant, it would seem that an exception must be made in the case of an indigent defendant, because such a defendant will not be able to pay the fine although detained in jail for that purpose, nor does he have within his control the power to limit the period that he thus stands committed. To hold otherwise would add one more disadvantage which the law will place upon the indigent, and one more advantage which the law will give to

⁶ *People ex rel Rubenstein v. Warden of City Prison*, N. Y., 279 App. Div. 47, 107 N.Y.S. 2d 948 (Dep't 1951). *People ex rel Thompson v. Warden of House of Detention for Men*, 214 N.Y.S. 2d 171 (Sup. Ct. 1966).

⁷ c.f. Conot, *Rivers of Blood, Years of Darkness* (1967).

⁸ Ares, Rankin, and Sturz, *The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole*, 38 N.Y.U.L. Rev. 67 (1963).

⁹ See *Stack v. Boyle*, *supra*.

the defendant with the money in his pocket to pay his fine, although the quality of their conduct has been the same and although their intention to pay the fine has been the same.¹³

One can only hope that the teachings of *Collins, Griffin v. Illinois*,¹⁴ and other "equal protection" cases will ultimately compel the end to the \$1/day fine. Moreover, as stated in *Weems v. U.S.*,¹⁵

"[w]e cannot think that it [the Eighth Amendment] was intended to prohibit only practices like the Stuarts, or to prevent only an exact repetition of history. . . . Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief that gave it birth."¹⁶

Perhaps, as *Robinson* held any criminal punishment of disease violates the Eighth Amendment, so too will the Supreme Court hold that any fine (to be "coerced" by alternative jail time) of an indigent is excessive, in violation of the Eighth Amendment.

" . . . NOR CRUEL AND UNUSUAL PUNISHMENTS INFLICTED."

Although dealing specifically with the "cruel and unusual punishment section of the Eighth Amendment, *Robinson v. California*,¹⁷ as interpreted in *Gideon v. Wainwright*,¹⁸ makes the entire Eighth Amendment binding upon the states. In *Robinson*, the Supreme Court held that "a state law which imprisons a person [addicted to drugs] as a criminal . . . inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment."¹⁹ The crux of the holding in *Robinson* is that any punishment for an involuntary disease would be violative of the Eighth Amendment. Relying upon the holding of *Robinson*—that an involuntary condition cannot be made criminal—the Fourth Circuit reversed the conviction of an alcoholic for public intoxication,²⁰ holding that since a chronic alcoholic must sometime venture out into the street, public intoxication was merely a necessary aspect of the involuntary condition and could not be punished.²¹

¹⁰ 18 U.S.C.A. sec. 3569.

Upon taking a pauper's oath stating,

1) defendant unable to pay fine and

2) a. does not own non-exempt property worth more than \$20.00,

b. or any property other than that necessary for the support of his family,

the defendant is to be released from imprisonment for failure to pay a fine after 30 days incarceration pursuant thereto.

¹¹ See *O'Neil v. Vermont*, 144 U.S. 323 (1892) and *State v. Starlight Club*, 406 P.2d 912 (Utah Sup. Ct. 1965) as to fine excessive *per se*.

¹² 47 Misc. 2d 210 (Orange City Court 1965).

¹³ 47 Misc. 2d at 212-213. *Collins* was disapproved in *People ex rel Loos v. Redman*, 48 Misc. 2d 592 (Sup. Ct. Erie City 1965).

¹⁴ 351 U.S. 12 (1956).

¹⁵ 217 U.S. 349 (1910).

¹⁶ *Ibid.*, 373.

¹⁷ 370 U.S. 660, 667 (1962).

¹⁸ 372 U.S. 335, 342 (fn. 2) (1963).

¹⁹ *Id.* at 370 U.S. 667.

²⁰ *Driver v. Hinnant*, 356 F. 2d 761 (4th Cir. 1966).

²¹ *Acc.*: *Easter v. District of Columbia*, 361 F. 2d 50 (D.C. Cir. 1966); *In re Newborn*, 53 Cal. 786 (1960); Note, *the Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 Harv. L. Rev. 635 (1966).

Robinson and its progeny represent one type of "cruel and unusual punishment": conduct which cannot be considered criminally culpable and therefore may not be criminally punished. Two other types of "cruel and unusual punishment" for admittedly criminal conduct can be identified. Punishment that is "of such a character . . . as to shock the general conscience or to be intolerable to fundamental fairness,"²² is the first of these. Cases in this area include *Weems v. U.S.* (12 years imprisonment in irons, loss of civil rights for life, continued surveillance and loss of freedom to change residence for life, for falsifying a government document); *Trop v. Dulles*²³ (denaturalization for desertion during wartime); *Rudolph v. Alabama*²⁴ (Justice Goldberg, joined by Justices Douglas and Brennan, dissenting from a denial to review by a writ of *certiorari* a death sentence of a Negro for rape); and *Jordan v. Fitzharris*,²⁵ (cruel and unusual punishment to confine a prisoner in an irregularly cleaned four-by-eight-and-one-third foot cell with no furniture).

The other kind of cruel and unusual punishment for assumedly criminal activity is punishment that is so excessive in relation to the offense that it violates the Eighth Amendment.²⁶ In *O'Neil*, a liquor dealer was found guilty of selling (by mail order) 307 orders of liquor to Vermont residents, and was sentenced to 19,914 days (over 54 years) or \$6,638.72, i.e., three days per dollar.²⁷ Although the majority held that the Eighth Amendment issue was not raised by the defendant, the three dissenting Justices disagreed. Mr. Justice Field declared that the Eighth Amendment "is directed, not only against punishments . . . such as torture but against all punishments which by their excessive length or severity are greatly disproportionate to the offense charged."²⁸

O'Neil notwithstanding, the following sentences have recently been sustained against the defendants' claim of cruel and unusual punishment: death for rape²⁹ in the cases of *Sims v. Balkcom*, *Ralph v. Peppersack*, and *Vanleeward v. State*; life sentence for two sales of marijuana (*People v. Keller*, 54 Cal. Rptr. 154, Cal. App. 1966).

Perhaps the most interesting application of the Eighth Amendment is in the areas of capital punishment for crimes such as rape and in the punishment of status. In *Robinson*, the Supreme Court specifically excluded from its opinion the crimes of possessing narcotics as opposed to being a narcotic addict. But the subsequent alcoholic cases have said that the act of appearing in public cannot be punished because it is a necessary incident of the involuntary disease or condition. But cannot it also be argued, with equal logic, that the possession of narcotic drugs or paraphernalia essential for its use is a necessary and unavoidable incident of the acknowledgedly involuntary condition of addiction?

²² 352 f. 2d 970, 972 (8th Cir. 1965).

²³ 356 U.S. 86, 100-101 (1958).

²⁴ 375 U.S. 889, 890-891 (1963).

²⁵ 257 F. Supp. 674 (D.C. Cal. 1966).

²⁶ *O'Neil v. Vermont*, 144 U.S. 523, 339-340 (1892) (Concurring opinion of Mr. Justice Field); Turdington, *Unconstitutionally Excessive Punishments*, 3 Crim. L. Bull. 145 (1967). See *Gable v. State*, 424 P. 2d 433 (Okla. Cr. 1967); *State v. Starlight Club*, 406 P. 2d 912 (Utah, 1965); *McDougle v. Maxwell*, 203 N.E. 2d 334 (Ohio 1964).

²⁷ In *Starlight Club* (*supra*), however, the Supreme Court of Utah held that the fining of a private club \$2,500 for each of the violations (3 illegal sales of liquor to the same person) was excessive, in violation of the Utah Constitution ("excessive fines shall not be imposed.")

²⁸ 144 U.S. 339-340.

²⁹ *Sims v. Balkcom*, 220 Ga. 12, Rev'd on other gds, aff'd 144 S.E. 2d 103 (1966); *Ralph v. Peppersack*, 335 F. 2d 128 (C.A.Md. 1964); *Vanleeward v. State*, 137 S.E. 2d 452 (Ga. 1964).

E.C.L.C. TEST CASES

THREE CALL SELECTIVE SERVICE DISCRIMINATORY

Challenging the constitutionality of the Selective Service Act, a suit has been filed in the Southern District Court of New York by the Emergency Civil Liberties Committee attorneys, Victor Rabinowitz and Leonard B. Boudin, on behalf of three men who are threatened with induction after having received the classification of 1-A. The three men, all Negroes, are James Boyd, Bernard Hughes, and Ralph Hendrix; all are residents of New York City.

The basis of the challenge is the discriminatory provision of the Act. Each of the three young men has been classified I-A instead of 2-S, as they would have been if they were at college. They maintain in the brief that they are the victims of discrimination as registrants who, through lack of financial means, are unable to pursue a full-time course at a college or university.

The brief further holds that all of the plaintiffs would have attended institutions of higher learning had they been financially capable of doing so, and all would have been eligible for a deferred classification as students but for their lack of economic means and their consequent inability to attend such institutions. Many persons in New York who are older than the plaintiffs have in fact received deferred classifications and their induction has been postponed, while the plaintiffs have been classified in Class I-A and threatened with immediate induction.

The brief asks that the Military Selective Service Act be held unconstitutional as being in violation of the Fifth Amendment to the Constitution.

PRIVATE PETRICK FACES DISCHARGE

Private Howard Petrick now stationed in Fort Hood has received "Notice of Action to Determine Your Suitability for Retention in the

Army Establishment." Charges were first brought against Private Petrick because of the publications he possessed but those charges were dropped after the intercession of ECLC into the case. Now he is threatened with a discharge less than honorable.



Private Petrick

The charges against Private Petrick are now based on the fact that he belongs to the Young Socialist Alliance, a fact the Army knew before inducting Petrick. ECLC attorney Leonard B. Boudin has notified the Army that on the basis of the Abramowitz and Harmon decisions by the Supreme Court, Petrick is entitled to an honorable discharge and that if he is not given one the case will be taken to the courts.

PRIVATE STAPP APPEALS FINE

Private Andrew Stapp of Fort Sill, who describes himself as a militant socialist but belonging to no organization, and who also keeps his locker full of socialist publications and makes no effort to conceal the fact either from his colleagues or his superiors, was courtmartialed and convicted on the charge of disobeying orders. He refused to open his footlocker unless he was assured that any papers taken would be returned.

The footlocker was forcefully opened against his objection.

Private Stapp has asked E.C.L.C. to support him in a court test of the propriety of the Army's action.



Private Stapp

DRAFT CASES TO BE TRIED

Geoffrey Conklin refused induction in December 1965, Antonio Fargas in 1966. Both have resisted the draft as conscientious objectors against the war in Vietnam. Another ECLC test case of the draft is that of Toney Hudson, who reported for induction but refused to take the two steps forward ordered by the Army. Motion to dismiss his case will be made by ECLC attorneys in October.

In all three draft cases ECLC will challenge the discriminatory basis of choosing juries in New York City. In the Conklin and Fargas cases the method of choosing petit juries will be challenged, and similar charges against the Grand Jury will be made in the Hudson case.

FELONS' RIGHT TO VOTE

Gilbert Green of New York is suing for the right to vote despite the fact that in 1949 he was convicted under the Smith Act. The New York

Constitution and that of many other states denies the right to vote to people who have been convicted of a felony. Insisting that such a conviction is no proper disqualification for voting, Mr. Green and ECLC will ask the U.S. Supreme Court to void it. No similar case has yet been before the Court. The Court of Appeals in New York decided against Mr. Green.

FINAL VICTORY IN BLOOMINGTON CASE

The attempt of Prosecuting Attorney Hoadley of Monroe County, Indiana, to jail three University of Indiana students who were members of the Young Socialist Alliance has finally come to an end. The students were indicted in 1963 for attending a meeting which the prosecutor deemed subversive under a state law passed in 1951. When the case was tried in 1964, Judge Nat U. Hill held the law to be unconstitutional and dismissed the indictments. The State Supreme Court, however, reversed Judge Hill and reinstated the indictments.



The Bloomington Students, l. to R. Levitt, Bingham and Morgan

Thereupon, attorneys for the students and ECLC petitioned the federal courts for an injunction forbidding the use of the statute. Then the present Prosecuting Attorney of Monroe County, Thomas A. Berry, asked that the indictments be withdrawn. They were, with prejudice, meaning that no further indictments could be issued against the students.

***Political and Civil Rights in the United States* by Thomas I. Emerson, David Haber and Norman Dorsen (3d ed. Boston and Toronto: Little Brown and Company, 1967) two volumes, pp. 2,274, \$45; student's edition, pp. 1,754, \$18.**

Reviewed by Leonard B. Boudin

When I was in law school over thirty years ago, law school did not give courses in civil liberties or civil rights. Texts and materials on constitutional law were massive tomes on property rights. Case involved property rights in Negroes, not of them.¹ The only exception that I recall was a slim volume² written by a brilliant teacher

and friend, Maurice Finkelstein of St. John's University Law School, which did contain such cases as *Gitlow v. New York*,³ involving the criminal anarchy law, the search and seizure cases, and an interesting memorandum by Mr. Justice Holmes on the *Sacco-Vanzetti* case, which would be written quite differently today. Law reviews rarely dealt with civil liberties; it remained for the *International Judicial Association Bulletin*, the product of that extraordinary lawyer Carol Weiss King and her colleagues, to create and monopolize the fields of civil liberties and labor law during its short life from 1932 to 1942.

Today the situation has radically changed. The law reviews are replete with articles, student notes, and reviews of cases and books on civil rights and liberties. Courses on the subjects are taught at all leading law schools. Students in such organizations as the Law Students Research Council are doing extensive research for publications and for practicing lawyers and civil rights organizations in connection with litigation.

There have been corresponding changes in the textbooks on constitutional law. No book on this subject written during the last two decades has failed to include these newly-discovered areas in American jurisprudence. Two noteworthy examples are *Constitutional Law: Cases and Other Problems*, by Professors Paul A. Freund, Arthur E. Sutherland, the late Mark DeWolfe Howe, and Ernest J. Brown of Harvard Law School, and *Constitutional Law: Cases—Comments—Questions*, by Dean Lockhart of Minnesota, and Professors Yale Kamisar of Michigan Law School and Jesse Choper of Berkeley.

It remained for Professors Thomas I. Emerson and David Haber of Yale Law School to publish in 1952 a single volume, *Political and Civil Rights in the United States*, which constituted the first such collection of "some of the basic materials which must be considered in seeking an answer to questions concerning the fundamental rights of the individual in modern society."⁴ The book grew out of a law school course given by both authors, whose qualifications were pre-eminent. Professor Emerson's history as a government lawyer in a series of New Deal and World War II agencies would require a separate review to do it justice,⁵ Professor Haber's present leadership makes us forget that he was the *enfant terrible* of the 1940's as one of our youngest law school professors.⁶ Both men were actively involved in civil liberties litigation, and they have long played important roles in the Emergency Civil Liberties Committee, which signalized the publication of the First Edition with a luncheon where Louis M. Rabinowitz noted that the struggle for

¹ E.g., Thayer, *Cases on Constitutional Law* (1895).

² Finkelstein, *Cases on Constitutional Law* (1927).

³ 268 U.S. 652, whose vitality has been sapped by the *Feinberg* Act decision, *Kekishian v. Board of Regents*, 385 U.S. 589, and which may be reversed by the pending case of *Epton v. New York*.

⁴ Preface to the Third Edition, Vol. I.

⁵ For example, he held important legal posts in the National Labor Relations Board, the Department of Justice, the Office of Price Administration, and the Office of Economic Stabilization; he is also the author of *Toward a General Theory of the First Amendment*, and he successfully argued the *Sweezy* and *Griswold* cases in the Supreme Court.

⁶ He was law clerk to Circuit Judge Charles E. Clark and to Justice Black, and author with Professor Myres McDougall of *Property, Wealth, Land Allocation, Planning and Development*, and with Stephen S. Bergen of *Law of Water Allocation in the Eastern United States*. Today he is Professor of Law at Rutgers Law School and a member of ECLC's Executive Committee.

civil liberties was a constant one, and inquired whether the word "Emergency" was appropriate in the organization's title.

But this First Edition of more than 1200 pages soon proved inadequate because of the "mounting volume of court decisions, commentaries, studies, reports and other materials"; hence the Second Edition, in 1958, consisting of two volumes.

This year has come the Third Edition, with a third editor whose pre-eminence in this field makes him a "natural" member of the triumvirate. Professor Norman Dorsen of New York University Law School, where he teaches civil liberties courses, among others, is also director of the Arthur Garfield Hays Civil Liberties Program, which given much important research assistance to practicing lawyers and civil rights organizations. Professor Dorsen recently argued and won in the Supreme Court the *Gault* case, which secured for juveniles due process rights in delinquency hearings, and he was co-counsel in *Lamont v. Postmaster General*, the ECLC test case striking down as unconstitutional the ban upon "foreign communist propaganda."

The Third Edition has been published in two editions—one for the practicing lawyer and specialist, and the other for the student. They are substantially the same except for the omission from the student edition of the chapters on academic freedom, affirmative government controls, and several sections of the book.

To simplify matters I shall direct my attention to the student edition. It is a comprehensive work. Volume I is in two parts: *Freedom of Expression and Academic Freedom*, *Freedom of Religion and Other Individual Rights*. Volume II contains the third part: *Discrimination*. Part I covers the following subjects: theoretical framework, development of freedom of expression in the United States, national security, internal order, other social interests, defamation, obscenity, and affirmative government controls. The first of these eight chapters includes Milton's Areopagitica, Jefferson's First Inaugural Address, writings of Alexander Meiklejohn, and excerpts from the Abrams and Whitney opinions of Holmes and Brandeis. This is followed by a broad list of references appropriately arranged to guide the reader in his more detailed exploration. This procedure is paralleled throughout the book, with the authors presenting material expressing all aspects of the subject and a full spectrum of differing views.

The range of the subject matter and the comprehensiveness of the treatment given it is not only impressive; it makes these volumes the most useful of any ever published on these subjects, whether in case books, textbooks, law review articles, or government publications. For example, the discussion of national security (Chapter III) begins with a short introduction noting that "[t]he right to freedom of expression has usually met its severest test when it has been thought to impair the social interest in national security." (p. 72) There follow eight subchapters on such subjects as the background of the laws of treason, rebellion, and insurrection; interference with war defense efforts; anti-sedition laws and other direct restrictions on political expression; denial of privileges or positions of influence to persons declared subversive; loyalty-security qualifications for employment; and legislative investigations.

Some idea of the last subject is indicated by the fact that it consists of eighty-six pages of discussion, notes, and references and the text of such decisions as *Watkins*, *Barenblatt*, *Gibson* and *Quinn*, the text of the Immunity Act of 1954, and a good discussion of its practical effect, its judicial history, and parallel state law situations. It includes such unusual materials for a case book as excerpts from the rules of the House of Representatives and of the House Committee on Un-American Activities.

The second volume, *Discrimination*, contains a most elaborate collection of materials on such subjects as the right to security of the person; discrimination in voting; discrimination in the administration of justice and federal-state relations; and discrimination in health and welfare services. It includes such older materials as the Supreme Court decisions in the *Slaughter-House Cases* (1873) and the *Civil Rights Cases* (1883), and such more recent materials as the proposed Civil Rights Act of 1966 and the reports of the United States Commission on Civil Rights.

These volumes are unique in the splendid organization of the materials, in the large variety of legal and non-legal materials, and in the extensive and pungent comments of the authors. The word "indispensable" has been misused frequently, but surely one can correctly call *Political and Civil Rights in the United States* indispensable for the practicing lawyer, the teacher, and the student concerned with any aspect of the broad panoply of political and civil rights in the United States. More, these volumes are so organized as to be of value to the thousands of Americans who participate individually or through organizations in the movement for civil rights in this country. Technical aspects of reading legal materials should be of no concern; any intelligent person can read with understanding and excitement the modern Supreme Court decisions, and the authors here have provided a good structure for understanding by their organization of the work and by their thoughtful comments. The reader is aided further by a general four-page summary of contents, by a detailed sixteen pages of contents, by an elaborate table of cases, and by a very good subject matter index alphabetically arranged. The publishers, who are experienced in the publication of law books, have produced attractively printed and readable volumes.

These books can be very important educational instruments in the active days ahead. While expensive, they represent a sound investment for the intelligent citizens or resident of this country. I am sure that many of the members of the National Council of the Emergency Civil Liberties will purchase the general trade or the student edition, and that this will be true of the many thousands of ECLC associates and the individual and library readers of *Rights*. It is inconceivable that a public or university library should be without several reference and circulating copies of this major work.

RIGHTS Notebook

MICHAEL J. KENNEDY JOINS ECLC STAFF

In November ECLC is adding a staff counsel who will help handle the numerous appeals from soldiers and civilians threatened with conscription. The American intervention in Vietnam has caused an increasing number of tests of the constitutionality of government action.

Michael J. Kennedy, who has been in the practice of law in San Francisco with the firm of Hoberg, Finger, Brown and Abramson, will not only serve as staff counsel but will also be an assistant director in addition to Mrs. Edith Tiger.

POVERTY AND THE BILL OF RIGHTS

A meeting was held in Carnegie Recital Hall on September 22 to discuss the denial of rights to those who have been too disadvantaged to know about them. William Meyers presided and pointed to the events of last summer as an indication that the rights which our ancestors came to cherish in their revolution are also important to those who now seek to improve things.

Conrad Lynn, an attorney in New York, told of some of the punishment before the establishment of guilt which results from imposition of high bail on poor people. Henry di Suvero, Executive Director of the New Jersey Civil Liberties Union, told of the violations of the Fourth Amendment in the ruthless searches made last summer in New Jersey by the police and National Guard. Michael Standard, another attorney, brought the discrimination against Negroes in the Selective Service Act. He compared the figures for I-A classifications in the poorer and richer districts of New York. He also told of pending ECLC suits testing the Selective Service discrimination against men unable to afford college. William Crain of the Lawyers' Guild also talked about the bail abuses (his article on the subject in this issue is a more elaborate discussion of the question).

BILL OF RIGHTS DINNER

On December 8 at the Americana Hotel in New York City, ECLC will celebrate the 176th anniversary of the ratification of the Bill of Rights. John Henry Falk will be toastmaster. Pete Hamill, Washington correspondent, will be the chief speaker. Warren Hinkle III, Editor of *Ramparts*, will receive the Tom Paine Award.

SACB PASSING

One-fifth of the Senators are willing to vote to end the Subversive Activities Control Board this year. An amendment introduced by Senator Brooke (R., Mass.) got 17 votes and the announced support of three other Senators who were not able to be present. The amendment failed by a vote of 17 to 58, but an amendment by Senator Dirksen, the Republican leader, to get around the Supreme Court decision voiding the registration requirements of the McCarran Act, was amended to provide for the ending of the SACB in 1969 if the Attorney General finds that the Board has not instituted proceedings and held hearings before the end of 1968.

The provision for ending the SACB was a compromise by Senator Mansfield, the Democratic leader, after a determined fight against the Dirksen resolution had been made on the floor of the Senate by Senator Proxmire of Wisconsin and other Senators. The compromise was agreed to by Proxmire's group in the conviction that the Attorney General would decide that the Dirksen amendment violates the Constitution and could therefore not be used.

A number of the country's leading lawyers have said that the Dirksen provisions are unconstitutional. We hope others will write to the Attorney General, Department of Justice, Washington, D.C. urging him not to institute further proceedings under this Act, in accordance with his oath to uphold the Constitution.

SALUTE TO I. F. STONE

RIGHTS expresses the hope that I. F. Stone will soon return to his great job of bringing the facts to the people. We were sad to hear of his heart attack, and hope that his recovery will be complete and speedy.

EMERGENCY CIVIL LIBERTIES COMMITTEE

421 7th Ave. New York City Oxford 5-2863

The Emergency Civil Liberties Committee was formed in 1951 to give uncompromising support for the Bill of Rights and the freedom of conscience and expression it guarantees.

The governing body of ECLC is the National Council of 104 members from 20 states, Puerto Rico, and D.C. All who agree with our aims are invited to join as Associates by paying \$5.00 a year. Associates receive **RIGHTS** and other literature distributed by the Committee.

Chairman: Corliss Lamont

Vice-Chairman: Eleanor Brussel

V.-Chm. & Editor: John M. Pickering

Treasurer: John Scudder

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