Recent Developments

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Recent Developments

FINES — Imprisonment Of Indigent Defendant For Non-Payment Of Fine. People v. Saffore, 18 N.Y.2d 101, 218 N.E.2d 686 (1966). Defendant appealed a conviction of assault in the third degree.\(^1\) He was ordered imprisoned for one year and was also fined $500; if not paid, the fine was to be served out at the rate of one day’s imprisonment for each dollar remaining unpaid.\(^2\) Since defendant was known to the trial court to be an indigent and thus unable to pay the fine, the practical result of the sentence was to incarcerate defendant for an additional 500 days. In reversing the conviction, the Court of Appeals of New York gave two grounds for its decision. The court noted, first, that even though there was an ancient practice of incarcerating a criminal defendant for the non-payment of a fine, such incarceration was not part of the imprisonment but only a means of collecting the fine against an offender who refused payment.\(^3\) Thus, the court held that confinement of a bona fide indigent defendant violated the meaning and intent of section 484 of the New York Code of Criminal Procedure.\(^4\) On constitutional grounds, the court stated that it was a denial of equal protection of the law to allow defendant’s inability to pay a fine to determine the length of his confinement\(^5\) since this was said to result in unequal treatment of solvent and insolvent offenders. Also, the $500 fine for a common misdemeanor\(^6\) was held to be constitutionally excessive because defendant in reality would be jailed for a period far longer than the normal period for the offense and would be unable to earn a livelihood for an additional 500 days.

In past cases involving similar sentences,\(^7\) but not involving known indigent offenders, most courts have held that such incarceration—

\(^1\) N.Y. Penal Law § 245 (McKinney 1944): “Assault in the third degree is punishable by imprisonment for not more than one year or by a fine of not more than $500, or both.”

\(^2\) N.Y. Code Crim. Proc. § 484 (McKinney 1945): “A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied; specifying the extent of the imprisonment, which cannot exceed one day for every one dollar of the fine . . . .”

\(^3\) Shoop v. State, 209 Ark. 642, 192 S.W.2d 122 (1946); State v. Bogue, 142 Mont. 459, 384 P.2d 749 (1963); City of Buffalo v. Murphy, 228 App. Div. 279, 239 N.Y.S. 206 (1930); see generally Annot., 127 A.L.R. 1283 (1940).

\(^4\) 218 N.E.2d at 687.

\(^5\) Id. at 688.

\(^6\) Assault in the third degree or simple assault is a misdemeanor in New York. People v. Katz, 290 N.Y. 361, 49 N.E.2d 482 (1943); People v. Rytel, 284 N.Y. 242, 30 N.E.2d 578 (1940).

\(^7\) In a recent federal habeas corpus proceeding involving a New York state prisoner, defendant, an indigent, claimed his eighth and fourteenth amendment rights were violated when he received a thirty day jail sentence plus a $500 fine and, in default of payment, sixty additional days in jail. Even though the fact situation was almost identical to that of the instant case, the district court denied prisoner’s eighth amendment contentions because he received less than the maximum sentence allowed by the statute and theoretically could have received a straight one year prison term with no fine which would have exceeded prisoner’s actual term by nine months. The court also denied his fourteenth amendment claim by stating that defendant did not receive his sentence because he was an indigent, but because he was convicted of a crime. As a
tion was legal on both statutory and constitutional grounds, although there is some question as to whether in the absence of statutory provisions such confinement was justified at common law. With few exceptions, the instant case departs from the prevailing view in this area.

In a prior New York case, a lower court held that defendant's inability to pay a fine did not render the fine unreasonable or excessive and, moreover, section 484 was said to disclose a legislative intent that the inability to pay a fine should not constitute a legal objection to the fine. The court added that the state should not be relegated to the ineffective remedy of a civil action to enforce the fine. Similarly, the Supreme Court of Tennessee recently held that an indigent mother convicted of child neglect could be confined until she worked off the costs of her trial. Twisting the equal protection argument, the court held that to allow an indigent defendant to escape payment of his fine would deny the financially able defendant of his right to equal protection of the laws because he alone would be held responsible for his fines. In effect, that court stated that the objective of the American judicial system was to balance the interests of society against those of the individual and concluded that the interest of the state in enforcing its judgments was superior to the defendant's inability to pay her fine.

In rare opposition to the prevailing view is a recent New York County Court decision, which held that a $250 fine or 250 days in jail alternative, in addition to a prison term, did deprive the defendant of his constitutional right to equal protection of the laws because caveat, however, the district court did find that defendant's constitutional claims would have been much stronger had defendant received the maximum sentence allowed by law, i.e., the same sentence defendant received in the instant case. United States ex rel. Privitera v. Kross, 239 F. Supp. 118 (S.D.N.Y. 1965).


9. The authorities as to the common law practice are not clear. Compare Ex parte Watkins, 32 U.S. (7 Pet.) 568 (1833) and 8 ENCYC. PL. & PRAC. 961 (18______), where defendant stands committed until his fine is paid, with People v. Velarde, 45 Cal. App. 520, 188 Pac. 59 (1920) and 1 BISHOP, NEW CRIM. PROCED. § 1307 (4th ed. 1895), where imprisonment for nonpayment of a fine is invalid at common law.


16. From a practical viewpoint, any sentencing policy that imposes fines beyond the capacity of a defendant to pay has been criticized as being unsound: Like any judicial order which is not enforced it breeds disrespect for the judicial process. It tends to encourage lack of executive diligence in the collection of fines which with due diligence are collectible. If accompanied by a sentence of confinement it constitutes an arbitrary obstruction to parole and creates unde-
there is no way to equate payment of a fine with imprisonment. However, the same court did not sustain defendant's eighth amendment claim and held that the penalties imposed by the legislature were neither cruel nor unusual.

The problem in question has not arisen in cases of federal criminal convictions because the Federal Poor Convict Law allows an insolvent criminal defendant to secure his release after a thirty day confinement for nonpayment of a fine. At present, the constitutionality of the thirty day confinement period has not been challenged. The Model Penal Code recommends confinement for nonpayment only if the default is willful and contumacious, but English statutes give no consideration to the indigent defendant's inability to pay his fine.

Maryland has a statute similar to the federal statute, but the minimum period of confinement varies according to the amount of the fine. Only once has the Maryland Court of Appeals ruled on the constitutionality of imprisonment of an indigent defendant for nonpayment of a fine under this statute. In Cohen v. State, the court specifically held that notwithstanding defendant's inability to pay the fine, his sentence was neither cruel nor unusual. Although this decision
may be read as precluding a statutory interpretation similar to that in the New York Court of Appeals decision in People v. Saffore, the constitutionality of the statute as applied to indigents under the equal protection clause remains an open question in Maryland.\textsuperscript{27}

**LOYALTY OATHS — Loyalty Oath Requirements Of Maryland’s Subversive Activities Act Held Constitutional. Whitehill v. Elkins, 258 F. Supp. 589 (1966).** The plaintiff, employed as a guest lecturer in English at the University of Maryland, executed an employment contract for the academic year 1966-1967, but declined to execute a loyalty oath contained in a document called a “Certification of Applicant for Public Employment.”\textsuperscript{11} Upon being advised that he could not be employed at the University until he executed the oath, the plaintiff brought suit before a three-judge district court,\textsuperscript{2} asking that the oath be declared unconstitutional and that the defendants be enjoined from preventing the consummation of his contract with the University of Maryland.

Recognizing that the specific wording of the current oath had been upheld by the Supreme Court in Gerende v. Board of Supervisors of Elections,\textsuperscript{8} the plaintiff maintained the validity of Gerende had been impaired by later decisions in Baggett v. Bullitt\textsuperscript{4} and Elfbrandt v.

\textsuperscript{27} The application of the equal protection doctrine in the criminal field is a relatively new and growing phenomenon, and a 1937 decision would not conclude a question in this area. See generally Comment, 27 MD. L. REV. 154 (1967).

1. **CERTIFICATION OF APPLICANT FOR PUBLIC EMPLOYMENT. Required by Law (Art. 85A, Paragraph 13, Annotated Code of Maryland, 1957).**

   I do hereby certify that I am not engaged in one way or another in the attempt to overthrow the Government of the United States, or the State of Maryland, or any political subdivision of either of them, by force or violence.

   I further certify that I understand the foregoing statement is made subject to the penalties of perjury prescribed in Article 27, Section 439 of the Annotated Code of Maryland (1957 edition).


   3. 341 U.S. 56 (1951). The oath held valid was required of candidates for public office to obtain a place on the ballot and stated that they are not engaged “in one way or another in the attempt to overthrow the government by force or violence” and that they are not knowingly members of an organization engaged in such an attempt.

   4. 377 U.S. 360 (1964). The oath under consideration was applicable to all state employees and incorporated the Washington Subversive Activities Act of 1951 prohibiting employment to a subversive person defined as:

   . . . [A]ny person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of government of the United States, or of the state of Washington, or any political subdivision of either of them by revolution, force, or violence; or who . . . becomes or remains a member of a subversive organization.
The latter cases struck down oaths requiring the affiant to state that he was not knowingly a member of an organization seeking to overthrow the state or federal government. Such a provision was upheld in *Gerende*, and, therefore, in the principal case plaintiff argued that *Gerende* as a whole was not entitled to significant weight on the issue of whether the oath and its supporting statutes were unconstitutionally vague. The plaintiff launched a broad attack on loyalty oaths as a condition to public employment, arguing that the Maryland statutes do not provide for a judicial hearing prior to a final determination and are, therefore, arbitrary and discriminatory. Even if such a hearing were provided, the plaintiff maintained that the oaths are invalid because they operate to invade constitutionally protected freedoms with no showing of a reasonable relation between the oath requirements and the state's interest in keeping subversive persons from obtaining state employment. Plaintiff also

[Wash. Code Ann. § 9.81.010(5) (1961). The court struck down the statute as too broad because it proscribed "guiltless knowing behavior" and was, therefore, too vague. For a discussion of the case and past loyalty oath decisions, see Note, 25 Md. L. Rev. 64 (1965); Annot., 18 A.L.R.2d 268 (1951).

5. 384 U.S. 11 (1966). State employees in Arizona were required to take an oath to support the federal and state constitutions and state laws. The employee was subject to perjury and discharge if he "... knowingly and willfully becomes or remains a member of the communist party of the United States or its successors or any of its subordinate organizations or any other organization having for one of its purposes the overthrow by force or violence of the government of the State of Arizona or any of its political subdivisions. . . ." Ariz. Rev. Stat. § 38-231E (1965 Supp.). The oath was held unconstitutionally broad because its provisions presume conclusively that those who join a "subversive" organization share its unlawful aims. See Wieman v. Updegraff, 344 U.S. 183 (1952), where the Court held that the due process clause of the fourteenth amendment was violated by a state statute which excluded individuals from employment solely on the basis of organization membership. In *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), New York's Education Law, which establishes a presumption that a member of the Communist Party is ineligible for state employment, was challenged. The statute was previously upheld in Adler v. Board of Education, 342 U.S. 485 (1952), where the Court said that the presumption of ineligibility based on membership in a listed organization was reasonable since "the relationship between the fact found and the presumption is clear and direct and is not conclusive, [and therefore] the requirements of due process are satisfied." 342 U.S. at 496. In *Keyishian*, the Court struck down the provision because the presumption could only be rebutted by (a) a denial of membership; (b) by a denial that the organization advocates overthrow by force; or (c) by a denial that the teacher had knowledge of such advocacy. Therefore, proof of non-active membership or the absence of intent to further the aims would not be sufficient to rebut the presumption.

6. See note 3 supra.


8. The plaintiff argued that loyalty oath statutes inhibit personal freedom by causing conscientious individuals not to seek state employment, even though they are qualified. In *Bates v. Little Rock*, 361 U.S. 516 (1960), petitioners were fined for violating an ordinance requiring them to furnish membership lists of the local NAACP branch. The judgment was reversed, the Court saying that where personal freedom is threatened, the state must show a compelling interest and must show that its action "bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification." 361 U.S. at 525. See Griswold v. Connecticut, 381 U.S. 479 (1965). Compare Bryant v. Zimmerman, 278 U.S. 63 (1928) (upholding statute requiring membership list of Ku Klux Klan). In *Shelton v. Tucker*, 364 U.S. 479 (1960), the Court invalidated an Arkansas statute requiring teachers to list every
alleged that the oath was a bill of attainder against him, and that it incorporates the clearly unconstitutional provisions of article 85A, thereby rendering the oath itself invalid. Plaintiff's final argument was to the effect that the Attorney General of Maryland had no authority to sever the oath into its valid and invalid provisions since the sections of the statute are so intertwined that the legislature would not have passed one without the other.

The court upheld the oath pointing to the majority opinion in Baggett v. Bullitt, which expressly stated that Gerende was still good law and that none of the later decisions had impaired that portion of the oath presently under consideration. The court went on to say that the oath did not have to be read in conjunction with the supporting statutes and that it was clearly severable under article 85A, section 18.

organization to which they belonged or to which they contributed for five years. The Court said that even though the state's purpose might be legitimate, they could not use a means which stifles personal freedom where the goals could be achieved by less harmful means. Plaintiff in the present case argued that any benefit obtained by loyalty oaths could be achieved by ordinary criminal process.

9. This argument was dismissed as being without merit. In Garner v. Board of Public Works, 341 U.S. 716 (1951), the Supreme Court recognized that a municipal employer could inquire into matters which were relevant to an employee's fitness and suitability for public service and that a reasonable restriction of the political activities of employees is valid. But cf. Wieman v. Updegraff, 344 U.S. 183 (1952). A bill of attainder is a legislative act which inflicts punishment without judicial trial. United States v. Lovett, 328 U.S. 303 (1946). A legislative prohibition can attach to prescribed activities but not to named organizations or persons without a full hearing subject to judicial review. United States v. Brown, 381 U.S. 437 (1965). Plaintiff in the present case argued that the Maryland statutes constituted an attainder against him because a refusal to sign the oath automatically disqualified him from employment with no provision for a hearing or judicial review. Md. Code Ann. art. 85A, §§ 11, 13 (1957). See Keyishian v. Board of Regents, 255 F. Supp. 981 (W.D.N.Y. 1966), rev'd on other grounds, 385 U.S. 589 (1967), where New York's Education Law, note 5 supra, was held not to be a bill of attainder because disqualification did not follow automatically from a legislative determination since an employee could, at a hearing, introduce rebutting evidence.

10. The provisions of Md. Code Ann. art. 85A, §§ 1, 13 (1957), defining subversive persons are substantially identical to the statute struck down in Baggett v. Bullitt, 377 U.S. 360 (1964), note 4 supra. Article 85A, § 10, states that no subversive person as defined in the article shall be eligible for public office or employed in state government. Article 85A, §§ 11, 13, impose the oath requirements, and article 85A, § 1, defines subversive person in clearly unconstitutional language. Without these sections, there would be no statutory authority for requiring the oath or for imposing the penalty for perjury for false swearing. See Judge Sobeloff's concurring opinion in the principal case expressing grave doubts about not judging the oath in conjunction with the supporting statutes.

11. In Railroad Retirement Board v. Alton R.R. Co., 295 U.S. 330 (1935), a compulsory pension system for employees of interstate carriers was struck down as not within the commerce power. The statute, 45 U.S.C. §§ 201-14, contained a separability clause, but the Court said that it only operated to reverse the presumption that the act must operate as an entirety; however, the Court "cannot rewrite a statute and give it an effect altogether different from that sought by the measure viewed as a whole." 295 U.S. at 362. See Utah Power & Light Co. v. Pfost, 286 U.S. 165 (1932). See also Carter v. Carter Coal Co., 298 U.S. 238 (1936), where the Court recognizes that the presumption is reversed by a separability provision in a statute.

12. 377 U.S. 360, 368 n.7 (1964). In answering the dissenting opinion's statement that Gerende had been overruled, the Court said it did not pass on the definition of a subversive person in the Maryland statutes, but only on the actual oath to be administered. Perhaps it is significant to note that when the Court quoted the portions of the oath approved in Gerende, it omitted the phrase "in one way or another."


If any provision, phrase, or clause of this article or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other
The district court’s decision has far from settled the question of whether Maryland’s loyalty oath is valid. The court obviously felt that the issue could only properly be determined by the Supreme Court since it had specifically upheld the provisions under attack. Aside from the question of the validity of the supporting statutes, and whether they are to be read in conjunction with the oath, it appears likely that the phrase “engaged in one way or another in an attempt to overthrow the Government of the United States” will be viewed as proscribing too great an area of activity in that it requires the conscientious individual to “steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked” and, therefore, unconstitutionally interferes with first amendment freedoms. The problem lies in determining what minimum activity will be deemed engaging in the attempt to overthrow the government. In loyalty oath cases and in other situations, the Court has recently required definite notice as to what acts or activities are prohibited or disclaimed. The Whitehill case is now pending before the Supreme Court, and it seems likely that the Court will deem the oath in question to be too indefinite under this standard.

SEARCH AND SEIZURE — Landlord’s “Right To Exculpate Himself” Makes His Consent To Search Binding On The Tenant. United States v. Botsch, 364 F.2d 542 (2d Cir. 1966). After commencing operations in a newly opened retail sporting goods store in Huntington, New York, the defendant rented a small shack in Sayville, New York. The owner retained a key and, at the request of the defendant, agreed to unlock the shack to permit daily deliveries of merchandise to be stored inside. He was provided with funds to pay freight expenses on delivery. Upon receipt of a complaint that defendant was using the shack to receive and store merchandise obtained on the credit rating of a wholly unrelated enterprise in Sayville, Postal
Inspectors, who, at this point, had no search warrant, went to the shack to investigate. The owner, concerned that he might be involved in an illegal activity, fully disclosed the circumstances of the rental and invited the Inspectors to examine the contents of the shack. As a result of this examination, the Inspectors obtained a listing of shippers from which they later received a copy of a purchase order containing the fraudulent credit rating. On the strength of this information, arrest and search warrants were issued and defendant was subsequently found guilty on thirteen counts of using the mails in a scheme to defraud and on one count of assuming a fictitious name or address to promote a fraud. On appeal, the major question was whether the owner’s consent to the search was binding on the defendant, thus rendering the search reasonable.

The court, speaking through Judge Kaufman, upheld the search. Noting that the protection afforded unoccupied premises may diminish, it distinguished *Chapman v. United States* and the *Hotel Cases* on the grounds that in none of those cases was the landlord an unwitting but active accomplice in the tenant’s illegal activities. The court ruled that a landlord has a “right to promptly and voluntarily exculpate himself” where the landlord’s innocent activities are “inextricably intertwined with [the defendant’s] alleged scheme and cast suspicion upon him . . . his authorization of the inspection when viewed in its full context rendered the search reasonable.”

The dissenting opinion, stressing that the owner’s authority was limited, reasoned that since the consent of one in complete possession

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3. In *Feguer v. United States*, 302 F.2d 214 (8th Cir. 1962), the defendant had abandoned his rented room, and a search with the consent of the landlord was held reasonable. The decision indicates that protection extends only to a place of occupancy. See *Abel v. United States*, 362 U.S. 217 (1960); *Buettner v. State*, 233 Md. 235, 196 A.2d 465 (1964).
4. 365 U.S. 610 (1961), noted in *Notre Dame Law*. 250 (1961). Police officers with the consent of the landlord searched defendant’s rented house and found a distillery. The Court held that the evidence was inadmissible, ruling that the landlord’s common law right to enter and view waste could not be delegated to law enforcement officers. See *Klee v. United States*, 53 F.2d 58 (9th Cir. 1931) (right of entry under lease).
5. Police had no right to believe that hotel clerk had been authorized by the defendant to permit police to search. *Stoner v. California*, 376 U.S. 483 (1964); *United States v. Jeffers*, 342 U.S. 48 (1951). See *People v. Hicks*, 165 Cal. App. 2d 548, 331 P.2d 1003 (1958), where defendant was a hotel guest and had a key to a storage room but not exclusive control; consent by the hotel manager was binding.
6. 364 F.2d 542, 547–48 (2d Cir. 1966), where the defendant gave an unlocked briefcase to his landlady instructing her not to give it to anyone else and the landlady informed the FBI, the court stated:

Mrs. Caldwell had no reason to become involved in the crime by allowing her apartment and herself to be used as a hiding place . . . when possession and control of his briefcase is given by a man to another person we think that man accepts the risk that the other person will consent to a search and seizure of it and, under the circumstances that exist in this case, such consent is valid. *Marshall v. United States*, 352 F.2d 1013, 1015 (9th Cir. 1965), cert. denied, 382 U.S. 1010 (1966). See *United States v. Eldridge*, 302 F.2d 463 (4th Cir. 1962), holding that the consent to a search of an automobile by a gratuitous bailee did not exceed the authority or dominion entrusted to him and his consent was binding on the defendant. See also *Von Elchelberger v. United States*, 252 F.2d 184 (9th Cir. 1958). See generally 23 Md. L. Rev. 93 (1963).
may not make a search reasonable, the consent of a party with a limited right of entry is less effective. Where there is this limited right, the dissent maintains that it must be clearly shown "that the absent person has made the consenting party his agent to consent." Since the owner was not engaged in receiving shipments at the time of his consent he could not have been acting as an agent. The dissent argues that the activities of the owner were irrelevant, neither increasing his dominion over the property nor creating an agency.

The fourth amendment protects the right of privacy of an owner or occupier from unreasonable searches of his premises. Where consent to a search is given by a third party, most cases regard the existence of his possession and control a primary element in determining whether the search is reasonable and the consent binding on the defendant. Consent to a search without a warrant by a third party who is an owner or tenant is binding on his guest. Consent is also binding where the third party and the defendant have joint control of the premises, where the defendant denies an interest in the premises, or where the defendant has left the premises in control of the third party. Mere ownership interest or limited right of access without substantial control or dominion over the property does not usually give the power to make a binding consent. Consequently, consent by a landlord is generally not binding on a defendant tenant solely on the basis of a landlord's ownership and limited right to enter or by other third party owners residing in the same household where the

7. See 364 F.2d 542, 551 (2d Cir. 1966); Reeves v. Warden, Md. State Penitentiary, 346 F.2d 915 (4th Cir. 1965).
8. In Klee v. United States, 53 F.2d 58, 61 (9th Cir. 1931), the court, holding the search unreasonable, stated: "Agency means more than passive permission; it involves request, instruction, or command," and found that the landlord had no right to permit officers to enter on any business except his own. The Supreme Court has recognized that a valid consent may be given through an agent, but has also said: "Our decisions make clear that the rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of 'apparent authority.'" Stoner v. California, 376 U.S. 483, 488 (1964).
9. McGuire v. State, 200 Md. 601, 92 A.2d 582 (1952). See Johnson v. United States, 358 F.2d 139 (5th Cir. 1966); Hall v. Commonwealth, 261 S.W.2d 677 (Ky. 1953). See generally Annot., 31 A.L.R.2d 1078 (1953); Davis, Federal Searches and Seizures 200-15 (1964). Consent to a search is generally not binding on a defendant tenant solely on the basis of a landlord's ownership and limited right to enter or by other third party owners residing in the same household where the owner's consent binding on casual visitor.
11. United States v. Sferas, 210 F.2d 69 (7th Cir. 1954), cert. denied, 347 U.S. 935 (1954); United States v. Thompson, 113 F.2d 643 (7th Cir. 1940); United States v. Goodman, 190 F. Supp. 847 (N.D. Ill. 1961). The latter cases hold that the consent of one partner in a business is binding on the other. See, e.g., Stein v. United States, 166 F.2d 851 (9th Cir. 1948), where the wife's consent was binding on the husband since she held joint title in the premises. See People v. Hicks, 165 Cal. 2d 548, 331 P.2d 1003 (1958). In People v. Gorg, 45 Cal. 2d 776, 291 P.2d 469 (1955), a search was held reasonable where the landlord believed he had joint control and gave consent. 12. E.g., Driskill v. United States, 281 Fed. 146 (9th Cir. 1922); Bucholtz v. Warden, Md. State Penitentiary, 252 Md. 614, 195 A.2d 690 (1963).
13. E.g., United States v. Sergio, 21 F. Supp. 553 (E.D.N.Y. 1937), where the defendant's wife was in charge of the house while her husband was in the attic operating a distillery, and the court held her consent was binding on the husband; Hook v. State, 15 Misc. 2d 672, 181 N.Y.S.2d 621 (Ct. Cl. 1958).
14. E.g., Chapman v. United States, 365 U.S. 610 (1961); Klee v. United States, 53 F.2d 58 (9th Cir. 1931); Hall v. Commonwealth, 261 S.W.2d 677 (Ky. 1953); Miller v. State, 174 Md. 362, 198 Atl. 710 (1938).
area searched is designated as reserved for the personal effects of the defendant.\textsuperscript{16} There is a split in the cases on whether a wife can consent for her husband.\textsuperscript{18} An interesting recent Maryland decision indicated that the possession of a key gave the wife "constructive possession" of her husband's railway station locker sufficient to consent to a search.\textsuperscript{17}

Behind the doctrines arising out of common factual situations, the true test for the admissibility of seized evidence is whether the search is reasonable under the circumstances.\textsuperscript{18} In the present case, the court appears to be stressing the reasonableness of the motives prompting consent rather than the crucial issue of whether there has been a reasonable invasion of the defendant's right to be free from a warrantless search. The opinion indicates that the fourth amendment cannot be applied as a restraint on the reasonable actions of the consenting party. The prohibition was never intended as a restraint on private citizens, but as a restraint on the investigative power of government. The focus should be on the actions of the investigators\textsuperscript{19} and the inferences they might draw on the validity of the consent after having been fully apprised of the landlord's relationship with the defendant. While the motive for consent would be relevant to a valid waiver in a prosecution against the consenting party, it becomes irrelevant to the determination of a valid waiver against this defendant.

**SEARCH AND SEIZURE — New Requirements For Consent.**

*United States v. Blalock*, 255 F. Supp. 268 (E.D. Pa. 1966). The defendant Blalock was approached by federal agents who had not obtained a warrant. The officers frisked him and then accompanied him to his hotel room where they briefly interrogated him concerning a bank robbery under investigation. After Blalock denied any knowledge of the robbery, the officers asked him whether he objected to their searching his room. Blalock replied that he had no objection. Marked stolen bank notes were found during the search. On motion to suppress the notes, the court found there was no valid consent to the search and held that the fourth amendment\textsuperscript{15} requires no less a standard of waiver.


18. Woodward v. United States, 254 F.2d 312 (D.C. Cir. 1958). See Burge v. United States, 342 F.2d 408 (9th Cir. 1965), cert. denied, 382 U.S. 829 (1965); Driskill v. United States, 281 Fed. 146 (9th Cir. 1922).

19. It is generally recognized that failure to obtain a warrant where the evidence is not likely to be immediately destroyed or removed is strong evidence of an unreasonable search. *E.g.*, Chapman v. United States, 365 U.S. 610 (1961). This point was raised in the present case, but was passed over with only the cursory comment that, notwithstanding the force of the argument, the circumstances justified the search.

1. U.S. Const. amend. IV:

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
than do the fifth and sixth amendments. The waiver must be voluntary and intelligent; that is, the defendant must actually know of his constitutional right to demand that the police obtain a search warrant before he can be said to have "waived" that right. Therefore the court concluded the law will not presume the defendant knows of this right, and therefore the police must formally warn the subject of his fourth amendment rights before an effective "waiver" can occur.

Constitutional rights as to searches and seizures may be waived. The waiver must be proven by clear and positive testimony, and there must be no duress or coercion, actual or implied. The government must show a consent that is "unequivocal and specific," "freely and intelligently given." Since waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege, courts have said they will indulge every reasonable presumption against waiver of fundamental constitutional rights. It has been held that entry under color of office and submission to authority is not a waiver and that words of invitation to police officers to enter and look around are not to be taken as a valid waiver. Thus, it would seem that under the law of search and seizure existing prior to the principal case, the court could have found an absence of consent on the facts of the case without extending the requirements to include a formal warning of the subject's rights. However, in light of the holding in *Miranda v. Arizona* that the fifth and the sixth amendments require that the accused be informed of his constitutional rights, this extension does not seem unwarranted. Moreover, since the fourth amendment by way of the fourteenth is applicable in full upon the states, it seems reasonable to extend the warning requirement to the fourth amendment.

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.

5. Kovach v. United States, 53 F.2d 639 (6th Cir. 1931). These requirements of effective waiver were applied in Judd v. United States, 190 F.2d 649 (D.C. Cir. 1951) and in Channel v. United States, 285 F.2d 217 (9th Cir. 1960).
6. See Johnson v. Zerbst, 304 U.S. 458, 464 (1938); Cipres v. United States, 343 F.2d 95 (9th Cir. 1965).
8. The court in Judd v. United States, 190 F.2d 649 (D.C. Cir. 1951), stated at 651: "Conceivably, that is the calm statement of an innocent man; conceivably, again, it is but the false bravado of the small-time criminal." See Catalanotte v. United States, 208 F.2d 264 (6th Cir. 1953); Karwicki v. United States, 55 F.2d 225 (4th Cir. 1932).
9. "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).
11. Several suggestions have been promoted to further safeguard the individual's rights under the fourth amendment; the warning requirement holding of the principal case was advanced in a comment on consent in 113 U. Pa. L. Rev. 260, 268 (1964). Justice Nathan R. Sobel suggests that where officers cannot get a warrant due to nebulous or absent probable cause, a written consent document should be executed before the judge. SOBEL, CURRENT PROBLEMS IN LAW OF SEARCH AND SEIZURE 128 (1964). The most radical view is to exclude all evidence in the absence of a valid warrant. See Higgins v. United States, 209 F.2d 819 (D.C. Cir. 1954).
SUPREME COURT — Procedural Rules As Adequate State Grounds. O'Connor v. Ohio, 385 U.S. 92 (1966). At defendant's trial for larceny the prosecutor commented to the jury on the failure of the accused to testify in his own defense. Because such comment was acceptable under current Ohio practice, defendant raised no objection. Defendant was convicted, his conviction affirmed by the Ohio Court of Appeals, and his appeal dismissed by the Ohio Supreme Court. While defendant was seeking review in the United States Supreme Court, that Court handed down its decision in Griffin v. California, which held that a prosecutor's comment in a state court upon an accused's failure to testify violated his constitutional privilege against self-incrimination. Defendant based his petition for certiorari on this new rule. The Supreme Court vacated the judgment and remanded the case for consideration in the light of Griffin. On remand, the Ohio Supreme Court affirmed defendant's conviction on the ground that it could refuse to consider a claim of error not raised in the trial court. The Supreme Court reversed, concluding that defendant's constitutional right could still be asserted in spite of his failure to comply with the Ohio procedural rule. The Ohio procedural rule was deemed not to be an adequate state ground for the decision, because the Court felt it would be unreasonable to require defendant to anticipate the Griffin decision by registering a futile objection at trial.

The doctrine of adequate state grounds provides that where a state judgment rests on an independent state ground, which in itself demands a particular disposition of the case, the Supreme Court has no jurisdiction to review the federal questions presented. An effect

1. 380 U.S. 609 (1965). The foundation for the Griffin decision was laid in Malloy v. Hogan, 378 U.S. 1 (1964), in which the fifth amendment privilege against self-incrimination was made applicable to the states through the due process clause of the fourteenth amendment.

2. Tehan v. United States ex rel. Shott, 382 U.S. 406 (1966), held that the Griffin rule would not be applied in cases final on the date of the Griffin decision, but indicated Griffin would be applied to cases pending appeal on that date.


5. The doctrine was first articulated in Murdock v. City of Memphis, 87 U.S. 590 (20 Wall.) 590 (1874). Under the Murdock approach, the Court would first examine the federal question itself to determine if the state court had decided it correctly. If the federal issue had been correctly resolved, the Court would affirm the state judgment; if it had not, the Court would then consider the adequacy of the state ground. Under the more modern approach developed in Fox Film Corp. v. Muller, 296 U.S. 207 (1935), the Court first weighs the adequacy of the state ground, refusing to consider the federal question unless the state ground is found insufficient. Although the two methods of applying the doctrine differ, they both achieve the same practical result — to deny the Court jurisdiction where the state ground is adequate. It should be noted, however, that the Fox approach is consistent with the rationale underlying the adequate state grounds doctrine, while the Murdock approach is not. The rationale was stated in Herb v. Pitcairn, 324 U.S. 117, 126 (1945), as follows: "We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." The Murdock method of applying the doctrine resulted in dictum on the federal question, in that the federal question was considered by the Court first. Such dictum was no more than an advisory opinion. The Fox approach, by requiring the adequacy of the state ground to be determined initially, cures the defect associated with the Murdock approach.
of this doctrine has been to permit the forfeiture of federal rights through failure to comply with state procedural requirements. However, the Court has been reluctant to allow such forfeitures where it is obvious that the procedural rule is being used expressly to evade Supreme Court review of important federal issues. Generally, the Court has found state procedural grounds inadequate when they have posed unreasonable obstacles to the vindication of federal rights or when they were inconsistently applied to achieve a discriminatory purpose. The doctrine was never seriously challenged, however, until the Court's decision in *Fay v. Noia*, which virtually destroyed its operation in federal habeas corpus proceedings. A state prisoner can now have his federal claim considered in a federal court regardless of the adequacy of the state grounds upon which the judgment of the state courts rests.

The *Fay* ruling set the stage for the Court's enigmatic opinion in *Henry v. Mississippi*. The *Henry* case involved a default under a state "contemporaneous objection" rule requiring timely objection to illegal evidence as a prerequisite for appellate review. The Court declined to consider whether or not the rule was an adequate state ground until after the state supreme court had determined if defendant had voluntarily waived his federal rights for tactical purposes. After disposing of the case on this narrow basis, the Court launched into a broad discussion of the application of the adequate state grounds doctrine to state procedural rules, concluding that such rules could be adequate state grounds only if they served a "legitimate state interest." This vague dictum has left the status of the doctrine highly unsettled. Justice Harlan, dissenting in *Henry*, warned that the

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7. See Comment, 61 COLUM. L. REV. 255 (1961). In Davis v. Wechsler, 263 U.S. 22, 25 (1923), the Court held that "local practice shall not be allowed to put unreasonable obstacles in the way" of federal substantive rights. Brown v. Western Railway, 338 U.S. 294, 298 (1949), stated: "Strict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws." In Staub v. City of Baxley, 355 U.S. 313 (1958) and NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958), state procedural rules were found to be inadequate state grounds because they were applied inconsistently. In the *NAACP* decision, at 457-58, the Court explained: "Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance on prior decisions, seek vindication in state courts of their federal constitutional rights." Where the Court refused to enforce a default of federal rights through non-compliance with a state procedural rule, it justified its departure from the adequate state grounds doctrine by concluding that the question of when a state procedural rule can preclude consideration of a defendant's federal rights is itself a federal question, subject to Supreme Court review. Henry v. Mississippi, 379 U.S. 443 (1965); Liner v. Jafco, Inc., 375 U.S. 301 (1964); Carter v. Texas, 177 U.S. 442 (1900). Thus the Court has sometimes indulged in a kind of balancing process in which the state's legitimate interest in the procedural requirement is weighed against the importance of the federal right allegedly violated.
8. 372 U.S. 391 (1963). *Fay* held that the Supreme Court has the power to grant habeas corpus to a state prisoner regardless of the adequacy of state procedural grounds for conviction. The adequate state grounds doctrine thus would apply only to direct appellate review. The defendant in *Fay* did not exhaust his available state remedies; to grant such a prisoner federal habeas corpus seriously impairs the finality of state judgments.
majority language foreshadowed an extension of the Fay ruling to
direct review.\(^{10}\) On the other hand, the majority opinion, on its face,
appears to be nothing more than a recapitulation of the earlier law
in the area.\(^{11}\) It seems more likely that Henry is an attempt to strike
a middle ground between the traditional practice of permitting for-
feiture of federal rights through non-compliance with state procedure
and the more radical approach adopted in Fay.\(^{12}\)

The instant case provided the Court with an opportunity to
clarify the uncertain position taken in Henry. Unfortunately, the
Court based its decision solely on the unreasonableness of requiring
defendant to anticipate Griffin with a vain objection. This reasoning
is strikingly similar to that used in Herndon v. Georgia,\(^ {13}\) in which
the Court concluded that the defendant would not forfeit his federal
claim if he could not reasonably have anticipated a decision recon-
struing the state statute involved in the case.\(^ {14}\) In the light of this
similarity, it is possible that the Court genuinely intends to continue
to rely on settled principles. It is more likely, however, that the Court
is merely reluctant to take a definitive new stand on the issue until
it is squarely presented. The O'Connor decision, because of the narrow
scope of its facts, has questionable value as an indicator of the course
of future decisions.

10. Id. at 457. If Justice Harlan's forebodings are correct, it appears likely
that valuable state procedural requirements will be impaired once again. Such an
impairment would not be as significant in practical effect as it might appear, because
no more than a few cases each year on direct review to the Supreme Court have
been disposed of by the state courts on state procedural grounds.

11. Justice Brennan's opinion in Henry contains the repeated assurance that the
Court will apply only "settled principles" in considering the adequacy of state pro-
cedural grounds. The legitimate state interest test recommended in Henry has been
called a "fair synthesis of prior decisions." 65 COLUM. L. REV. 710, 713 (1965).
There are indications, however, that the Court is suggesting a departure from the
erlier cases. It is by no means certain that the situation in Henry warranted such
a sweeping treatment of the doctrine. The Mississippi Supreme Court had recognized
exceptions to the state contemporaneous objection rule in several cases where funda-
mental rights were involved. See Sandalow, Henry v. Mississippi and the Adequate
The Supreme Court could have restricted its opinion to "settled principles" by
declaring the procedural rule inadequate on the grounds of inconsistent application.
Also, the Henry dictum stated that the Mississippi procedural rule did not serve a
legitimate state interest in this situation, because the defendant's motion for directed
verdict, partially based on the illegal admission of evidence, was an adequate sub-
stitute for an express objection. The Court appeared to be dictating procedural rules
to the state court, rules more conducive to the unfettered assertion of federal rights.
See 65 COLUM. L. REV. 710 (1965).

12. See Sandalow, Henry v. Mississippi and the Adequate State Ground: Pro-
posals for a Revised Doctrine, 1965 SUPREME COURT REV. 187, 238.


14. In Herndon, however, the Court held that defendant could have, in the light
of the circumstances, reasonably anticipated the reconstruction of the statute, and,
accordingly, the conviction was affirmed.