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Comments

COMMENTS

CONSTITUTIONAL LAW—DOUBLE JEOPARDY— PROSECUTION OF RELATED OFFENSES IN SEPARATE TRIALS. *Jordan v. Virginia,* No. 78-6540 (4th Cir. June 2, 1980).

I. INTRODUCTION

In *Jordan v. Virginia,*[1] the Court of Appeals for the Fourth Circuit held that separate trial prosecutions for related offenses arising from a single criminal episode might violate the double jeopardy clause[2] even though those same offenses could be prosecuted in a single action. In reaching its decision, the court found that if evidence used in prosecuting an earlier charge would sustain a subsequent charge, the offenses are the same, and double jeopardy bars the second prosecution.[3]

On May 6, 1976, defendant entered a drugstore in the Commonwealth of Virginia and procured a quantity of the drug Eskatrol by presenting a forged prescription to the pharmacist. Subsequently, defendant was arrested and charged with the misdemeanor offense of obtaining a drug with a forged prescription[4] and the felony offense of possession of a controlled substance.[5]

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1. No. 78-6540 (4th Cir. June 2, 1980).

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

3. No. 78-6540, slip op. at 10.

4. VA. CODE § 54-524.76 (1950)(repealed 1977)(subject currently addressed at VA. CODE § 18.2-258.1 (Cum. Supp. 1980)) provided as follows:

> No person shall obtain or attempt to obtain any drug or procure or attempt to procure the administration of any drug: (1) by fraud, deceit, misrepresentation, or subterfuge; or (2) by the forgery or alteration of a prescription or of any written order; or (3) by the concealment of a material fact; or (4) by the use of a false name or the giving of a false address.

5. Under VA. CODE § 18.2-250 (Cum. Supp. 1980), it is unlawful "for any person knowingly or intentionally to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his professional practice . . . ." Defendant was charged with obtaining a schedule II controlled substance, defined as a substance in current medical use, but with a high potential for abuse that will lead to severe psychic or physiological dependence. VA. CODE § 54-524.89:5 (replacement vol. 1978).

A store employee had followed defendant into a parking lot and observed him in

Defendant was tried and convicted on the misdemeanor charge, and nearly two months later, was tried and convicted on the felony charge. At the second trial, defendant raised a double jeopardy defense, claiming that the earlier misdemeanor conviction for the illegal procurement of a controlled substance barred subsequent prosecution for possession of the same substance. The trial court rejected this argument,[6] holding that the related offenses were not the "same offense" for double jeopardy purposes.

Following an unsuccessful appeal to the Supreme Court of Virginia on the double jeopardy claim, defendant sought relief by writ of habeas corpus in federal district court. The district court ruled that defendant had been placed in double jeopardy and issued the writ; an appeal by the Commonwealth ensued.

II. Establishing A Double Jeopardy Standard for Multiple Prosecutions

The Commonwealth based its appeal on the two-offense, or same-evidence, test set forth by the United States Supreme Court in *Blockburger v. United States.*[7] Under this approach, "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses, or only one, is whether each provision requires proof of an additional fact which the other does not."[8] The Commonwealth reasoned that the misdemeanor offense required proof of illegal procurement or an attempt to procure, which was not required to prove the felony offense, and the felony required proof of possession, a fact not required to establish the misdemeanor offense.[9]

The Court of Appeals for the Fourth Circuit consistently has applied the two-offense test of *Blockburger* to double jeopardy questions concerning the constitutionality of multiple punishments in a single proceeding.[10] *Jordan,* however, was the first

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possession of the drug.

6. No. 78-6540, slip op. at 4.

7. 284 U.S. 299 (1932).

8. *Id.* at 304.

9. No. 78-6540, slip op. at 6 n.5.

10. *See* United States v. Crew, 538 F.2d 575 (4th Cir. 1976); Smith v. Cox, 435 F.2d 453 (4th Cir. 1970); United States v. Oates, 314 F.2d 593 (4th Cir. 1963); McGann v. United States, 261 F.2d 956 (4th Cir. 1958). In view of the court's favorable remarks on

case to present the issue of the constitutionality of separate trials for offenses arising from a single criminal episode.[11] In an opinion by Judge Phillips, the court of appeals upheld the decision of the district court, rejecting the *Blockburger* test as inappropriate for determining the constitutionality of multiple prosecutions for related offenses. The court noted that although the two-offense test may be proper for determining whether a defendant may be subjected to multiple punishments for related offenses in a single proceeding, additional interests at stake in multiple-trial prosecutions warrant an analysis more protective of the rights of criminal defendants.[12]

Double jeopardy protection against retrial for related offenses, according to the court, should vindicate "principles of finality and repose of former judgments and of fundamental fairness that simply are not involved in a joined charge prosecution"[13] and should insure that a defendant should not have to "run the gauntlet" of criminal trial a second time.[14] To protect these interests, the court fashioned an analysis that focuses on the *actual evidence adduced at the first trial* rather than the evidence *required to prove the offense.*[15] Using this analysis, the court determined that the defendant had been placed twice in jeopardy for the same offense.

This actual-evidence test has little support in caselaw[16] and

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Jordan regarding the use of the two-offense, or same-evidence, test for determining the constitutionality of multiple punishments in a single trial, the court will likely continue to apply the test in those cases in the future. *See* No. 78-6540, slip op. at 5-7.

11. *But see* United States v. Fowler, 463 F. Supp. 649 (W.D. Va. 1978). Applying the *Blockburger* test, the district court in *Fowler* determined that separate prosecutions for the receipt of stolen goods and for the sale of the same stolen goods was permissible. *Id.* at 652.

12. No. 78-6540, slip op. at 5-7.

13. *Id.* at 7.

14. *Id.*

15. *See id.* at 10. By proving in the first trial that the defendant had obtained the drug, rather than only that he attempted to obtain it, the government established the essential elements of possession requisite to the felony offense, thereby precluding the second trial, according to the court. *See id.*

16. The language on which the court in *Jordan* relied as authority for the actual-evidence approach—" ' "the evidence required to warrant a conviction upon one of the [prosecutions] would have been sufficient to support a conviction upon the other," ' " *id.* at 7 (quoting substantially *Ex parte* Nielsen, 131 U.S. 176, 188 (1889) (quoting Morey v. Commonwealth, 108 Mass. 433, 434 (1871)))—does not stand in *Morey* for the proposition for which it was cited in *Jordan.* Rather, the test set forth in *Morey* was the forerunner of the same-evidence test attributed to *Blockburger*—the very same test the

constitutes a departure from approaches used by other courts.[17] Several federal circuit courts recently have applied the *Blockburger* two-offense test to multiple-prosecution situations,[18] and a number of state supreme courts have adopted yet another approach to the multiple prosecution problem: the same-transaction test.[19] This broad test prohibits successive trials for offenses arising out of a single criminal episode or transaction, and is, in effect, a rule of joinder.[20]

The United States Supreme Court has addressed double jeopardy in the context of multiple prosecutions on several occasions, often analyzing in terms of the *Blockburger* test.[21] The Court, however, has not addressed directly whether double jeopardy may prohibit multiple trials on related charges even if *Blockburger* would allow the charges to be brought in a single proceeding.[22] In *Gavieres v. United States*,[23] the Court em-

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court rejected in *Jordan*. *Morey* underscored that the crucial evidence is not the evidence actually presented, but rather that minimally necessary to prove the crime charged.

Apparently, an actual-evidence approach has been suggested only once prior to *Jordan* in the federal courts. In District of Columbia v. Buckley, 128 F.2d 17 (D.C. Cir. 1942), Judge Rutledge, in a concurring opinion, noted that "the [same-evidence] test therefore is useful only in relation to the evidence *actually offered*, not in relation to that *required to prove* the greater offense." *Id.* at 21. For state court decisions using the actual-evidence test, see Martinis v. Supreme Court, 15 N.Y.2d 240, 206 N.E.2d 165, 258 N.Y.S.2d 65 (1965); Estep v. State, 11 Okla. Crim. 103, 143 P. 64 (1914).

17. Two courts of appeals have expressly rejected the use of the actual-evidence test. *See* United States v. Brunk, 615 F.2d 210, 211-12 (5th Cir. 1980); United States v. Cowart, 595 F.2d 1023 (5th Cir. 1979). The *Cowart* court stated that the "test looks not to the evidence adduced at trial but focuses on the elements of the offense charged." *Id.* at 1029.

18. In United States v. DeCoteau, 516 F.2d 16 (8th Cir. 1975), for example, the Court of Appeals for the Eighth Circuit upheld separate prosecutions for charges of operating a motor vehicle under the influence of alcohol and involuntary manslaughter, yet both offenses arose from a single criminal incident. The Court of Appeals for the Second Circuit, in United States v. Ortega-Alvarez, 506 F.2d 455 (2d Cir. 1974), *cert. denied*, 421 U.S. 910 (1975), upheld separate prosecutions for the sale of narcotics not in their original stamped package and for conspiracy to violate narcotic statutes, yet both charges arose from a single criminal event. Both courts applied the *Blockburger* test rejected by the Fourth Circuit.

19. *See* People v. White, 390 Mich. 245, 212 N.W.2d 222 (1973); Commonwealth v. Campana, 452 Pa. 233, 304 A.2d 432 (1973); State v. Brown, 262 Or. 442, 497 P.2d 1191 (1972). The holding in *Brown*, but not its rationale, has since been repudiated. State v. Hammang, 271 Or. 749, 534 P.2d 501 (1975).

20. *See* Ashe v. Swenson, 397 U.S. 436, 453-54 (1970)(Brennan, J., concurring).

21. *See* text accompanying notes 23 & 27-32 *infra*.

22. *See* State v. Brown, 262 Or. 442, 450, 497 P.2d 1191, 1195 (1972); J. COOK, CON-

ployed the *Blockburger* two-offense test in upholding separate trials for offenses arising from the same criminal conduct. The precedential value of this case is questionable, however, simply because of the growth of the double jeopardy doctrine since the case was decided in 1911. In *Ciucci v. Illinois,*[24] the Court upheld the prosecution of a defendant at three separate trials for the murder of his family. This decision, however, was based on due process considerations rather than double jeopardy grounds since, at the time, the double jeopardy clause of the fifth amendment had not yet been incorporated into the fourteenth amendment and, therefore, was inapplicable to state prosecutions. In *Ashe v. Swenson,*[25] the Court recognized that the doctrine of collateral estoppel will spare defendants the hardship of second trials under some circumstances. While this doctrine is available to a defendant acquitted in an earlier proceeding, however, it is useless to a defendant convicted in an earlier proceeding.[26] Thus, *Ashe* does not solve the problem presented in *Jordan.*

Two other major cases decided recently by the Court have raised the issue of double jeopardy in multiple prosecutions. In *Brown v. Ohio,*[27] the Court employed the *Blockburger* test to preclude prosecutions for related offenses. The Court reasoned that if under that test the "offenses are the same . . . for purposes of barring consecutive sentences at a single trial, they necessarily will be the same for purposes of barring successive prosecutions."[28] However, because the *Blockburger* test adequately protected the defendant from multiple trials in that case, the Court was not compelled to go further. In *Jordan,* the Fourth Circuit read *Brown* to allow a broader test than *Blockburger,* if necessary to protect a defendant from double jeopardy in multiple-trial situations.[29]

Another, arguably less expansive, interpretation of *Brown*

STITUTIONAL RIGHTS OF THE ACCUSED—POST-TRIAL RIGHTS 163 n.62 (1976).

23. 220 U.S. 338 (1911).

24. 356 U.S. 571 (1958).

25. 397 U.S. 436 (1970).

26. Commonwealth v. Campana, 452 Pa. 233, 246, 304 A.2d 432, 438 (1973). The doctrine of collateral estoppel actually works against a defendant convicted at the first trial because he will be unable to relitigate issues resolved against him.

27. 432 U.S. 161 (1977).

28. *Id.* at 166.

29. No. 78-6540, slip op. at 5-6.

was given by the Supreme Court in *Illinois v. Vitale*,[30] a case decided after *Jordan*. In that case, the Supreme Court of Illinois had held that separate prosecutions of an automobile driver for involuntary manslaughter and failure to reduce speed to avoid a collision violated the prohibition against double jeopardy. In a five to four decision, the United States Supreme Court, relying on *Brown*, vacated judgment and remanded the case, directing the Illinois court to determine whether the offenses were the same under the *Blockburger* analysis.[31] Although it may be inferred from *Vitale* that *Blockburger* is to be the sole double jeopardy test for multiple prosecution situations, the Court did leave open a possibility that other tests may be used in multiple-prosecution cases.[32]

III. DETERMINING THE BEST STANDARD

A. *The* Blockburger *Test*

The two-offense, or same-evidence, test, commonly attributed to *Blockburger v. United States*,[33] was first expounded in *The King v. Vandercomb & Abbott*.[34] There, the court stated that "unless the first indictment were such as the prisoner might have been convicted upon by proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second."[35] This approach was well suited to cope with the double jeopardy problems of its time. Criminal statutes were relatively few in number and broad in scope. Accordingly, offenses were distinguished easily on the basis of their substantive elements.[36]

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30. 100 S. Ct. 2260 (1980).

31. *Id.* at 2267-68.

32. The Court recognized the *Blockburger* test as "the *principal* test for determining whether two offenses are the same for purposes of barring successive prosecutions." *Id.* at 2265 (emphasis added). This qualified statement, along with the Court's recognition in *Brown* that "[t]he *Blockburger* test is not the only standard for determining whether successive prosecutions impermissibly involve the same offense," 432 U.S. at 166 n.6, suggests that the Court has left open the possibility for other approaches.

33. 284 U.S. 299 (1932).

34. 2 Leach 708, 168 Eng. Rep. 455 (1796).

35. 2 Leach at 720, 168 Eng. Rep. at 461.

36. *See* Commonwealth v. Campana, 452 Pa. 233, 242, 304 A.2d 432, 435-36 (1973). For a history of the early concept of double jeopardy, see Kirk, *"Jeopardy" During the Period of the Year Books*, 82 U. PA. L. REV. 602 (1934).

Application of the principle in the modern era, however, has been complicated by the proliferation of criminal statutes.[37] An act that once constituted only a single offense today may violate several closely related statutory provisions. As a result, prosecutors have vast discretionary power to characterize a criminal act as one offense or several.[38]

A prosecutor may use this discretion to stack related charges against a defendant in a single proceeding. In so doing, he simply defers to the presumed intent of the legislature that each statutory offense be considered separately.[39] Questions arise, however, whether prosecutors should be permitted to subject defendants arbitrarily or vindictively to "a *series of trials* for violations which are part of the same course of conduct and which could be tried together."[40] Clearly, this unfettered discretion to prosecute charges jointly or separately is allowed under the two-offense test, so long as the facts needed to prove each offense are not the same.

The trend among courts, however, appears to be toward recognition of certain protected interests that militate against arbitrary separation of charges.[41] The interests in protecting defendants from the social stigma and psychological trauma of a second trial and in protecting a defendant and the public from the expense of prolonged and unnecessary litigation are furthered by a single proceeding.[42] If an important purpose of the double jeopardy clause is to prohibit vexatious prosecution,[43] the

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37. J. SIGLER, DOUBLE JEOPARDY 64 (1969); *see* Note, *Twice in Jeopardy*, 75 YALE L.J. 262, 304 (1965).

38. *See, e.g.*, Ashe v. Swenson, 397 U.S. at 452 (Brennan, J., concurring); Note, *supra* note 37, at 304.

39. *See* Note, *supra* note 37, at 311.

40. State v. Brown, 262 Or. 442, 457, 497 P.2d 1191, 1198 (1972) (emphasis added).

41. *See, e.g.*, Brown v. Ohio, 432 U.S. 161, 169 (1977) ("The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of spatial units."); Ashe v. Swenson, 397 U.S. at 452 (Brennan, J., concurring)("Given the tendency of modern criminal legislation to divide the phases of a criminal transaction into numerous separate crimes, the opportunities for multiple prosecutions for an essentially unitary criminal episode are frightening."); State v. Brown, 262 Or. 442, 450, 497 P.2d 1191, 1198 (1972)("The underlying considerations in multiple punishment cases are entirely different from those involved in multiple prosecutions . . . .").

42. *See, e.g.*, J. SIGLER, *supra* note 37, at 39-40; Note, *Criminal Law: The Same Offense in Oklahoma*, 28 OKLA. L. REV. 131, 133 (1975).

43. D. FELLMAN, THE DEFENDANT'S RIGHTS TODAY 378 (1976). "The underlying ratio-

argument that these interests are entitled to constitutional protection is persuasive. The court's recognition in *Jordan* that the two-offense test of *Blockburger* does not adequately vindicate these interests supports a conclusion that the double jeopardy protection covers an area too broad for a single test.[44]

B. Limitations of the Actual-Evidence Test

What then is the appropriate test for determining whether offenses are the same in multiple prosecution cases? Several variations of the *Blockburger* test have been formulated in attempts to avoid the hardship imposed by application of the strict test.[45] Although the variants may offer a greater degree of protection under some circumstances, they generally fail to pro-

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nale is that the state should not take advantage of its power to subject a defendant to avoidable embarrassment, expense, and ordeal, and should not require him to live in a continuing state of anxiety and insecurity which enhances the chances of convicting the innocent." *Id.* at 356. *See* Brown v. Ohio, 432 U.S. 161, 165 (1977); Ashe v. Swenson, 397 U.S. 436, 457 (1970)(Brennan, J., concurring); Green v. United States, 355 U.S. 184, 187-88 (1957)("[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for [the same] . . . offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity . . . .").

44. *See* Note, *The Protection from Multiple Trials*, 11 STAN. L. REV. 735, 745 (1959). In *Ashe v. Swenson*, Justice Brennan, concurring, said of the *Blockburger* test: "[I]ts deficiencies are obvious. It does not enforce but virtually annuls the constitutional guarantee." 397 U.S. at 451. In State v. Brown, 262 Or. 442, 497 P.2d 1191 (1972), the Oregon Supreme Court stated:

> Under the same evidence [*Blockburger*] test . . . a defendant is deprived of the assurance that an acquittal is the end of the matter or that a conviction and sentence is the final measure of his guilt and punishment. Moreover, repeated prosecutions strain the resources of the defendant and dissipate those of the courts and prosecutors, and deprive judgments of their finality.

Id. at 449, 497 P.2d at 1194-95.

45. The *Blockburger* test has been stated in various ways. Gavieres v. United States, 220 U.S. 338, 342 (1911)(whether "each statute requires proof of an additional fact which the other does not . . . ."); Burton v. United States, 202 U.S. 344, 380 (1906)(quoting Commonwealth v. Roby, 29 Mass. (12 Pick.) 496, 504 (1832)("It must appear that the offense[s] charged, . . . [were] 'the same *in law* and *in fact.*' "); State v. Roberts, 152 La. 283, 287, 93 So. 95, 96 (1922) ("[T]he rule is that there must be only substantial identity, that the evidence necessary to support the second indictment would have been sufficient for the first."); State v. Brownrigg, 87 Me. 500, 501, 33 A. 11, 12 (1895)("The test is, not what facts were offered in evidence in the trial upon the first indictment, but . . . what facts might have been proved under that indictment."); Morey v. Commonwealth, 108 Mass. 433, 434 (1871)(whether "the evidence required to support a conviction upon one [indictment] . . . [is] sufficient to warrant a conviction upon the other.").

tect adequately against multiple prosecutions.[46] One writer has suggested that "[a]ttempting to choose which version of the same evidence [*Blockburger*] test would best implement the double jeopardy prohibition is like deciding which of five lumberjacks would be most handy with a violin."[47]

The actual-evidence test used in *Jordan* is a variation of the *Blockburger* test and is based on the actual evidence adduced at trial rather than that required to prove the charges. Undeniably, the test effectively protected the interests at stake in that case. Closer examination, however, reveals that the usefulness of the test may be limited. In *Jordan,* the court recognized that

> Although the Commonwealth might have charged and proved only an attempt in the first prosecution, it charged instead the actual "fact situation": a consumated purchase resulting in the defendants obtaining physical possession of the subject drug. Whether proof that had actually stopped short of the obtainment but established "attempt" would have created a different case need not concern us.[48]

This statement intimates that the court realized the flaw inherent in a test based on actual evidence—it is easily circumvented by a prosecutor who deliberately charges and proves only what is necessary to support a conviction on each statutory offense. The statement also suggests that if in the first trial the prosecution had proved only what was required by statute to support a conviction on the charge, that is, an attempt to procure a controlled substance,[49] the court might have selected an approach other than the actual-evidence test to achieve the result desired. Therefore, it appears that the utility of the actual-evidence test employed in *Jordan* is limited to the situation presented by the facts of that case.

C. The Same-Transaction Test

Another approach available to the court which would have produced a less limited result was the same-transaction test.

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46. *See, e.g.,* S. NAGEL, THE RIGHTS OF THE ACCUSED 291-92 (1972); Note, *supra* note 37, at 273-75.

47. Note, *supra* note 37, at 274.

48. No. 78-6540, slip op. at 10 n.9.

49. For the text of the procurement statute, see note 4 *supra.*

This test focuses on the criminal episode itself rather than on the substantive elements of each offense. It is, in effect, a rule of compulsory joinder,[50] requiring, in all but exceptional circumstances,[51] that the prosecution consolidate at one trial "all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction."[52] The test, which has been characterized as "the layman's idea of fair play under the double jeopardy clause,"[53] has received increased support in recent years.[54] Although the test aparently has not been used in the federal court system,[55] it finds a champion in Justice Brennan, who has urged that the test "not only enforces the ancient prohibition against vexatious multiple prosecutions embodied in the Double Jeopardy Clause, but responds as well to the increasingly widespread recognition that the consolidation in one lawsuit of all issues arising out of a single transaction or occurrence best promotes justice, economy, and convenience."[56]

Applied to the facts of *Jordan,* the same-transaction test would have flatly prohibited the second prosecution, since both offenses arose out of a single criminal episode—the "continuous and uninterrupted conduct that establishes at least one offense and is so joined in time, place and circumstances that such conduct is directed to the accomplishment of a single criminal objective."[57]

At least three state supreme courts have adopted the same-

50. Ashe v. Swenson, 397 U.S. at 453-54 (Brennan, J., concurring).

51. The joinder requirement imposed by the test is subject to some commonsense exceptions. *Id.* at 453 n.7 (no single court has jurisdiction of all the alleged crimes); *id.* at 455 n.11 (either party can show prejudice). *See* Jeffers v. United States, 432 U.S. 137 (1977)(the government attempts to join charges but the defendant objects); Diaz v. United States, 223 U.S. 442 (1912)(additional charge is not discovered until after the commencement of an action for other charges arising from the same criminal transaction).

52. 397 U.S. at 453-54 (Brennan, J., concurring). The court in *Jordan* discussed in dictum the theory of continuing offenses, which is similar to the same-transaction test. The theory suggests that when an offense is of a continuing nature, prosecution on any temporal segment of the offense bars future prosecution on other segments. No. 78-6540, slip op. at 11.

53. Comment, *Double Jeopardy—Defining the Same Offense,* 32 LA. L. REV. 87, 92 (1971).

54. *See* J. COOK, *supra* note 22, at 152-54; D. FELLMAN, *supra* note 43, at 278-79; J. SIGLER, *supra* note 37, at 64-69. See note 19 and accompanying text *supra.*

55. The test has been neither formally adopted nor rejected by the Supreme Court.

56. Ashe v. Swenson, 397 U.S. at 454 (Brennan, J., concurring).

57. OR. REV. STAT. § 131.505(4) (1979).

transaction test in cases analogous to *Jordan*.[58] The American Law Institute Model Penal Code[59] also supports the same-transaction test: "a defendant shall not be subject to separate trials for multiple offenses based on the same conduct or arising from the same criminal episode, if such offenses are known to the appropriate prosecuting officer at the time of the commencement of the first trial . . . ."[60] The American Bar Association Standards Relating to Joinder and Severance[61] and the Federal Rules of Criminal Procedure[62] also encourage the joinder of related charges in a single proceeding.

Despite the appeal of the test, several commentators suggest that the elastic nature of the term "transaction" renders this test easy prey for abuses of discretion, and that it is, therefore, no better than the *Blockburger* test.[63] This proposition is untenable because it fails to recognize a fundamental distinction between the two tests—the *Blockburger* test vests discretion in the prosecution, whereas the same-transaction test vests discretion in the trial judge. The judiciary is the institution charged with preserving constitutional rights.[64] The prosecutor, on the other hand, is an advocate whose office requires persuasive presentation of all evidence favorable to the government's case.[65] That discretionary judgments of constitutional magnitude should be made by an impartial mediator rather than by an adversarial party would seem just.[66]

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58. *See* note 19 and accompanying text *supra*. In Connelly v. Director of Pub. Prosecutions, [1964] A.C. 1254, the House of Lords, which some consider to be the birthplace of the modern double jeopardy principle, promulgated a rule of court that prosecutors generally must join in one action charges that are based on the same facts or that are part of a series of offenses of similar character.

59. MODEL PENAL CODE § 1.07(2) (Proposed Official Draft 1962).

60. *Id.*

61. ABA STANDARDS RELATING TO JOINDER AND SEVERANCE § 1.3 (Approved Draft 1968).

62. FED. R. CRIM. P. 8(a).

63. *See* Comment, *supra* note 53, at 92; 20 WAYNE L. REV. 1377, 1378 (1974).

64. Before assuming office, state and federal judges must take an oath to support the Constitution of the United States. 4 U.S.C. § 101 (1976); 28 U.S.C. § 453 (1976).

65. G. Felkenes, *The Criminal Justice System: Its Functions and Personnel*, in THE PROSECUTOR IN AMERICA 18-21 (J. Douglass ed. 1977). *But see* EC 7-14, ABA CODE OF PROFESSIONAL RESPONSIBILITY ("A government lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is obviously unfair.").

66. *See* People v. White, 390 Mich. 245, 259 n.9, 212 N.W.2d 222, 228 n.9 (1973)(prosecutor admitted that additional charges arising from same criminal transac-

Other resistance to the same-transaction test arises from a misunderstanding of the appropriate scope of the test. It must be remembered that the test is applicable only in multiple-prosecution cases; whether charges may be joined in a single proceeding remains a question peculiarly within the province of the *Blockburger* test.[67]

The same-transaction test is likely to continue to grow in popularity and frequency of use. In most instances, the impact of the test on existing law will not be severe because joinder of related charges is permitted in nearly all jurisdictions and has become virtually automatic in most.[68] Several states have enacted statutes that compel joinder under some circumstances.[69] Further, the test establishes a clear standard for prosecutors by requiring them to join their best counts for a single trial, thereby promoting the conservation of public and private resources and assuring that defendants need "run the gauntlet" of criminal prosecution only once.[70]

IV. CONCLUSION

In *Jordan v. Virginia,* the Court of Appeals for the Fourth Circuit reasoned that when related offenses growing out of a single criminal episode are prosecuted at more than one trial, vital interests of justice, economy, and convenience warrant a double jeopardy standard more protective than the traditional *Blockburger* two-offense test. Although the Supreme Court failed to discuss these additional interests in *Vitale,* the approach taken by the Fourth Circuit seems consonant with the policies underlying the double jeopardy prohibition. To further the interests recognized in *Jordan,* the Court of Appeals might have applied

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tion were brought in a second trial because prosecutor was unhappy with sentence given defendant at first trial; court noted duty of trial judge, not prosecutor, to pass judgment on defendant).

67. *But see* People v. Carter, 94 Mich. App. 501, 290 N.W.2d 46 (1979)(court appeared to employ same-transaction test to determine whether multiple punishments may be secured in single proceeding).

68. Note, *supra* note 30, at 294. For procedural rules authorizing joinder, see, *e.g.,* FED. R. CRIM. P. 8 and CAL. PENAL CODE § 954 (West 1970).

69. *See, e.g.,* MINN. STAT. ANN. § 609.035 (West 1964); N.Y. CRIM. PROC. LAW § 40.20(2) (McKinney 1971).

70. *See* Commonwealth v. Campana, 452 Pa. 233, 251-52, 304 A.2d 432, 440-41 (1973).

the same-transaction test to the facts of the case. This test, compelling joinder of related charges, would render the result desired in *Jordan*, would eliminate the potential for abuses of discretion by prosecutors, and would promote more fully justice, economy, and convenience.

Unfortunately, the court applied, instead, an actual-evidence test, which appears to be of limited value. Because that test is easily circumvented by prosecutors, it normally will give the defendant no greater protection than the *Blockburger* test.

Colin Scott Cole Fulton

PROCEDURE—THE RECALL OF MANDATE DOCTRINE. *Uzzell v. Friday*, 625 F.2d 1117 (4th Cir. 1980).

In its most recent consideration of *Uzzell v. Friday*,[1] the Court of Appeals for the Fourth Circuit vacated the original judgment of the United States District Court for the Middle District of North Carolina[2] and remanded the case to that court for development of the record and further findings of fact and conclusions of law. This decision followed recall by the court of its earlier mandate nine months after it was issued. The action gave new life to a suit that appeared to have been concluded a year earlier[3] and placed the litigants in essentially the same positions they had been in when the suit began six years earlier.

The court's action in recalling its mandate a full nine months after the decision that prompted issuance of that mandate[4] illustrates the tension which exists between two basic policies of the law. The first of these policies is finality of judgment—the principle "that litigation must at some definite point come to an end."[5] In frequent conflict with this is the equally important policy that favors fairness and correct results in litigation—the interest in justice that is the foundation of the legal system.[6] The courts must balance these opposing interests when considering a motion to vacate or amend a judgment.

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1. 625 F.2d 1117 (4th Cir. 1980), *cert. denied*, 100 S. Ct. 2917 (1980).

2. Uzzell v. Friday, 401 F. Supp. 775 (M.D.N.C. 1975).

3. Uzzell v. Friday, 591 F.2d 997 (4th Cir. 1979).

4. *Id.* This case was decided on February 2, 1979; mandate was issued on February 23, 1979; and the time for appeals and petitions for writ of certiorari had passed when the court of appeals recalled its mandate on November 9, 1979.

5. FTC v. Minneapolis-Honeywell Regulator Co., 344 U.S. 206, 213 (1952). *See* Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 244 (1944); Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522, 525 (1931); United States v. Throckmorton, 98 U.S. 61, 65 (1878); Marine Ins. Co. v. Hodgson, 11 U.S. (7 Cranch) 332, 336 (1813). In *Baldwin*, the court stated that "[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest; and that matters once tried shall be considered forever settled as between the parties." 283 U.S. at 525.

6. *See* Gondeck v. Pan Am. World Airways, Inc., 382 U.S. 25, 26 (1965); Bankers Mortgage Co. v. United States, 423 F.2d 73, 77 (5th Cir.), *cert. denied*, 399 U.S. 927 (1970). *See generally* United States v. Ohio Power Co., 353 U.S. 98, 109 (1957)(Harlan, J., dissenting); Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 244-45 (1944).

The district courts can look to the Federal Rules of Civil Procedure for guidance in determining whether relief from a final judgment can be granted. Rule 60(b) lists the grounds that will justify relief from judgment[7] and limits the time in which motions for such relief must be made.[8] There is no comparable rule of appellate procedure to govern the granting of relief by a court of appeals from its own decisions.[9] As a result, the recall of a mandate is a matter of the court's discretion, guided by the principles of finality and justice as applied in previous decisions of the federal courts. In an effort to determine whether the court has followed traditional concepts or stepped beyond established boundaries in reviving *Uzzell v. Friday*,[10] this Comment will compare the decision with the principles established in other cases concerning recall.

I. PROCEDURAL BACKGROUND IN *Uzzell v. Friday*

Plaintiffs Uzzell and Arrington, white male students at the University of North Carolina, brought a class action in district court against the president of the university and the leaders of a campus organization known as the Black Student Movement (BSM). The complaint alleged that certain practices of the university and the student Campus Governing Council (Council) violated the equal protection clause of the fourteenth amend-

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7. FED. R. CIV. P. 60(b) provides as follows:

> On motion and upon such as terms are just, the court may relieve a party . . . from a final judgment, . . . for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence . . .; (3) fraud . . ., misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or . . . vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

For a further discussion of Rule 60(b), see Note, *Relief From Unfairly Obtained Verdicts in Federal Court: Determination and Analysis of the Level of Fraud Required for Vacation of Judgments Under Fed. R. Civ. P. 60(b)*, 30 S.C.L. REV. 781 (1979).

8. Motions based upon mistake, newly discovered evidence, or fraud must be made within one year of the entry of judgment. All motions must be made within a reasonable time. FED. R. CIV. P. 60(b).

9. The Federal Rules of Appellate Procedure provide for issuance and stay of mandate, but do not mention recall. FED. R. APP. P. 41. The Fifth Circuit has attempted to fill this void with its own rule of court, providing that "[a] mandate once issued shall not be recalled except to prevent injustice." 5TH CIR. R. 15.

10. 625 F.2d 1117 (4th Cir.), *cert. denied*, 100 S. Ct. 2917 (1980).

ment,[11] the Civil Rights Act of 1871,[12] and section 601 of the Civil Rights Act of 1964.[13] Plaintiffs challenged university funding of BSM, which restricted its membership to blacks, as well as provisions of the student constitution mandating the racial and sexual composition of the Council and the Student Honor Court.

The district court granted summary judgment for defendants[14] "without full development of the record"[15] on the grounds that the complaint concerning BSM was moot[16] and that the remaining causes of action presented no justiciable injury. Because of the summary judgment, the court did not reach the question of certification of the suit as a class action.[17]

On appeal, a three-judge panel of the Fourth Circuit affirmed the district court's summary judgment with respect to BSM, but reversed the judgment concerning the Council and the Honor Court.[18] The court granted summary judgment to plaintiffs on these claims, declaring the relevant student constitution provisions to be invalid because they were "related to race with

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11. U.S. CONST. amend. XIV. The amendment provides in pertinent part as follows:

> No State shall make or enforce any law which shall abridge privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

12. 42 U.S.C. § 1983 (1976) (amended 1979). At the time the suit was brought the statute provided:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.

13. 42 U.S.C. § 2000d (1976). This statute provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." *Id.*

14. Uzzell v. Friday, 401 F. Supp. 775 (M.D.N.C. 1975).

15. 625 F.2d at 1119.

16. On September 18, 1974, the organization's membership policies were amended to grant membership to any student, regardless of race, whose views were consistent with the organization's goals of furthering Black unity and offering outlets for the expression of Black ideas and culture. 401 F. Supp. at 777.

17. *Id.* at 777 n.1.

18. Uzzell v. Friday, 547 F.2d 801 (4th Cir. 1977).

no reasonable or compelling nexus to that classification."[19]

The court reheard the case in banc on June 8, 1977. Because he had sat on the panel originally hearing the case, Senior Circuit Judge Bryan also sat as a member of this in banc court, as permitted by the Judicial Code.[20] The court split four to three, with the majority confirming the decision of the panel.[21] The three dissenters advocated returning the case to the district court for further development of the record regarding the student constitution provisions.[22]

On July 3, 1978, the United States Supreme Court granted defendants' petition for a writ of certiorari,[23] vacated the judgment of the court of appeals, and remanded the case for further consideration in light of *Regents of University of California v. Bakke*.[24] Pursuant to the Supreme Court mandate, the court of appeals reheard the case in banc on November 16, 1978. Senior Circuit Judge Bryan sat as a member of the court, as he had in the first in banc rehearing.

On February 2, 1979, the second in banc court reaffirmed its earlier decision,[25] the majority holding that, notwithstanding *Bakke*, the two student constitution provisions at issue violated the fourteenth amendment and the Civil Rights Acts of 1871 and 1964.[26] The court again split four to three, with the same judges dissenting[27] and arguing once more that the case should

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19. *Id.* at 804.

20. 28 U.S.C. § 46(c) (1976)(amended 1978). At that time the statute provided in part as follows:

> A court in banc shall consist of all circuit judges in regular active services. A circuit judge of the circuit who has retired from regular active service shall also be competent to sit as a judge of the court in banc in the hearing of a case or controversy if he sat in the court or division at the original hearing thereof.

Id.

21. Uzzell v. Friday, 558 F.2d 727 (4th Cir. 1977).

22. Chief Judge Haynsworth and Circuit Judges Winter and Butzner expressed the opinion that the record was not complete enough for decision on the merits in that it did not tell "the whole story of the history of discrimination or non-discrimination at the university, the need for remedial measures, the reasonableness of the measures and how, in practice, they have operated . . . . [T]hese are all factors bearing on the ultimate merits." *Id.* at 728 (Winter, J., concurring and dissenting).

23. Friday v. Uzzell, 438 U.S. 912 (1978).

24. 438 U.S. 265 (1978).

25. Uzzell v. Friday, 591 F.2d 997 (1979).

26. See notes 11-13 *supra*.

27. See note 22 *supra*.

be remanded to the district court.[28] The court's mandate to the district court was issued on February 23, 1979. Because there were no appeals or petitions for writ of certiorari within the time permitted by law,[29] the decision of the second in banc court became final.

During the second in banc rehearing the court and counsel were unaware that on October 20, 1978, less than one month before the rehearing, Congress had amended the Judicial Code to provide that an in banc court must consist only of active circuit judges.[30] As a result, Judge Bryan's participation in the second rehearing was unauthorized. The court did not become aware of the change in the law until after all deadlines for review had passed.

On May 31, 1979, the court sent a letter to counsel for all litigants, informing them of the change in the law and inviting suggestions about what should be done, if anything, under the circumstances.[31] Counsel for the defendants responded with a request that the court simply not count Judge Bryan's vote, thereby affirming the district court's original decision by the vote of an equally divided court. Defendants' counsel did not move to recall the mandate. Plaintiffs' counsel argued that the judgment was final and should be left in repose and requested full briefing and a hearing should a motion be made for recall of

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28. The dissenting judges stated that in their view the *Bakke* decision recognized and approved the use of racial criteria in measures designed to redress wrongs worked by racial discrimination, so long as such remedial steps worked "the least harm possible on other innocent persons competing for the benefit." 591 F.2d 997, 1001 (quoting *Bakke*, 438 U.S. at 308). For this reason, the dissenters felt that it was essential that the case be returned to the district court for a full trial to develop the factors identified in their first dissenting opinion. *See generally* note 22 *supra*. The dissent also suggested that the case should be remanded to the district court for consideration of the possibility that the litigation had become moot "either because all named plaintiffs [had] severed their connections with the University, or . . . no named plaintiff had maintained a continuing connection with the University." 591 F.2d at 1001.

29. 28 U.S.C. § 2101(c) (1976) provides that "[a]ny . . . appeal or any writ of certiorari intended to bring any judgment or decree in a civil action . . . before the Supreme Court for review shall be taken or applied for within 90 days after the entry of such judgment or decree." *See generally* SUP. CT. R. 22(3).

30. The Omnibus Judgeship Bill, Pub. L. No. 95-486, § 5(a), 92 Stat. 1633, repealed the last sentence of 28 U.S.C. § 46(c), so that the present statute provides that "[a] court in banc shall consist of all circuit judges in regular active service." 28 U.S.C. § 46(c) (Cum. Supp. 1980).

31. The complete text of the letter is printed in Uzzell v. Friday, 625 F.2d 1117, 1123 (4th Cir. 1980) (Widener, J., dissenting).

mandate. "At that point, the court was . . . equally divided on whether to recall the mandate . . . . Thus, had the matter been finally terminated at that juncture, the judgment of the court would have remained undisturbed, for a majority did not exist to recall the mandate."[32]

On November 9, 1979, an expanded court, without the briefing or hearing requested by plaintiffs, recalled the mandate on its own motion, withdrew the in banc opinion of February 2, 1979, and ordered that the case be reheard in banc a third time.[33] The case was reargued on January 7, 1980. Shortly thereafter, plaintiffs filed a petition for writ of certiorari,[34] questioning whether "recall of mandate after nine months and after appointment of two new judges depart[s] from accepted and usual course of judicial proceedings."[35] The Supreme Court requested that defendants file a response to the petition for certiorari and scheduled consideration of the petition for May 15, 1980.[36] On May 12, 1980, the court of appeals filed its opinion from the third in banc hearing of the case.[37]

The third in banc court affirmed the district court judgment with respect to funding of BSM, but vacated the judgment concerning the two student constitution provisions. It remanded the case "for the development of a full record and for findings of fact and conclusions of law in the light of *Bakke* and what was said in the dissenting opinions in the first and second in banc cases,"[38] and for consideration of the possible mootness issue discussed in the dissenting opinion of the second in banc case.[39]

II. Established Principles Governing Recall of Mandate

The principle of finality of judgment is based upon the

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32. *Id.*

33. Between May 31, 1979, when the court of appeals invited suggestions from counsel, and November 9, 1979, when the mandate was recalled, two new circuit judges were commissioned. These new judges joined with the judges who had dissented in the previous in banc decision to form the majority in a five to three vote to recall the mandate. *Id.* at 1123.

34. 48 U.S.L.W. 3538 (1980).

35. *Id.* at 3617.

36. The petition for writ of certiorari was denied on May 19, 1980. Uzzell v. Friday, 100 S. Ct. 2917 (1980).

37. 625 F.2d 1117 (4th Cir. 1980).

38. *Id.* at 1121.

39. See 591 F.2d at 1001. The majority in this five to three decision was composed of

strong interests in insuring that litigants can rely upon a judgment as the final settlement of their dispute,[40] and in enabling the courts to clear their dockets in order to make room for new controversies.[41] This profound interest in finality of judgment is evidenced by a reluctance to recall mandates after rehearing periods have expired.[42]

Despite the absence of explicit statutory authority, the power of a court of appeals to recall its mandate has long been recognized.[43] Most courts of appeals have attributed the power of recall to the inherent power of a court to exercise control over its judgments and to protect the integrity of its mandates.[44] While it is clear that courts of appeals have the power to recall their mandates, it is not clear when and under what circumstances that power will be exercised. Existing precedent concerning the recall of mandate after expiration of the time for rehearing or certiorari emphasizes that recall of mandate is an extraordinary remedy that should be used sparingly to prevent

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the same judges who comprised the majority in the vote to recall the mandate. See note 33 *supra.*

40. American Iron & Steel Inst. v. EPA, 560 F.2d 589, 592 (3d Cir. 1977). *See* United States v. Ohio Power Co., 353 U.S. 98, 111 (1957)(Harlan, J., dissenting). In his dissent, Justice Harlan stated, "I can think of nothing more unsettling to lawyers and litigants, and more disturbing to their confidence in the even-handedness of the Court's processes, than to be left in . . . uncertainty . . . as to when their cases may be considered finally closed in this Court." *Id.*

41. American Iron & Steel Inst. v. EPA, 560 F.2d 589, 592 (3d Cir. 1977).

42. *See* Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 244 (1944); United States v. Throckmorton, 98 U.S. 61, 65 (1878); American Iron & Steel Inst. v. EPA, 560 F.2d 589, 592 (3d Cir. 1977); Greater Boston Television Corp. v. FCC, 463 F.2d 268, 271 (D.C. Cir. 1971), *cert. denied,* 406 U.S. 950 (1972); Hines v. Royal Indemnity Co., 253 F.2d 111, 114 (6th Cir. 1958); 16 C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, FEDERAL PRACTICE & PROCEDURE, § 3938, at 281-82 (1977) [hereinafter cited as WRIGHT & MILLER].

43. *See* United States v. Ohio Power Co., 353 U.S. 98, 98-99 (1957); Bronson v. Schulten, 104 U.S. 410, 415 (1881); American Iron & Steel Inst. v. EPA, 560 F.2d 589, 593 (3d Cir. 1977); Greater Boston Television Corp. v. FCC, 463 F.2d 268, 276-77 (D.C. Cir. 1971), *cert. denied,* 406 U.S. 950 (1972).

44. *E.g.,* American Iron & Steel Inst. v. EPA, 560 F.2d 589, 593-94 (3d Cir. 1977); Reserve Mining Co. v. Lord, 529 F.2d 184, 188 (8th Cir. 1976); Aerojet-General Corp. v. American Arbitration Ass'n, 478 F.2d 248, 254 (9th Cir. 1973); Greater Boston Television Corp. v. FCC. 463 F.2d 268, 276-77 (D.C. Cir. 1971), *cert. denied,* 406 U.S. 950 (1972). The court in *Greater Boston* also found authority for the power of recall in 28 U.S.C. § 2106, which provides that federal appellate courts may require further proceedings "as may be just under the circumstances." 463 F.2d at 277. From this, the District of Columbia Circuit inferred a grant of power to review its own decisions if such action would be "just under the circumstances." *Id.* at 277.

injustice,[45] for good cause,[46] or in special circumstances.[47]

In 1971, the District of Columbia Circuit attempted to summarize the existing precedent on recall of mandate in *Greater Boston Television Corp. v. Federal Communications Commission.*[48] The court stated that the most common reasons for recall of mandate by appellate courts had been to correct clerical mistakes or to make the judgment consistent with the opinion,[49] to clarify an outstanding mandate,[50] or to regain a mandate that was obtained fraudulently.[51] The summary also noted that courts of appeals traditionally have recalled their mandates in order to revise instructions that would otherwise produce an unintended or unjust result.[52]

In addition, the court in *Greater Boston* identified two other circumstances under which recall of mandate would be appropriate. First, significant evidence discovered after issuance of the mandate would justify recall,[53] but only to the extent that the district court would have been permitted to reopen the case under Rule 608(b) of the Federal Rules of Civil Procedure.[54] Second, recall of mandate might be warranted to avoid inconsistent results of several cases pending at the same time.[55] The court also noted that the timeliness of the motion[56] for recall of

45. *See, e.g.*, Aerojet-General Corp. v. American Arbitration Ass'n, 478 F.2d 248, 254 (9th Cir. 1973); Gradsky v. United States, 376 F.2d 993, 995 (5th Cir. 1967).

46. *See, e.g.*, Aerojet-General Corp. v. American Arbitration Ass'n, 478 F.2d 248, 254 (9th Cir. 1973); Greater Boston Television Corp. v. FCC, 463 F.2d 268, 277 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 950 (1972).

47. American Iron & Steel Inst. v. EPA, 560 F.2d 589, 594 (3d Cir. 1977)(citing Powers v. Bethlehem Steel Corp., 483 F.2d 963, 964 (1st Cir. 1973)); Greater Boston Television Corp. v. FCC, 463 F.2d 268, 280 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 950 (1972).

48. 463 F.2d 268, 275-80 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 950 (1972).

49. *Id.* at 278 (citing Kinnear-Weed Corp. v. Humble Oil & Ref. Co., 296 F.2d 215 (5th Cir. 1961)) (mandate recalled and amended on ground that mandate was inconsistent with full opinion).

50. 463 F.2d at 278 (citing Meredith v. Fair, 306 F.2d 374 (5th Cir. 1962)). This reason for recall and amendment of mandate was used recently in Dilley v. Alexander, 603 F.2d 914 (D.C. Cir. 1979), *motion for clarification filed*, No. 77-1789, (D.C. Cir. May 15, 1980).

51. 463 F.2d at 278 (citing Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 244 (1944)).

52. 463 F.2d at 279.

53. *Id.* at 279-80.

54. FED. R. CIV. P. 60(b).

55. 463 F.2d at 278-79 (citing United States v. Ohio Power Co., 353 U.S. 98, 99 (1957)).

56. 463 F.2d at 276.

mandate can be significant, since the recall measure is not to be employed simply to extend the period allowed for granting a rehearing.[57]

When errors of law are alleged, and petitions for rehearing or certiorari—the accepted means of seeking review on these grounds—[58] have previously been denied, recall motions will not be viewed favorably by some courts.[59] Subsequent changes in the substantive law or the court's view of the law also have been held to be insufficient to justify recall of mandate.[60]

The Third Circuit, in *American Iron & Steel Institute v. Environmental Protection Agency*,[61] took a different approach in considering a motion for recall of mandate. Rather than considering the request in terms of the recognized factors and then implicitly weighing that *category* of justification for recall against the principle of finality, the court looked at the case as a whole and expressly weighed all the aspects of the case against the interest in finality. In granting a motion for recall of its mandate, the court stressed that its decision was based upon a combination of factors[62] rather than on any one ground. Among the factors that the court balanced against finality was a subsequent Supreme Court decision that, while not showing the appellate court's ruling to be "demonstrably wrong,"[63] did call into

57. *Id.* at 277 (citing Estate of Iverson v. Commissioner, 257 F.2d 408, 409 (8th Cir. 1958)). This is especially significant in view of the fact that one of the grounds most frequently advanced in motions for recall is that the court made an error of law in its decision of the appeal. Because the correction of such errors is considered the primary purpose of petition for rehearing or Supreme Court review, such a motion for recall may be considered nothing more than an untimely petition for rehearing. *See, e.g.*, Hines v. Royal Indem. Co., 253 F.2d 111, 114 (6th Cir. 1958)(denying motion filed eight months after issuance of mandate, since the motion was "obviously" an untimely petition for rehearing).

58. *See* note 57 *supra.*

59. *See* Legate v. Maloney, 348 F.2d 164, 166 (1st Cir. 1965); Hines v. Royal Indem. Co., 253 F.2d 111, 114 (6th Cir. 1958). *But see* United States v. Ohio Power Co., 353 U.S. 98, 99 (1957)(recalling mandate 18 months after Supreme Court denial of petition for rehearing).

60. *See* Powers v. Bethlehem Steel Corp., 483 F.2d 963, 964 (1st Cir. 1973); Collins v. City of Wichita, 254 F.2d 837, 839 (10th Cir. 1958). *But see* Legate v. Maloney, 348 F.2d 164, 166 (1st Cir. 1965) (dictum)(If a subsequent Supreme Court decision were to show that the original decision was "demonstrably wrong," a motion to recall that mandate "might be entertained.").

61. 560 F.2d 589 (3d Cir. 1977).

62. *Id.* at 600.

63. See note 60 *supra.*

question the overall correctness of the decision.[64] The court also gave weight to the public interest in intercircuit uniformity in the administration of a national environmental protection program[65] and to the relatively slight disruptive effect that the necessary modification to the mandate would have on finality, since the original decision had imposed a continuing duty on the parties, rather than a money judgment.[66] At the time the Fourth Circuit was considering action on its mandate from the second in banc rehearing,[67] *American Iron & Steel*[68] was the most recent precedent of any importance on the exercise of the recall power.

III. EXERCISE OF RECALL POWER IN *Uzzell v. Friday*

In recalling its mandate from the second in banc rehearing,[69] the majority avoided serious consideration of the principles of finality by concluding that the "requirement of nonparticipation by a senior judge in a rehearing in banc is jurisdictional."[70] The court based this conclusion on *United States v. American-Foreign Steamship Corp.*,[71] a case concerning section 46(c) of the Judicial Code[72] when, as now, senior judges were not allowed to sit on an in banc court. In that case, the Supreme Court vacated an in banc decision in which a sitting judge took senior status during consideration of the case. The majority in *Uzzell* found that *American-Foreign Steamship* "compels the conclusion that . . . [the court] . . . should take steps to remedy . . . [its] . . . own oversight."[73]

The majority in *Uzzell*, however, overlooked that in *American-Foreign Steamship* the senior judge's authority to sit was challenged at the time of the in banc hearing,[74] not, as in *Uzzell*,

64. 560 F.2d at 596.
65. *Id.* at 598.
66. *Id.* at 599. The court warned that the remedy granted "may well be confined to instances where litigants are under a continuing duty to satisfy an order of the Court." *Id.*
67. Uzzell v. Friday, 591 F.2d 997 (4th Cir. 1979).
68. 560 F.2d 589 (3d Cir. 1977).
69. Uzzell v. Friday, 591 F.2d 997 (4th Cir. 1979).
70. Uzzell v. Friday, 625 F.2d 1117 (4th Cir.), *cert. denied*, 100 S. Ct. 2917 (1980).
71. 363 U.S. 685 (1960).
72. 28 U.S.C. § 46(c) (1976). *See* 625 F.2d at 1120 n.3.
73. 625 F.2d at 1120.
74. *Id.* at 1125 & n.6 (Widener, J., dissenting).

after the relevant deadlines for review had passed. Two years after *American-Foreign Steamship,* the same Supreme Court Justices indicated that they considered the decision in that case to be based not upon jurisdictional issues, but upon a timely challenge to a judge's authority.[75] The Court noted that, absent such a challenge, it is "well settled 'that where there is an office to be filled and one, acting under color of authority, fills the office and discharges its duties, his actions are those of an officer *de facto,* and binding upon the public.' "[76]

Hicks v. Miranda[77] also stands in opposition to the majority's reading of *American-Foreign Steamship.* In that case, the Supreme Court stated that it did not deem jurisdictional the requirement of a federal statute[78] that a particular district court judge sit on a three-judge court in particular circumstances.[79] Failure to object to the composition of the court before direct appeal to the Supreme Court was held to constitute waiver of the objection.[80]

The majority in *Uzzell* attempted to distinguish *Hicks* on the ground that *American-Foreign Steamship* established that nonparticipation of a senior judge is jurisdictional. This distinction is unconvincing, since it can be argued forcefully that *American-Foreign Steamship,* as it has been construed in subsequent cases, does not establish the claimed jurisdictional effect of an improperly constituted court.[81] The court also found that there could be no waiver of objection to the composition of the court in the present case, since the court and the parties did not know that the court was improperly constituted. This view, however, ignores the fact that defendants never raised the matter, even after they were informed of the improper composition of the court in May 1979.[82]

IV. CONCLUSION

Aside from the jurisdictional issue, which is not conclusively

75. *See* Glidden Co. v. Zdanok, 370 U.S. 530, 535 (1962).
76. *Id.* (quoting McDowell v. United States, 159 U.S. 596, 602 (1895)).
77. 422 U.S. 332 (1975).
78. 28 U.S.C. § 2284 (1976).
79. 422 U.S. at 338 n.5.
80. *Id.*
81. *See* notes 75 & 76 and accompanying text *supra.*
82. *See* 625 F.2d at 1125-26 (Widener, J., dissenting).

established by the majority, little in the circumstances of this case seems to justify recall of the mandate in question. Under either the balancing approach of *American Iron & Steel Institute v. Environmental Protecton Agency*[83] or the more traditional doctrines allowing recall of mandate, the profound public interest in finality in this case should outweigh all other considerations. The parties have been involved in litigation for six years and now face the prospect of exhaustive relitigation. Although a purpose of recalling a mandate is to prevent injustice,[84] the extent and gravity of the injustice must be considered in determining whether a final decision should be disturbed. "[T]he power to recall a mandate should not be used to destroy finality and repose simply on the ground that the court of appeals wrongly decided the case."[85]

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83. 560 F.2d 589 (1977).
84. See text accompanying note 45 *supra*.
85. 16 WRIGHT & MILLER, *supra* note 42, § 3938, at 284.

CRIMINAL LAW—THE SUPREME COURT NARROWS DEFINITION OF INTERROGATION TO ALLOW ADMISSION OF SOME CUSTODIAL CONFESSIONS. *Rhode Island v. Innis,* 100 S. Ct. 1682 (1980).

The United States Supreme Court in *Rhode Island v. Innis*[1] presented an analysis and application of a suspect's rights under the fifth amendment[2] and *Miranda v. Arizona*.[3] In the 1966 landmark *Miranda* decision, a sharply divided Court[4] determined that incriminating statements made by a suspect during a custodial interrogation were inadmissible at trial unless the suspect had been informed of his fifth amendment rights.[5] The Court, in delineating the scope of fifth amendment rights, at-

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1. 100 S. Ct. 1682 (1980).

2. U.S. CONST. amend. V. This amendment provides, in pertinent part, that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." *Id.* In 1964, the United States Supreme Court ruled that the fifth amendment privilege against self-incrimination is applicable to the states through the due process clause of the fourteenth amendment. Malloy v. Hogan, 378 U.S. 1 (1964).

3. 384 U.S. 436 (1966).

4. Justice Clark asserted that there was " 'no significant support' in our cases for the holding of the Court," *id.* at 503 n.4 (Clark, J., dissenting in part, concurring in part)(apparently quoting the majority opinion), and styled the holding as an "arbitrary Fifth Amendment rule." *Id.* at 503 (Clark, J., dissenting in part, concurring in part). Justice Harlan, joined by Justices Stewart and White, charged that the decision "represent[ed] poor constitutional law and entail[ed] harmful consequences for the country at large." *Id.* at 504 (Harlan, J., joined by Stewart and White, JJ., dissenting). Justice White, joined by Justices Harlan and Stewart, observed that the majority opinion had "no significant support in the history of the privilege [against self-incrimination] or in the language of the Fifth Amendment." *Id.* at 526 (White, J., joined by Harlan and Stewart, JJ., dissenting).

5. Chief Justice Warren, writing for the majority, concluded:

> [T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. . . . 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.

Id. at 444. In so holding, the Court reversed State v. Miranda, 98 Ariz. 18, 401 P.2d 721 (1965); People v. Vignera, 15 N.Y.2d 970, 207 N.E.2d 527, 259 N.Y.S.2d 857 (1965); and Westover v. United States, 342 F.2d 684 (9th Cir. 1965), which had held that failure to inform defendants of their rights prior to obtaining their confessions did not violate their rights. The decision affirmed the finding of People v. Stewart, 62 Cal. 2d 571, 400 P.2d 97, 43 Cal. Rptr. 201 (1965), that such failure did violate defendant's rights. 384 U.S. at 498.

tempted to "draw a balance between the individual rights of a defendant and the interest of society in being protected against crimes."[6] The warnings set forth in *Miranda* are still required.[7] Nevertheless, several Supreme Court Justices, in dissenting opinions, have suggested that the Court is pursuing actively a course designed to narrow the scope of rights defined by the *Miranda* decision.[8] The Court's decision in *Rhode Island v. Innis* adds credence to this contention.[9]

I. STRUCTURING A DEFINITION OF INTERROGATION IN *Innis*

A. A Broad View—The State Court's Analysis

In *Innis,* a Rhode Island taxicab driver, missing for four days, was found dead from a shotgun blast on January 16, 1975. On January 17, another taxicab driver reported that he had been robbed by a man wielding a shotgun. From a photograph on the bulletin board of the police station, the second driver identified Innis as his assailant. Several hours later, Innis was arrested and advised of his *Miranda* rights. He and the arresting officer waited at the scene of the arrest without further significant conversation until other police officers arrived. A sergeant and a police captain appeared, each readvising Innis of his rights. Innis told the captain that he understood his rights and that he wanted to speak with a lawyer.[10] The police then put Innis in a police car, in the company of three officers, to be driven to the stationhouse. The officers were instructed not to question, intimidate, or coerce him in any way. While traveling to the station, two of the officers discussed the missing shotgun. During their

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6. Annot., 46 L. Ed. 2d 903, 911 (1976).

7. *See e.g.,* Rhode Island v. Innis, 100 S. Ct. 1682 (1980); Doyle v. Ohio, 426 U.S. 610 (1976); Michigan v. Mosley, 423 U.S. 96 (1975).

8. For example, in Michigan v. Mosley, 423 U.S. 96 (1975), Justice Brennan observed that "the process of eroding *Miranda* rights, begun with Harris v. New York, 401 U.S. 222 . . . (1971), continues with today's holding . . . ." 423 U.S. at 112 (Brennan, J., joined by Marshall, J., dissenting).

9. Justice Stevens, in his dissent, stated: "This holding represents a plain departure from the principles set forth in *Miranda.*" 100 S. Ct. at 1694 (Stevens, J., dissenting).

10. 100 S. Ct. at 1686. Innis' request for a lawyer constituted an assertion of his right to counsel under the fifth and fourteenth amendments. *Id.* at 1688 (citing Miranda v. Arizona, 384 U.S. at 444). Although the right to counsel is also guaranteed by the sixth and fourteenth amendments, the Court stated that Innis' right was not based on those amendments. *Id.* at 1689 n.4. For a discussion of the Court's analysis of this distinction, see text accompanying notes 40-42 *infra.*

brief conversation, no part of which was directly addressed to Innis, one of the officers observed that because there was a school for handicapped children in the neighborhood, he feared that one of the children might find the shotgun and injure himself.[11] At that point, having traveled no more than a mile from the scene of the arrest, Innis interrupted and told the officers that he would show them the location of the shotgun. The officers again advised Innis of his *Miranda* rights, and he replied that he understood those rights, but "wanted to get the gun out of the way because of the kids . . . ."[12] He then led police to the gun.

Innis was later indicted for kidnapping, robbery, and murder. The trial court sustained the admissibility of the shotgun and Innis' incriminating statements, noting that he had been "repeatedly and completely advised of his *Miranda* rights" and had intelligently waived them.[13] At trial, Innis was convicted on all counts. On appeal, the Supreme Court of Rhode Island vacated the conviction and remanded the case for a new trial.[14] Relying on "[t]he expansion of the concept of interrogation . . . recently . . . undertaken by the United States Supreme Court,"[15] the Rhode Island court found that Innis had been interrogated absent any waiver of his right against self-incrimination.[16] The court explained:

> We do not accept the argument that Officer Gleckman's remarks do not constitute interrogation because he was expressing only a concern for public safety and not intentionally attempting to solicit evidence of an incriminating nature. . . . Public safety, . . . certainly a subject foremost in the mind of a police officer, nevertheless must not be permitted to become a vehicle for violating a suspect's consitutional rights.

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11. The officer may have used the emotionally charged words "God forbid" and his reference may have been to a little girl. *See* 100 S. Ct. at 1686-87.

12. *Id.* at 1687.

13. This language apparently appeared in the trial transcript of the Motion for New Trial and Sentencing. The transcript was included as part of the petition. *See* Petition for a Writ of Certiorari to the Supreme Court of the State of Rhode Island at 33a-34a, *quoted in* 100 S. Ct. at 1687.

14. State v. Innis, ___ R.I. ___, ___, 391 A.2d 1158, 1167 (1978).

15. *Id.* at ___, 391 A.2d at 1161 (citing Brewer v. Williams, 430 U.S. 387 (1977)). For a discussion of the applicability of *Brewer* to *Innis*, see text accompanying notes 39-48 *infra*.

16. ___ R.I. at ___, 391 A.2d at 1162-63.

> We also reject the contention that no interrogation occurred because defendant was not addressed personally. . . . Police officers . . . must not be permitted to achieve indirectly, by talking with one another, a result which the Supreme Court has said they may not achieve directly by talking to a suspect who has been ordered not to respond. The same "subtle compulsion" exists.[17]

The state court further observed that "[t]here is *no* evidence in the record . . . indicating that defendant *affirmatively* waived his fifth amendment rights at this time other than the fact that he ultimately agreed to assist the police in locating the incriminating evidence"[18] and concluded that "the weapon and any evidence leading to its discovery must be suppressed as 'fruit of the poisonous tree.' "[19]

B. A Narrower View—Supreme Court Finds No Interrogation

The United States Supreme Court vacated the judgment of the Supreme Court of Rhode Island and remanded the case. Noting that no question existed that respondent had been fully informed of his *Miranda* rights, that he had invoked his right to counsel at the time of the arrest, and that he was "in custody" while being transported to the police station,[20] the Court addressed the question of whether respondent had been " 'interrogated' by the police officers in violation of . . . [his] undisputed right under *Miranda* to remain silent until he had consulted

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17. *Id.* at ___, 391 A.2d at 1162. The term "subtle compulsion" comes from *Miranda*:

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. . . . *[A]ny statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise.*

384 U.S. at 473-74 (emphasis added).

18. ___ R.I. at ___, 391 A.2d at 1163-64.

19. *Id.* at ___, 391 A.2d at 1164 (quoting Wong Sun v. United States, 371 U.S. 471 (1963)).

20. 100 S. Ct. at 1688. *Miranda* defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 444. For a discussion of custodial interrogation, see Annot., 31 A.L.R.3d 565 (1970).

with a lawyer."[21] The Court first pointed to the *Miranda* definition of "custodial interrogation,"[22] which contained the word "questioning," and observed that "[t]his passage and other references throughout the [*Miranda*] opinion to 'questioning' might suggest that the *Miranda* rules were to apply only to those police interrogation practices that involve express questioning of a defendant while in custody."[23] Nevertheless, the Court believed a broader construction of interrogation was appropriate because certain "techniques of persuasion, no less than express questioning, were thought, in a custodial setting, to amount to interrogation" if they reflected "a measure of compulsion above and beyond that inherent in custody itself."[24]

The Court explained that

> the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. . . . [T]he definition of interrogation can extend only to words or actions on the part of the police officers that they *should have known* were reasonably likely to elicit an incriminating response.[25]

Thus, the Court set forth two tests to determine what constitutes interrogation under the fifth amendment: (1) express questioning, or (2) its functional equivalent, that is, words or actions that the police should know are likely to elicit a response. The Court further elaborated on its standard by defining an incriminating response as "any response—whether inculpatory or exculp-

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21. 100 S. Ct. at 1688. As Chief Justice Warren explained in *Miranda*:

> [T]he need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires.
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> . . . .
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> . . . If the individual states that he wants an attorney, the interrogation must cease until an attorney is present.

384 U.S. at 470-74.

22. See note 20 *supra*.

23. 100 S. Ct. at 1688.

24. *Id.* at 1689.

25. *Id.* at 1689-90 (footnotes omitted).

patory—that the *prosecution* may seek to introduce at trial."[26] It observed that "where a police practice is designed to elicit an incriminating response from the accused, it is unlikely that the practice will not also be one which the police should have known was reasonably likely to have that effect."[27]

Based on its explanation of interrogation, the Court held that respondent had not been interrogated within the meaning of *Miranda* because the conversation between the officers that resulted in the respondent's incriminating statements neither included express questioning nor subjected Innis to the functional equivalent of questioning.

> There is nothing in the record to suggest that the officers were aware that the respondent was peculiarly susceptible to an appeal to his conscience concerning the safety of handicapped children. Nor is there anything in the record to suggest that the police knew that the respondent was unusually disoriented or upset at the time of his arrest.
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> . . . .
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> . . . Given the fact that the entire conversation appears to have consisted of no more than a few off-hand remarks, we cannot say that the officers should have known that it was reasonably likely that Innis would so respond.[28]

Admitting that respondent, in fact, may have been subjected to "subtle compulsion," the Court criticized the Rhode Island Supreme Court's reasoning in equating subtle compulsion with interrogation and explained that, in order to constitute interrogation, subtle compulsion must result from words or actions that the police knew or "should have known were reasonably likely to elicit an incriminating response . . . ."[29] The Court agreed with the trial judge's observation that "it was 'entirely understandable that [the officers] would voice their concern [for the safety of the handicapped children] to each other.' "[30] The Court found no basis in the record to conclude that the police knew or should

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26. *Id.* at 1689 n.5.

27. *Id.* at 1690 n.7.

28. *Id.* at 1690-91.

29. *Id.* at 1691.

30. *Id.* at 1690 n.9 (quoting Petition for a Writ of Certiorari to the Supreme Court of the State of Rhode Island at 33a-34a). The trial judge made this statement at the hearing on a Motion for a New Trial and Sentencing. A portion of the transcript of this hearing appeared in the Petition for Certiorari.

have known the impact of their remarks.[31] Because the Court found that respondent had not been interrogated under *Miranda*, it did not reach the question of whether Innis had waived his *Miranda* right to be free from interrogation until counsel was present.[32]

II. THE COURT LIMITS PROTECTION AFFORDED SUSPECTS

The *Innis* decision can be characterized more accurately as pragmatic law than as principled law.[33] First, the Court adopted an unexplained and apparently artificial distinction between the definitions of interrogation under the fifth and fourteenth amendments and under the sixth and fourteenth amendments. This distinction creates tension with the Court's earlier decision in *Brewer v. Williams*[34] by reaching a different result on very similar facts. Second, the Court structured a test for interrogation, which effectively predicates the determination of whether or not a suspect's rights have been violated on the testimony of those who may have violated those rights. These two points are inconsistent with the Court's earlier decisions and suggest a view that conflicts with the aims of *Miranda*.

A. Brewer v. Williams *Distinguished on Constitutional Grounds*

1. Sixth Amendment Interrogation Under Brewer.—In *Brewer*, respondent Williams, an escapee from a mental hospital, surrendered to police in Davenport, Iowa, on advice he received by telephone from his attorney in Des Moines. He was arrested and arraigned on a charge of kidnapping a ten-year-old girl and

31. 100 S. Ct. at 1690.

32. *Id.* at 1688 n.2. A majority of the Court thus far has been unable to reach agreement on when a suspect has voluntarily waived his rights. Chief Justice Burger and Justices White, Blackmun, and Rehnquist are prepared to find that a waiver is voluntary whenever a suspect in custody knows and understands his rights, but, nevertheless, makes incriminating responses. *See* Brewer v. Williams, 430 U.S. at 417-18 (Burger, C.J., dissenting); *id.* at 434 (White, J., joined by Blackmun and Rehnquist, JJ., dissenting). The remaining Justices have not yet subscribed to this view.

33. Professor Grano explains that principled decisions are those supported by reasons and consistent with decisions in similar cases. Grano, Rhode Island v. Innis: *A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions*, 17 AM. CRIM. L. REV. 1, 3 n.15 (1979).

34. 430 U.S. 387 (1977).

was advised of his rights. During a second telephone conference, Williams' attorney informed him that the police had agreed not to interrogate him during the trip back to Des Moines and that he should not talk with them. A Davenport attorney, appointed to represent Williams at his arraignment, likewise advised him to make no statement before conferring with his attorney in Des Moines and reminded police officers of their agreement to refrain from interrogation during the trip. The officers refused the Davenport attorney's request to accompany Williams on the trip to Des Moines. During the 160-mile drive, Williams stated several times that he would tell the whole story when he reached Des Moines. At least one of the officers knew Williams had been a mental patient and was deeply religious. Not long after leaving Davenport, that officer spoke directly to Williams, emphasizing that the victim's " 'parents . . . should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas [E]ve and murdered.' "[35] As the journey progressed, Williams made a series of incriminating statements and ultimately led the officers to the body. These statements were admitted at trial, Williams was convicted, and the conviction was affirmed by the Iowa Supreme Court. Williams subsequently petitioned for a writ of habeas corpus, and the district court ruled that the incriminating statements had been wrongly admitted. The Court of Appeals for the Eighth Circuit affirmed and denied rehearing.[36] Finding the Christian burial speech "tantamount to interrogation,"[37] the United States Supreme Court agreed with the court of appeals that Williams' sixth and fourteenth amendment right to counsel had been violated and affirmed that court's judgment.[38]

2. The Court's Effort to Distinguish Fifth Amendment Interrogation.—In both *Brewer* and *Innis,* the suspects were taken into custody and advised of their rights. Each requested counsel, and each subsequently made incriminating statements in response to remarks by police officers. In *Brewer,* the remarks by the police were held to constitute interrogation in violation of the suspect's rights, while in *Innis,* the remarks were found not

35. *Id.* at 393 (quoting the officer's statement to the defendant).
36. Williams v. Brewer, 509 F.2d 227 (8th Cir. 1975).
37. Brewer v. Williams, 430 U.S. 387, 400 (1977).
38. *Id.* at 406.

to be interrogation and thus not in violation of the suspect's rights.[39] The Court in *Innis* attempted to distinguish *Brewer* on the ground that the *Brewer* interrogation occurred after Williams' arraignment. Thus, the *Brewer* decision "rested solely on the Sixth and Fourteenth Amendment right to counsel."[40] In contrast, the officers' conversation that resulted in Innis' incriminating statements occurred prior to his arraignment, and the Court, simply noting that custody is not a controlling factor in the attachment of the sixth and fourteenth amendment right, concluded that "the right to counsel at issue in . . . [*Innis*] is based not on the Sixth and Fourteenth Amendments, but rather on the Fifth and Fourteenth Amendments as interpreted in the *Miranda* opinion."[41] The Court explained that "[t]he definitions of 'interrogation' under the Fifth and Sixth Amendments . . . are not necessarily interchangeable . . .,"[42] but offered no explanation of how the definitions might differ.

Paradoxically, following its statement that *Brewer* was not controlling in fifth amendment cases, the Court in *Innis* pro-

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39. The Rhode Island Supreme Court recognized the similarity and adopted the reasoning of *Brewer* on interrogation and waiver. ___ R.I. at ___, 391 A.2d at 1162-64. Moreover, Chief Justice Burger recognized tension between the holdings of *Innis* and *Brewer*, 100 S. Ct. at 1691 (Burger, C.J., concurring), and Justice Stevens argued in his dissent that Innis' "invocation of his right to counsel . . . [made] the two cases indistinguishable." *Id.* at 1694 n.7 (Stevens, J., dissenting).

40. 100 S. Ct. at 1689 n.4.

41. *Id.* In Escobedo v. Illinois, 378 U.S. 478 (1964), the Court explained that "[i]t would exalt form over substance to make the [Sixth Amendment] right to counsel . . . depend on whether at the time of the interrogation, the authorities had secured a formal indictment," *id.* at 486, and held that once an investigation has begun to focus on a particular suspect and that suspect is in custody, sixth amendment rights attach. *Id.* at 490-91. Later, however, the plurality in Kirby v. Illinois, 406 U.S. 682 (1972), referred to *Escobedo* as a "seeming deviation" and found that the sixth amendment right attaches at or after arraignment. *Id.* at 698.

In *Brewer v. Williams*, the Court noted that

> [t]here has occasionally been a difference of opinion within the Court as to the peripheral scope of . . . [the Sixth Amendment] right. . . . Whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him—"whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."

430 U.S. at 398. By failing to explain its conclusion that Innis' right to counsel was not based on the sixth and fourteenth amendments, the Court let pass an opportunity to shed further light on the point at which the right to counsel attaches.

42. 100 S. Ct. at 1689 n.4.

ceeded to incorporate concerns that arose in *Brewer* into its guidelines for the application of the functional-equivalent test for fifth amendment interrogation. In *Brewer,* the respondent was known to police as a former mental patient and a deeply religious individual. The Court in *Innis* pointed out that "[a]ny knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion might be an important factor in determining whether the police should have known that their words or actions were reasonably likely to elicit an incriminating response from the suspect."[43] Furthermore, testimony in *Brewer* showed that the detective who delivered the Christian burial speech had hoped to elicit a response from the prisoner. The Court in *Innis,* again unmistakably cognizant of the *Brewer* shadow, submitted that "where a police practice is designed to elicit an incriminating response from the accused, it is unlikely that the practice will not also be one which the police should have known would have that effect."[44] These efforts to tailor the *Innis* definition of interrogation to accommodate concerns that arose in *Brewer,* following closely at the heels of the Court's statement that *Brewer* was not controlling, suggest that the Court may have been more interested in putting distance between the two decisions than in pursuing and clarifying the constitutional distinction it had drawn.

Innis presented the Court with a serious dilemma. In *Brewer,* a finding that remarks designed to elicit a response and directed to a suspect were "tantamount to interrogation"[45] appears to have been influenced strongly by the Court's disposition to protect the rights of that respondent: "so clear a violation of the Sixth and Fourteenth Amendments as here occurred cannot be condoned."[46] As a consequence, *Brewer* appeared to broaden considerably the definition of interrogation, leaving aside the question whether definitions of interrogation under the fifth and sixth amendments are interchangeable. Yet *Miranda* "[did] not purport to find all confessions inadmissible."[47] Thus, in the wake of *Brewer,* the Court was faced with the choice between finding

43. *Id.* at 1690 n.8.
44. *Id.* at 1690 n.7.
45. 430 U.S. at 400.
46. *Id.* at 406.
47. 384 U.S. at 478.

all custodial confessions made in the absence of counsel inadmissible or identifying some exchanges between law enforcement officers and suspects as falling short of "interrogation."

Perhaps the absence of a clear violation of constitutional rights as in *Brewer*[48] impelled the Court to devise a test under which the *Innis* conversation would not constitute interrogation. The result was a test for interrogation under the fifth amendment which, following the bald settlement that *Brewer* was not controlling, inexplicably incorporated concerns that arose in *Brewer*, but, when applied, reached the opposite conclusion.

B. Retreat From Miranda *Restrictions on Police Practices*

Notwithstanding the lack of clarity in the Court's reasoning in *Innis*,[49] law enforcement practices must be adjusted to the interpretation in *Innis* of the constitutional rights of suspects.[50] *Miranda* definitively brought confessions within the scope of the fifth amendment by requiring that, prior to any questioning, a suspect had to be warned of his rights and by further providing that, if he chose to exercise those rights, all questioning had to stop.[51] The Court, in *Michigan v. Mosley*,[52] explained that inter-

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48. In *Brewer*, respondent retained two attorneys and received their advice. Moreover, one of the attorneys extracted an agreement from the police that they would refrain from interrogation, and the other attorney was denied permission to accompany respondent. See text preceding note 35 *supra*. In contrast, Innis merely stated that he wanted to see an attorney.

49. The Court has muddied fifth and sixth amendment waters on several occasions. Chief Justice Burger, concurring in *Innis*, feared that the majority opinion, based on fifth and fourteenth amendment rights, created tension with *Brewer*, based on sixth and fourteenth amendment rights. 100 S. Ct. at 1691 (Burger, C.J., concurring). Justice White, dissenting in *Brewer*, indicated that it was not necessary to distinguish between the amendments when addressing the waiver issue. 430 U.S. at 430 n.1 (White, J., dissenting). Justice Stewart, writing for the majority in *Schneckloth v. Bustamonte*, stated that "the standards of *Johnson* [v. Zerbst, 304 U.S. 458 (1938) (a sixth amendment case)] were . . . found to be a necessary prerequisite to a finding of a valid waiver [of fifth amendment *Miranda* rights]." 412 U.S. 218, 240 (1973). Law enforcement agencies cannot respond effectively to distinctions which the Court has failed to make clear.

50. Chief Justice Burger, concurring in *Innis*, acknowledges the adjustment made in law enforcement practices to conform to the strictures of *Miranda*. 100 S. Ct. at 1691 (Burger, C.J., concurring). Indeed, the Court granted certiorari in the cases decided in *Miranda* to "give concrete constitutional guidelines for law enforcement agencies and the courts to follow." 384 U.S. at 441-42.

51. See notes 5 & 17 *supra*.

52. 423 U.S. 96 (1975). In *Mosley*, after respondent was arrested in connection with certain robberies and advised of his rights, he declined to discuss the robberies and in-

rogation, terminated at a suspect's request, could resume "after the passage of a significant period of time and the provision of a fresh set of warnings" as long as the second interrogation involved a "crime that had not been a subject of the earlier interrogation."[53] In *Brewer,* the Court held that remarks designed to elicit a response and addressed directly to the suspect constituted interrogation. This finding was influenced by the fact that the police knew of the suspect's peculiar susceptibilities to the remarks.[54] *Brewer,* therefore, suggested that police should avoid addressing statements to their suspects and, likewise, discouraged law enforcement agents from admitting that statements made by them were designed to elicit a response. In the wake of *Brewer,* police also may be disinclined to reveal their knowledge of a suspect's peculiar susceptibilities. The police officers in *Innis* demonstrated at least coincidental conformity, if not conscientious adherence, to the standards of the foregoing decisions: *Miranda* warnings were given and repeated; the officers' remarks were not directly addressed to the suspect; "[t]he record in no way suggest[ed] that the officers' remarks were *designed* to elicit a response;"[55] and there was "nothing in the record to suggest

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terrogation ceased. More than two hours later, another officer, after once again advising respondent of his rights, questioned him about an unrelated murder and obtained an incriminating statement. Noting that *Miranda* could not "sensibly be read to create a *per se* proscription of indefinite duration upon any further questioning by any police officer on any subject, once the person in custody has indicated a desire to remain silent," *id.* at 102-03, the Court found no violation of respondent's rights. *Id.* at 107. Although the police conversation in *Innis* occurred after respondent had elected to exercise his rights, the Court's finding that the conversation was not interrogation made consideration of the issue addressed by *Mosley* unnecessary.

53. *Id.* at 106.

54. See text accompanying note 43 *supra.*

55. 100 S. Ct. at 1690 n.9. Justice Stevens, in his dissent, disputed this contention noting that

> there is evidence in the record to support the view that Officer Gleckman's statement was intended to elicit a response from Innis. Officer Gleckman, who was not regularly assigned to the caged wagon, was directed by a police captain to ride with respondent to the police station. Although there is a dispute in the testimony, it appears that Gleckman may well have been riding in the back seat with Innis. The record does not explain why, notwithstanding the fact that respondent was handcuffed, unarmed, and had offered no resistance when arrested by an officer acting alone, the captain ordered Officer Gleckman to ride with respondent. It is not inconceivable that two professionally trained police officers . . . might induce respondent to disclose the whereabouts of the shotgun. This conclusion becomes even more plausible in light of the emotionally charged words chosen by Officer Gleckman . . . .

that the officers were aware that the respondent was peculiarly susceptible to an appeal to his conscience concerning the safety of handicapped children" or that he "was unusually disoriented or upset at the time of his arrest."[56]

Confronted with the *Innis* test for interrogation, law enforcement officers need make no adjustment for express questioning because such questioning of a suspect after he has invoked his rights is forbidden by *Miranda*.[57] On the other hand, the opportunity for adjustment does arise regarding the functional equivalent of questioning. While police probably should continue to refrain from addressing remarks directly to suspects in custody who have invoked their rights, *Innis* appears to allow wide-ranging conversations to be carried on in the suspect's presence: only those "words or actions . . . that the police should know are reasonably likely to elicit an incriminating response" are prohibited.[58] The Court, however, offered a paradoxical explanation of this prohibition, noting that it

> focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. . . . But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response.[59]

Thus, although the test for the functional equivalent of interrogation purports to focus "primarily on the perceptions of the suspect," the Court itself admitted that the police cannot be held accountable for what suspects may perceive, and the test effectively shifted the focus back to the police. Consequently, in order to prove that certain words or actions were designed to elicit a response and therefore constitute interrogation, a suspect

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Id. at 1697 (Stevens, J., dissenting)(footnotes omitted).

56. *Id.* at 1690 (footnote omitted).

57. See note 17 *supra.*

58. 100 S. Ct. at 1689.

59. *Id.* at 1690 (emphasis in original).

is left with only two alternatives: (1) he must depend upon the police officers to admit at trial that their words or acts, in fact, were designed to elicit a response, or (2) he must prove by other evidence that the words or actions were so designed. To expect the former is unrealistic, and the latter places a heavy burden on the suspect in contravention of a recognized goal of *Miranda*.[60] As Justice Stevens said in his dissent to *Innis*,

> the Court's test creates an incentive for police to ignore a suspect's invocation of his rights in order to make continued attempts to extract information from him. If a suspect does not appear to be susceptible to a particular type of psychological pressure, the police are apparently free to exert that pressure on him despite his request for counsel, so long as they are careful not to punctuate their statements with question marks. And if, contrary to all reasonable expectations, the suspect makes an incriminating statement, that statement can be used against him at trial.[61]

Arguably, then, the *Innis* test for interrogation allows law enforcement agents to employ procedures and achieve results that *Miranda* was designed to prohibit.

III. CONCLUSION

Miranda's prophylactic rule has produced controversy among judges, law enforcement officers, and the public.[62] In balancing the rights of a suspect against the public policy of crime prevention,[63] the court in *Innis* found the public interest more compelling and sought to allow the admission of some custodial confessions. Yet, in what may have been its effort to avoid the issue of waiver,[64] the court reached a pragmatic decision that clouds rather than clarifies distinctions between the fifth and sixth amendments. Furthermore, *Innis* contravenes the Court's earlier decision in *Miranda v. Arizona*[65] by effectively allocating

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60. *See* text accompanying note 59 *supra*.

61. 100 S. Ct. at 1696 (Stevens, J., dissenting)(footnote omitted).

62. *See, e.g.*, Rhode Island v. Innis, 100 S. Ct. 1682 (1980); Brewer v. Williams, 430 U.S. 387 (1977); Michigan v. Mosley, 423 U.S. 96 (1975); Miranda v. Arizona, 384 U.S. 436 (1964).

63. See Annot., 46 L. Ed. 2d 903 (1976).

64. See note 32 and accompanying text *supra*.

65. See text accompanying notes 58-61 *supra*.

to the suspect the burden of showing that the police violated his rights.

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FEDERAL PRACTICE—RULE 3 OF THE FEDERAL RULES OF CIVIL PROCEDURE DOES NOT DETERMINE COMMENCEMENT OF A DIVERSITY ACTION FOR PURPOSES OF TOLLING A STATE STATUTE OF LIMITATIONS. *Walker v. Armco Steel Corp.*, 100 S. Ct. 1978 (1980).

In *Walker v. Armco Steel Corp.*,[1] the United States Supreme Court held that in a diversity action state law determines when an action is commenced for purposes of tolling a state statute of limitations.[2] The Supreme Court declared that rule 3 of the Federal Rules of Civil Procedure, which states that filing of a complaint commences an action,[3] was not intended either to toll a state statute of limitations or to displace state tolling rules.[4]

I. PROCEDURAL HISTORY AND BACKGROUND

Plaintiff in *Walker* was injured on August 22, 1975, in Oklahoma, by an allegedly defective nail manufactured by the nonresident defendant. Plaintiff filed suit in the United States District Court for the Western District of Oklahoma on August 19, 1977.[5] Summons was issued the same day, but remained in the possession of plaintiff's counsel[6] until December 1, 1977, at which time the United States Marshal received and served it. On January 5, 1978, defendant, contending that the action was barred by the applicable Oklahoma two-year statute of limitations,[7] filed a motion to dismiss. The district court granted the

1. 100 S. Ct. 1978 (1980).

2. *Id.* at 1986. The Supreme Court did not rule on the effect of rule 3 in a federal question action. The Court noted, however, that it had suggested in another case: "[I]n suits to enforce rights under a federal statute Rule 3 means that filing of the complaint tolls the applicable statute of limitations." *Id.* at 1985 n.11 (citing Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530, 533 (1949)). Yet, the Court further said: "We do not here address the role of Rule 3 as a tolling provision . . . if the cause of action is based on federal law." 100 S. Ct. at 1985 n.11.

3. FED. R. CIV. P. 3. This rule states: "A civil action is commenced by filing a complaint with the court." *Id.*

4. 100 S. Ct. at 1985. See text accompanying notes 59-61 *infra*.

5. 100 S. Ct. at 1981.

6. *Id.* at 1981 n.2. The reasons for the delay in delivery are unclear. *Id.*

7. *See* OKLA. STAT. ANN. tit. 12, § 95 (West Supp. 1979-80).

motion.[8]

The Court of Appeals for the Tenth Circuit upheld the district court's ruling,[9] finding that plaintiff, by failing to comply with the Oklahoma statute prescribing the procedure for commencing an action,[10] had not tolled the statute of limitations.[11] State law required either service of summons or a diligent effort to effectuate service, followed by service of summons within sixty days, to commence an action.[12] The court of appeals construed the Oklahoma commencement statute to be a limitation, as well as a filing, provision.[13] Failure to comply with its provisions within the limitations period resulted in a failure to toll the statute of limitations. The action, therefore, was barred in state court. According to the court,[14] it hence was barred in federal court, despite compliance with federal rule 3, under the Supreme Court's decision in *Ragan v. Merchants Transfer & Warehouse Co.*[15]

Ragan was similar in facts and issues to *Walker* and, like *Walker,* had originated in the Tenth Circuit.[16] In *Ragan,* the Supreme Court held that, in a diversity action, a state statute of limitations that would have barred suit in state court also barred suit in federal court, even though the suit had been properly

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8. 452 F. Supp. 243, 245 (W.D. Okla. 1978).

9. 592 F.2d 1133, 1136 (10th Cir. 1979).

10. *See* OKLA. STAT. ANN. tit. 12, § 97 (West Supp. 1979-80). This section provides in part:

> An action shall be deemed commenced, within the meaning of this article, as to each defendant, at the date of the summons which is served on him . . . . Where service by publication is proper, the action shall be deemed commenced at the date of first publication. An attempt to commence an action shall be deemed equivalent to the commencement thereof, . . . when the party faithfully, properly and diligently endeavors to procure a service; but such attempt must be followed by the first publication or service of the summons . . . within sixty (60) days.

Id. (footnote omitted). Commencement of a civil action also may be effectuated through the clerk of court. *See* OKLA. STAT. ANN. tit. 13, § 151 (West Supp. 1979-80).

11. 592 F.2d at 1134-35.

12. *Id.* at 1134.

13. *Id.* at 1135.

14. *See id.* at 1135-36.

15. 337 U.S. 530 (1949). In *Ragan,* the injury occurred October 1, 1943; complaint was filed and summons issued September 7, 1945; and service ultimately was effectuated December 28, 1945. Merchants Transfer & Warehouse Co. v. Ragan, 170 F.2d 987, 988-99 (10th Cir. 1948).

16. *See* Merchants Transfer & Warehouse Co. v. Ragan, 170 F.2d 987, 987-89 (10th Cir. 1948).

commenced in the latter court under federal rule 3; to hold otherwise, said the Court, would give the cause of action longer life than the state intended.[17]

The vitality of the holding in *Ragan* had been in dispute since the United States Supreme Court's decision in *Hanna v. Plumer*.[18] In *Hanna*, the federal rule prescribing the manner in which process was to be served was in direct conflict with a state rule.[19] This conflict, according to the Supreme Court, threatened the goal of uniform federal procedure since application of varying state laws in federal actions would result in disparate procedure among the federal courts.[20] The Court resolved the conflict by declaring that a federal rule of civil procedure that directly collided with a state rule would govern if it violated neither the Constitution nor the Rules Enabling Act[21] under which the rules were promulgated.[22]

The majority in *Hanna* distinguished *Ragan* as a case in which the federal rule in question was insufficiently broad in scope to raise a direct conflict with and to compel displacement of the state rule.[23] Justice Harlan, concurring in the result of *Hanna*, however, questioned whether *Ragan* was still good law and stated that he thought *Ragan* had been decided wrongly.[24] Thus, after *Hanna*, federal courts were confronted with an uncertain precedent when called upon to determine whether a diversity action had been commenced by a plaintiff who had com-

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17. 337 U.S. at 533-34.

18. 380 U.S. 460 (1965). *See* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 245 (1970).

19. *See* 380 U.S. at 470. At issue was rule 4(d)(1) of the Federal Rules of Civil Procedure. *See* FED. R. CIV. P. 4(d)(1).

20. 380 U.S. at 463.

21. 28 U.S.C. § 2072 (1976). The section provides in part:

> The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions . . . .
>
> Such rules shall not abridge, enlarge or modify any substantive right . . . .

Id.

22. 380 U.S. at 463-64.

23. *See id.* at 470. The Court in *Hanna* did not distinguish *Ragan* expressly on this point; instead, the Court, in its discussion of the application of the federal rule, cited *Ragan* twice. *See id.* at 469 n.10, 470 n.12. The *Walker* decision, however, makes this express distinction. *See* 100 S. Ct. at 1984-85.

24. 380 U.S. at 476-77 (Harlan, J., concurring).

plied with rule 3, but had failed to comply with a state tolling rule requiring service within a prescribed period. Some lower courts held rule 3 to be controlling under *Hanna,* while others followed *Ragan.*[25]

The Tenth Circuit, in deciding *Walker,* considered the issue before it to be "one of pure procedure" that would have permitted application of the federal rule in accordance with the *Hanna* analysis.[26] Yet, the court reluctantly followed *Ragan.* "The Oklahoma statute which we consider, however, is indistinguishable from the statute which was construed in *Ragan,* so even if we were desirous of applying Rule 3, which we are, we are not free to do so."[27] The court of appeals disclaimed "any spirit of criticism" in its comments, but indicated no reason for its preference for rule 3.[28] The court, however, further noted: "The Supreme Court would perform a great service if it were to clear away the dilemma which exists as a result of the conflict between *Ragan* and *Hanna.*"[29]

The Supreme Court granted Walker's writ of certiorari to resolve the disagreement among the federal courts of appeals[30] resulting from *Ragan* and *Hanna.* Reaffirming the vitality of *Ragan,* the Supreme Court affirmed without dissent the Tenth Circuit's decision that the state statute was controlling.[31]

II. ANALYSIS UNDER *Erie* AND *York*

A. *The Reasoning of the Court*

The Supreme Court's decision in *Walker* was predicated on the absence of a direct conflict between rule 3 of the Federal Rules of Civil Procedure and the state tolling rule.[32] The Court found no indication that rule 3 had been intended to function as a tolling provision, and hence, found it insufficiently broad to

25. For a detailed list of those conflicting decisions, see 100 S. Ct. at 1982 n.6; C. WRIGHT, *supra* note 18, at 246 nn.38 & 40.

26. *See* 592 F.2d at 1135.

27. *Id.* at 1136.

28. *Id.* The court of appeals may have preferred rule 3 in the interest of preserving uniform application of the federal rules. *See* Hanna v. Plumer, 380 U.S. at 463.

29. 592 F.2d at 1136.

30. *See* 100 S. Ct. at 1982.

31. *Id.* at 1986.

32. *See id.* at 1985-86.

control the issue.[33] The Court, therefore, did not test the validity of rule 3 by the standards of the Enabling Act as it had tested the federal rule at issue in *Hanna*.[34] Finding no direct conflict, the Court analyzed the issue under the principles it had applied in *Ragan*.[35]

These principles, expressed in *Erie Railroad v. Tompkins*[36] and *Guaranty Trust Co. v. York*,[37] were designed to avoid "inequitable administration of the laws"[38] and forum shopping[39] by achieving a "degree of conformity" that would prevent application of law in federal diversity actions differing from the law that would be applied in state court.[40] Although the Supreme Court acknowledged that a forum-shopping problem might not be created in *Walker* if rule 3 were held applicable, it determined that "the result would be an 'inequitable administration' of the law."[41] The Court reasoned that if a plaintiff were able to toll the statute of limitations by filing in federal court without subsequent effectuation of service within sixty days of the issuance of summons, the limitations period could be extended beyond the stipulated statutory maximum. The effect would be to give life to a cause of action in federal court beyond that contemplated by the state legislature for the same cause of action in state court.[42] According to the Court, a difference in state and federal rules[43] must not extend the "life"[44] of a cause of action in federal court when that action would be prohibited in state

33. *Id.* at 1985. The Court based this finding on the absence of language in rule 3 providing that it would toll a state statute of limitations and on what the Court interpreted as the neutral stance of the Advisory Committee on Rules of Civil Procedure with regard to the question. *Id.* at 1985 n.10.

34. *See id.* at 1984-85.

35. *See id.* at 1982-83.

36. 304 U.S. 64 (1938). The finding in *Erie* promotes a uniform application of state substantive law in both federal and state courts. *Id.*

37. 326 U.S. 99 (1945). The decision in *York* requires a materially similar outcome of an action whether in state or federal court. *Id.*

38. 380 U.S. at 468.

39. *Id.*

40. *See* McCoid, Hanna v. Plumer: *The* Erie *Doctrine Changes Shape*, 51 VA. L. REV. 884, 890 (1965). *See also* Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 712 (1974).

41. 100 S. Ct. at 1986 (quoting Hanna v. Plumer, 380 U.S. at 468).

42. *See* 100 S. Ct. at 1983 (the Court's reasoning discussed in the context of *Ragan*).

43. *Id.* at 1983, 1986.

44. *Id.* at 1983.

court.

B. A Criticism of the Erie-York *Analysis*

Inherent in the decision[45] was a concern that a substantial difference in outcome, as discussed in *Guaranty Trust Co. v. York*,[46] would result.[47] If a suit were allowed to continue in federal court after it had been barred in state court, a different outcome could result, according to the Court. Plaintiff could win in federal court, but, having no state forum, he would have no recovery in state court.[48] It is questionable, however, whether application of rule 3 always would be unfairly outcome determinative in the sense contemplated by *York*.[49] If access to state court is barred before any attempt is made to commence the action in federal court, a federal rule sustaining the action materially extends the limitations period and unfairly affects the result. When compliance with both state and federal commencement requirements is still possible at the time the action is instituted, however, and plaintiff selects the federal forum, the outcome is not determined unfairly, arguably, by filing in federal rather than in state court.[50]

Similarly, the giving of "longer life in federal court,"[51] which the Court declared incompatible with the principle of *Erie*,[52] is

45. The Court's opinion analyzed *Erie*, *York*, and *Ragan* individually. *Id.* at 1982-83. In its determination of the result in *Walker*, the Court failed to apply the facts of *Walker* to the principles expressed in *Erie* and *York*. This failure to apply the facts of *Walker* to *Erie* and *York* can be interpreted to mean only that the Court applied the principles of those cases through its recognition that "the present case is indistinguishable from *Ragan*." *Id.* at 1984.

46. 326 U.S. 99 (1945).

47. See note 37 *supra*.

48. 100 S. Ct. at 1982 (discussing *York*).

49. *Cf.* McCoid, *supra* note 40, at 901 (stating that *Hanna* clearly made an "unfair difference in outcome . . . rather than mere difference in outcome . . . relevant"). In *York*, the state statute of limitations had run before plaintiff attempted to commence the action in federal court. At issue was whether doctrines applicable in federal equity proceedings permitted a federal court to disregard the expired statutory period; the commencement function of rule 3 was not pertinent to that issue. York v. Guaranty Trust Co., 143 F.2d 503, 521-28 (2d Cir. 1944).

50. *See* Sylvestri v. Warner & Swasey Co., 398 F.2d 598, 606 (1968). *See also* Hanna v. Plumer, 380 U.S. at 467-69.

51. 100 S. Ct. at 1983.

52. The analysis of *Ragan* is made applicable to *Walker* by the Court's identification of the two cases as similar. *Id.* at 1984. *See* Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. at 533-34.

debatably not of the same magnitude of unfairness as proscribed by *Erie*.[53] When compliance with state commencement requirements is still possible at the time of filing in federal court, an extension of the sixty-day grace period for service does not result in an increase in the time within which to initiate the action. Rather, the extension results only in a delay in the time before which defendant would be notified by service that the action had been commenced. Extension of the sixty-day grace period is not necessarily an abrogation of the two-year statutory period nor necessarily inequitable to defendant if timely service is otherwise ensured.

III. AN ALTERNATIVE VIEW FAVORING THE *Hanna* ANALYSIS

A. *Reaching the* Hanna *Analysis—Rule 3 as a Tolling Provision*

Although under the circumstances of the two cases, the *Walker* and *Ragan* results may be correct,[54] the decisions establish a general rule that impairs the goal of uniform federal procedure. The decisions are problematic; not only do they render the commencement of a diversity suit more complex because of different state tolling rules, but the Court eschews the standards of the Enabling Act as the gauge for the legitimacy of rule 3. Application of those standards, which provided the basis of the *Hanna* decision, had been suggested by the Advisory Committee on the Rules of Civil Procedure as a possible test for the applicability of rule 3.[55] Instead, the Court chose to base its opinion,

53. *Cf.* Ely, *supra* note 40, at 712-13; McCoid, *supra* note 40, at 889-90. Although Professor McCoid expresses no opinion on the correctness of the *Ragan* decision, McCoid, *supra* note 40, at 893, Professor Ely believes the result may have been correct. Ely, *supra* note 40, at 730. For a discussion of a case exemplifying the inequities giving rise to the *Erie* goal of uniformity, see Hill, *The* Erie *Doctrine and the Constitution*, 53 NW. U.L. REV. 541, 590-92 (1958); Merrigan, Erie *to* York *to* Ragan—*A Triple Play on the Federal Rules*, 3 VAND. L. REV. 711, 713 (1950).

54. *See* Ely, *supra* note 40, at 720 n.147, 730. Professor Ely thinks "a strong argument can be made," *id.* at 730, that the result in *Ragan* was correct, although its rationale was erroneous; *Ragan* "should have been treated as an Enabling Act case." *Id.*

55. While noting that the Advisory Committee had foreseen the issue that arose in *Walker*, as in *Ragan*, the Court nevertheless did not address the issue in the manner that the Advisory Committee suggested. The Court did not examine "whether it is competent exercising the power to make rules of procedure . . . [under the mandate of the Enabling Act] without affecting substantive rights, to vary the operation of statutes of limitations." RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED

in part, upon a test of outcome determination, the test upon which it had refused to rely in *Hanna*.[56] An analysis under *Hanna*, even with a finding that application of the federal rule would impair substantive state rights and thus still not be permitted,[57] would have been more persuasive and consistent with the mandate of the Federal Rules of Civil Procedure than the analysis that the rule violated the policies of *Erie* and *York*.

It was observed prior to *Walker* that "[p]erhaps the day will come when the Court will inter Ragan; there will be few mourners."[58] In *Walker*, the Court had the opportunity to declare that rule 3 served a tolling purpose and to employ a *Hanna* analysis, which might have resulted in the overruling of *Ragan*. Instead, the Supreme Court reaffirmed *Ragan* and concluded that rule 3 did not toll the state statute of limitations because the rule did not explicitly indicate that such was its purpose.[59] The Court noted that in diversity actions the only purpose of rule 3 is to "[govern] the date from which various timing requirements of the federal rules begin to run,"[60] although it explicitly left open the possibility that the rule could act as a tolling provision in an action based on federal law.[61]

A persuasive argument for applying rule 3 as a tolling rule in some diversity actions, however, has been made previously by the United States District Court for the District of Montana:

> I think that when the complaint was filed the statute of limitations was tolled and remained tolled notwithstanding the failure to serve the summons with diligence. . . .
>
> I prefer the certainty which a literal application of Rule 3 brings to limitations problems to the uncertainty created by a read-in requirement that there be reasonable diligence in the service of process. I think that a failure to serve process should be treated as a failure to prosecute under Rule 41(b).[62]

STATES, NOTES TO THE RULES OF CIVIL PROCEDURE 221-22 (1939). *See* 100 S. Ct. at 1985 n.10.

56. *See* 380 U.S. at 446-67.

57. *See* 28 U.S.C. § 2072 (1976).

58. 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1057, at 191 (1969).

59. 100 S. Ct. at 1985 n.10.

60. *Id.* at 1985. Presumably, the timing requirements referred to are those found in rules 13(a), 26(a), 33, and 56.

61. *See* note 2 *supra*.

62. McCrea v. General Motors Corp., 53 F.R.D. 384, 385 (D. Mont. 1971) (footnote

The court in that case applied rule 3 as a tolling provision when state law barred all actions not "commenced" within a specified time.[63]

Adoption by the Court in *Walker* of the view that rule 3 is a tolling provision would have given a consistent purpose to the rule in all federal court actions, whether based on diversity of parties or federal law, and would have left the effectuation of timely service for proper enforcement under other applicable rules. Had the Supreme Court viewed rule 3 as implicitly a tolling provision, the rule, of course, would have been in direct conflict with the state tolling provisions. The proper test for the validity of the rule then, as in *Hanna,* would have been the application of the standards of the Enabling Act, which require that the federal rule "not abridge, enlarge or modify any substantive right."[64]

B. Applying the Hanna *Analysis*

By attributing no tolling function to rule 3, the Court avoided a perhaps undesirable confrontation between federal and state law, which would have necessitated the Court's making a complex distinction between substantive and procedural issues.[65] Nevertheless, an analysis under *Hanna* would have better protected federal interests without slighting substantive state interests. It is possible that the Court would have determined that application of rule 3 would modify substantive state interests impermissibly under the Enabling Act.[66] Arguably, however, the Court might have deemed the tolling effect of both rule 3 and the state service provision to be purely procedural,[67] and it then could have applied rule 3 in this case.

The Court noted that the service requirement of the state tolling provision does nothing to promote the general policy of all statutes of limitations to keep stale claims out of court.[68] It

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omitted).

63. *Id.*

64. 28 U.S.C. § 2072 (1976). *See* Ely, *supra* note 40, at 720 n.147.

65. *See* Ely, *supra* note 40, at 732 n.209. *But see* 100 S. Ct. at 1985 n.9. Ely states that the Enabling Act makes important the distinction between substance and procedure. Ely, *supra* note 40, at 723.

66. *See* 28 U.S.C. § 2072 (1976).

67. *See* Gavit, *States Rights and Federal Procedure,* 25 IND. L.J. 1, 7 (1949).

68. 100 S. Ct. at 1986 n.12.

declared that, instead, the service requirement furthers a policy of safeguarding each defendant's "right not to be surprised by notice of a lawsuit after the period of liability has run."[69] Requiring actual service helps to insure defendant's "peace of mind" after an established deadline and to prevent his having "to attempt to piece together his defense to an old claim."[70] On this basis, the Court determined that the service requirement was "integral" to the statute of limitations.[71]

A distinction between the right to timely notice, in which the state has a substantive interest, and the manner by which timely notice is ensured, which is procedural, might have provided a basis for analysis of *Walker* under *Hanna* and the Enabling Act. Under this analysis, the Court might have reached the same result, with the conclusion that rule 3 did not displace the state tolling rule. The service provision might have been deemed substantive and, therefore, not subject to impairment by a federal rule because it prescribed the limit of the period after which a potential defendant could expect not to be made party to a suit unless he had had notice. In effect, the service provision would ensure a right of repose for a potential defendant.[72]

On the other hand, if the *substantive* state interest is timely notice, the service requirement arguably might have been regarded as merely a *procedural* method by which to ensure that the substantive interest is served. The state's substantive interest, then, need not be impaired by a holding that rule 3 is controlling. In *Hanna* itself, a service requirement was found to be preempted by rule 4 of the Federal Rules of Civil Procedure, which was found to adequately ensure the state goal of effectuation of service.[73] If the federal rules are, as it has been suggested

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69. *Id.*

70. *Id.* at 1985. The Court's concern with these policies is proper in any analysis relying on *Erie* and *York*. The Rules of Decision Act, 28 U.S.C. § 1652 (1970), which is fundamental to *Erie* and *York*, underlies cases in which application of state or federal law is at issue and no federal rule of civil procedure is involved. One of the concerns of the Rules of Decision Act is to avoid "subversion of state policies" that are substantive rather than procedural. Ely, *supra* note 40, at 695, 708 & n.86, 714 & n.124, 716 n.126.

71. *See* 100 S. Ct. at 1985. "[T]he Oklahoma statute is a statement of substantive decision that actual service . . . , and accordingly actual notice . . . , is an integral part of the several policies served by the statute of limitations." *Id.*

72. *See* Ely, *supra* note 40, at 731.

73. 380 U.S. at 469 n.11. Rule 4(d)(1), at issue in *Hanna*, recognizes as alternate methods both personal service and service at the abode of the person served. *See* FED. R.

they should be, "viewed as an integrated whole and not as isolated fragments,"[74] the Court might have concluded that the service requirements of rule 4 also would protect sufficiently the state's substantive interest in timely notice, even if rule 3 were to function as a tolling provision. Furthermore, although dismissal under rule 41[75] for failure to prosecute or to comply with any of the rules has been termed "a drastic sanction . . . that should be exercised only in extreme situations,"[76] this protection of defendant's right to timely notice by service of process is within the power of the federal courts. Thus, the federal rules can safeguard a defendant from a plaintiff who seeks to gain an unfair advantage in federal court by delay of service.[77]

The state interest in timely notice furthered by the service requirement, therefore, would not necessarily have been sacrificed by a finding that compliance with rule 3 commences a federal diversity action for tolling purposes. Moreover, any state interest in keeping stale claims out of court by means of an established limitations period would not be diminished since the Court stated that that interest was not furthered by the service requirement.[78] In this light, the court of appeals' observation that the service requirement is "one of pure procedure"[79] is substantiated and application of rule 3 would appear to be permissible under the Enabling Act. At least, an analysis under *Hanna,* rather than under the holdings of *Erie* and *York,* might have preserved better the federal interest in the integrity of the federal rules and uniformity of federal procedure.[80]

IV. CONCLUSION

The implication of the Supreme Court's decision in *Walker* is that the federal interest in uniform federal procedure is less

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CIV. P. 4(d)(1).

74. Carribean Constr. Corp. v. Kennedy Van Saun M. & E. Corp., 13 F.R.D. 124, 126-27 (1952).

75. FED. R. CIV. P. 41.

76. C. WRIGHT, *supra* note 18, at 435.

77. *See id.* at 264.

78. 100 S. Ct. at 1986 n.12. See text accompanying note 68 *supra. See also* Ely, *supra* note 40, at 726. Ely suggests that the interest in keeping stale claims out of court is procedural. *Id.*

79. 592 F.2d at 1135.

80. *Cf.* Gavit, *supra* note 67, at 17. *See also* text accompanying notes 18-22 *supra.*

significant than the interest in uniform application of state law in state and federal courts, at least in the statutes of limitations area. The Court, in finding no "direct collision" between the state and federal rules, avoided a confrontation between these consequential interests, which bear upon all the Federal Rules of Civil Procedure. In so doing, although the Court made clear the effect of rule 3 in diversity actions, it retreated from the policy of *Hanna*—to promote a uniform system of procedure upon which litigants in a federal action can rely.

Anne G. Rounds