A Lawyer's Notes on the Warren Commission Report

Miss Scobey, who was a member of the staff of the President's Commission on the Assassination of President Kennedy, writes that the report of the Commission represents an unusual synthesis of historical, investigative and legal aspects. She views the testimony amassed by the Commission from the standpoint of the lawyer who might undertake the defense of Lee Harvey Oswald, had he lived. What she discovers makes a fascinating story.

by Alfredda Scobey • *Law Assistant to the Court of Appeals of Georgia*

AT LEAST THREE marginal comments are relevant to the published report of the Warren Commission.[1] In the first place it accomplished its original purpose: by assembling and evaluating all ascertainable facts relating to the assassination of President Kennedy it has to a large extent laid the ghost of rumor, both here and abroad. Second, it has made readily available as to a single murder a mass of evidentiary material of greater magnitude than ever before, which will prove to be a happy hunting ground for law students for years to come. Third, it has lent form, depth and historical perspective to the event in a way that catches some of the larger implications of our national society and its Executive Officer, whoever he may be.

The Report Has Historical Significance

Historical consciousness is a late and significant product of human civilization. Only in the last couple of centuries has there been any real philosophical analysis of specific forms of historical thought or comprehension of historical structure. The nature of man has been a subject of investigation from the days of the Stoic philosophers; contemporary interpretation is well summed up in the aphorism of Ortega y Gasset: "Man has no nature, what he has is history."[2] Cassirer maintained that "man is not a rational animal but a symbolic animal";[3] that is, the forms of his cultural life cannot be compassed by reason alone because the forms themselves are symbolic. While a lawyer might regret the philosopher's decision to omit jurisprudence from the six symbols through which he interprets the evolution of mankind, he cannot quarrel with the inclusion of history as one of the most rewarding.

So viewed, the initiation by executive order[4] of the President's Commission on the Assassination of President Kennedy was more than the creation of another fact-finding administrative agency, for its value lies both in and beyond the ascertainment of factual truth. History is molded not entirely by events but by men's judgment of them; the honest, unbiased, factual report of material plus the analysis and conclusions drawn by trained and diverse minds has not only discovered but in a sense created history in our time.

The commission members, themselves an impressively literate, conscientious and experienced group of men, drew their staff counsel from representative geographical and professional areas, but it is important to remember that the report was not the result of legal thinking alone. The initial organizational weakness which might have resulted from the fact that investigators were not given staff status[5] (doubtless influenced by an early sensitivity to public opinion, in view of rumors that Lee Harvey Oswald might have had prior connections with the Federal Bureau of Investigation) was

1. REPORT OF THE PRESIDENT'S COMMISSION ON THE ASSASSINATION OF PRESIDENT JOHN F. KENNEDY, published by the United States Government Printing Office, $2.50 paperbound, $3.25 clothbound, pages xxiv, 888 (including appendixes and index). This publication is hereafter cited as REPORT.

2. CASSIRER, AN ESSAY ON MAN 172 (1944).

3. *Id.* at 26.

4. Exec. Order No. 11130, 28 Fed. Reg. 12789 (November 30, 1963). This executive order, which is also set forth at REPORT 471, stated: "The purposes of the commission are to examine the evidence developed by the Federal Bureau of Investigation and any additional evidence that may hereafter come to light or be uncovered by federal or state authorities; to make such further investigation as the commission finds desirable; to evaluate all the facts and circumstances surrounding such assassination, and to report to me its findings and conclusions." Senate Joint Resolution 137, 88th Congress (Pub. L. No. 88-202, 77 Stat. 362), granted the subpeona power to the commission and granted immunity to witnesses compelled to give self-incriminating testimony.

5. Except for certain Treasury Department personnel, who did not, however, act in an investigative capacity at that time.

The President's Commission on the Assassination of President Kennedy, which was appointed by President Johnson on November 30, 1963, consisted of seven persons—the Chief Justice of the United States, who was designated Chairman, two members of the Senate, two members of the House of Representatives, and two members from private life.

The Senators were Richard B. Russell of Georgia and John Sherman Cooper of Kentucky. The Representatives were Hale Boggs of Louisiana and Gerald R. Ford of Michigan. All four are lawyers.

The members from private life were Allen W. Dulles, a former member of the United States Diplomatic Service and former Director of the Central Intelligence Agency, and John J. McCloy, a former Assistant Secretary of War, a former President of the World Bank, and former United States High Commissioner for Germany. Both Mr. Dulles and Mr. McCloy are lawyers.

J. Lee Rankin, former Solicitor General, served as General Counsel to the Commission, and he was aided by fourteen assistant counsel and twelve other staff members.

overcome by liaison between the investigative agencies and staff members, so that fact finding and legal interpretation proceeded harmoniously.

But this alone could not have produced the document that ultimately emerged save for the contribution of other than strictly legal viewpoints, and the unity, depth and significance of the compendium owes much to the decision to treat the work not only as investigative but also historical, and to include on the staff experienced historians, whose point of view, approaching the issues from a different path, offered a symbiotic climate in which the story could be developed. The report is thus the first of its kind to be simultaneously accepted as a scholarly historical presentation, a best-seller and a work of literature.[6]

The Evidentiary Aspects of the Report

From a legal standpoint, analysis of the report and particularly of Chapter IV stating the case against Oswald, is of special interest because of its evidentiary aspects. It has been widely deplored that Oswald was killed before he could be brought to trial. Our basic emotional and intellectual demands that the concepts of due process and fair trial be observed have led both lawyers and laymen to the conclusion that in the absence of such a trial during the lifetime of the accused, carrying with it the defendant's right to procure and present his own side of the story, something will be lacking in the conclusion reached. Had this document set out to be a brief for the prosecution, that would indeed have been true. Since it is not, the fact is inescapable that the report, although crammed with facts that would not be admissible on the trial of a criminal case, sets out the whole picture in a perspective a criminal trial could never achieve.

Collateral to this subject is the emphasis on the prejudice to the right of fair trial and its effects on the admissibility of evidence of the premature divulgence of material by the press and local law enforcement agents at the time of Oswald's first detention, including statements made by Oswald's wife, Marina, as to his ownership of the assassination weapon and other facts, the suspect's refusal to take a polygraph test, the results of a thoroughly discredited paraffin test purporting to be proof of the fact that Oswald had recently fired a gun, and the statements of police officers and prosecuting officials that they considered they had an airtight case against him. The report properly concludes that, while there was a legitimate area of inquiry within the scope of the public's right to know, "neither the press nor the public had the right to be contemporaneously informed by the police or prosecuting authorities of the details of the evidence being accumulated against Oswald. . . . The courtroom, not the newspaper or television screen, is the appropriate forum in our system for the trial of a man accused of a crime."[7]

What Evidence Would Be Admissible?

Apart from this, and from the well documented conclusion that Oswald was not denied the right to counsel,[8] the interesting question remains as to the character of the evidence which, from the maze of material set out in the transcript of the commission hearings and in the exhibits, properly could have been adduced against him on trial, had he lived to stand trial.

There must first be deleted the testimony of his wife, Marina, for although she testified on three occasions and was questioned by the press and investigative agencies on scores of others, it is difficult to find any statement which would not be more hurtful than helpful to her husband. Under Texas law, "The husband and wife may, in all criminal actions, be witnesses for each other; but they shall in no case testify against each other except in a criminal prosecution for an offense committed by one against the other."[9]

Considering the transcript and exhibits as the "brief of evidence" on a trial, there are many facts which appear only in the uncorroborated testimony of Marina Oswald. Chief among them are facts laying the basis for the admission of other criminal transactions—the attempt on the life of Major General Edwin A. Walker on April 10, 1963, and the reputed threat to make some assault on former Vice President Richard Nixon. Whether either of these transactions would have been ad-

6. McGraw-Hill Book Company has published the report, with an introduction by Harrison E. Salisbury and other material prepared by James Reston, Anthony Lewis and Tom Wicker, all of *The New York Times*, $3.95 for the hardcover edition and $1 for the paperback Bantam edition. The McGraw-Hill edition was brought out in a separate printing by the Book-of-the-Month Club as a dividend selection.

Doubleday & Company also has published the report, printed by offset from photographic plates of the Government version and containing a "special analysis and commentary" by Louis Nizer of the New York Bar and an "afterword" by Bruce Catton, the historian. It is priced at $4.95 in hardcovers.

The report first appeared in *The New York Times Book Review* best-seller list on November 8, 1964, and has made the list several weeks since.

7. REPORT 240.
8. REPORT 201, 655.
9. VERNON'S ANN. C.C.P. art. 714.

missible in any event is extremely doubtful.

Under Texas law, distinct criminal transactions are never admissible unless falling within some well-established exception to the general rule. They must tend to connect the defendant with the offense for which he is on trial as part of a general and composite transaction.[10] It might be argued that the Walker and Kennedy incidents both showed a senseless antagonism against public figures and thus lent "credence to otherwise implausible conduct",[11] a sort of extension of the motive exception which is, however, ordinarily confined to sex crimes. System or *modus operandi* is another exception.[12] But sharp differences exist between the two crimes: the extended advance planning and attention given to escape routes in the Walker affair; the differing ideological images of the victims, which make Walker's demise more understandable within the framework of Oswald's known thinking than was the President's; and so on. In any event, it is perfectly obvious that absent his wife's testimony the question is academic, as there is no substantial evidence on which an attempt to introduce the prior attempts could be predicated.

Texas law demands that if evidence of the commission of another crime is otherwise admissible, the rule obtains only when proof of the former may be established beyond a reasonable doubt.[13] The remaining evidence the commission found "of probative value"[14] consisted of: (1) an undated note which in no way refers to Walker, (2) negative testimony of a Federal Bureau of Investigation identification expert that the retrieved but damaged bullet could not be identified as coming from any particular gun, although it "could have been" fired from the rifle used to kill President Kennedy and (3) photographs of the Walker premises. Even as to these, the note was turned over to the investigating officers by Marina and could not in the absence of this testimony be identified with the event, and it is unclear whether the photographs were also delivered by her or were independently found on the premises by officers searching it with her permission.

The Nixon incident, of course, has no other corroboration.

Other Facts Depending on Marina's Testimony

Returning to the assassination itself, it was Marina Oswald who identified the blue jacket found in the Depository Building as belonging to her husband;[15] the shirt, threads from which were found caught in the rifle, as being one she thought he wore to work on the morning of November 22, 1963;[16] the white jacket found in the parking lot along Oswald's reconstructed escape route as belonging to him;[17] the photographs of Oswald with the rifle as being snapshots she took at his request;[18] and a camera found in his effects as the instrument with which they were made.[19] More important, she alone identified the rifle as the one which he owned, and testified that she had seen him practice with it, that it had been moved from New Orleans to Dallas in Ruth Paine's station wagon and that it had been stored in a green and brown blanket in the Paine garage.[20] This is the only eyewitness testimony connecting Oswald with the assassination weapon or definitely identifying his clothing. Other descriptions of clothing show the usual contradictions.

Marina Oswald also is the only source of a wealth of background information, including facts forming the basis of the interpretation of his character on which the "motiveless motive" of his crime depends. The statement that Oswald wanted to hijack an airplane for transportation to Castro Cuba is an example.[21] Connecting Oswald with the name Hidell was important because the murder weapons were purchased in that pseudonym; Mrs. Oswald testified to signing the name on certain cards at his insistence.[22]

Defense counsel would next be interested in the exclusion of physical evidence. The case for the prosecution would show that Oswald had purchased the rifle; that he moved it from New Orleans to Dallas wrapped in a green and brown blanket, which he left with his other belongings in the garage of the Paine residence in Irving; that Oswald took it from the blanket on the night of November 21, placed it in a bag made from paper he had obtained at the school book depository; and that he carried it to work with him the next morning, representing that the package contained curtain rods.

After the arrest on the afternoon of November 22, the Dallas police obtained a search warrant for the Oswald residence on North Bleckley Street, but no warrant was obtained for the Paine house until the following day. Nevertheless, the police went to the Irving home of Mrs. Paine where Marina Oswald was residing and Oswald spent his weekends and stored his effects.

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10. *Medina* v. *State*, 193 S. W. 2d 196 (Tex. Crim. App. 1945); *Morris* v. *State*, 198 S. W. 2d 901 (Tex. Crim. App. 1946).
11. *Head* v. *State*, 267 S. W. 2d 419 (Tex. Crim. App. 1954).
12. *Coston* v. *State*, 268 S. W. 2d 180 (Tex. Crim. App. 1954).
13. *Ernster* v. *State*, 308 S. W. 2d 33 (Tex. Crim. App. 1957).
14. REPORT 187.
15. REPORT 155.
16. REPORT 124.
17. REPORT 175.
18. REPORT 125-127.
19. REPORT 181.
20. REPORT 128.
21. REPORT 299, 412.
22. REPORT 122.

They conducted a search of Oswald's belongings that afternoon without a warrant and without his consent. It is clear from commission documents that permission to be interviewed was given by Mrs. Paine and that Mrs. Oswald, who was present, made no objection. It is not at all clear that she gave consent to a search, however, or that she in any way understood what her rights and those of her husband were.

The most important discovery at this time was the blanket in which the rifle had been wrapped, fibers from which were later identified as being identical in all measurable characteristics with fibers found in the abandoned bag beneath the assassination window.[23] Defense counsel might well wish to raise the question of whether the admission of this evidence would constitute a violation of the guarantees of personal security under the Fourth and Fourteenth Amendments.

In Texas the general rule was that a defendant has no standing to object to the search of another's premises[24] and that a wife has implied authority to consent to the search of her husband's premises,[25] provided she understands the nature of her act and is not subject to implied coercion. Slight circumstances will suffice to void the consent.[26] Since *Mapp* v. *Ohio*, 367 U. S. 643 (1960), however, such cases must be reassessed in evaluating the Fourth Amendment rights of defendants.[27]

The Supreme Court has not taken a literal or mechanical approach to the question of what constitutes a search or seizure. A hotel room, an occupied taxicab, as well as a store, apartment or automobile, may fall within the protected area. The protection extends to the effects of people as well as to the person and houses.[28] Invitation to enter for an interview will not justify a search after entry.[29] If the search is without a warrant, the prosecution must show a consent that is unequivocal and specific, freely and intelligently given. An invitation to enter a house extended to armed officers is usually considered an invitation secured by force.[30]

It is doubtful that such consent was extended by either woman. Even if Ruth Paine consented to the examination of property in her garage known to belong to Oswald, it is fairly obvious that Marina Oswald, considering her scanty knowledge of English and Ruth Paine's difficulties with Russian in a crisis, gave no intelligent consent to a search of the garage, although Marina pointed out the blanket in the belief, as she said, that it still contained the rifle. Because of these factors there would seem to be a strong basis for excluding this evidence.

What Might Be Done as to Other Witnesses

Nor would an adroit lawyer be altogether defenseless as to the remaining witnesses. While Oswald was seen on the sixth floor of the Depository Building, from the southeast window of which the shots were fired, thirty-five minutes before the assassination,[31] his duties in filling book orders were primarily on the first and sixth floors. The only eyewitness who ever identified him at the window first refused to make a positive identification, saying only that Oswald looked like the man he saw.[32] Oswald's subsequent departure from the building was reasonably subject to his explanation that with all the commotion he did not think any more work would be done that day.

It would be a fruitless task to attempt to repel evidence of Oswald's subsequent movements (boarding a bus and leaving it; taking a taxicab; changing clothes at his rooming house; walking down certain streets where he was seen entering the Texas Theater; resisting arrest there; possessing and attempting to use a pistol) since conduct of an accused following the commission of a crime may be inquired into generally[33] and flight constitutes circumstantial evidence of guilt.[34] Nor would it be necessary to show Oswald was aware that he was suspected of the crime.[35] While it would be necessary to show, as to the attempt to resist arrest in the theater, that Oswald knew he was being arrested,[36] the evidence on this point is undisputed.

There remains the question of whether the Tippit murder would be admissible. As a subsequent similar offense it would be excluded.[37] As part of a subsequent escape attempt it could not be shown until it first had been shown that an effort was being made to arrest him. Here the prosecution might succeed, on the proposition that the description being circulated of the President's assassin was sufficient to raise an inference that Tippit intended to hold Oswald for questioning.[38] However, the testimony of Mrs. Helen Markham, an eyewitness standing on the street corner, was merely that after the men talked, Tippit got out of the car on one side and Oswald walked forward on the other and shot him.[39]

This witness was hysterical. Her initial description of Oswald, as well as facts she stated regarding the time of the occurrence, was inaccurate. Her original identification of Oswald in a line-up occurred after she had been given sedatives, and she remained hysterical for several hours after the event.[40] The admissibility of the Tippit murder, accordingly, is at least arguable.

Assuming it to be admissible, however, as part of the general flight picture, the transcripts show the usual contradictions which arise to plague the prosecution. Domingo Benavides,

23. Report 588-591.
24. *Nagel* v. *State*, 71 S. W. 2d 285 (Tex. Crim. App. 1934).
25. *Brown* v. *State*, 235 S. W. 2d 142 (Tex. Crim. App. 1950).
26. *Jordan* v. *State*, 11 S. W. 2d 323 (Tex. Crim. App. 1928).
27. *Lanza* v. *New York*, 370 U. S. 139 (1962).
28. *United States* v. *Hortze*, 179 F. Supp. 913 (S.D. Calif. 1959).
29. *Robertson* v. *State*, 375 S. W. 2d 457 (Tex. Crim. App. 1964).
30. *Gatlin* v. *United States*, 326 F. 2d 666 (D.C. Cir. 1963); *United States* v. *Roberts*, 179 F. Supp. 478 (D.D.C. 1959).
31. Report 143.
32. Report 145.
33. 23 Tex. Jur. 2d 190.
34. *Vaccaro* v. *United States*, 296 F. 2d 500 (5th Cir. 1961).
35. McCormick & Ray, Texas Law of Evidence 394.
36. *Chester* v. *State*, 300 S. W. 57 (Tex. Crim. App. 1927).
37. *Gross* v. *State*, 135 S. W. 373 (Tex. Crim. App. 1911).
38. Report 165.
39. Hearings of the President's Commission on the Assassination of President John F. Kennedy, Volume 3 (testimony of Helen Markham, page 307). Hereafter these volumes are referred to as Hearings.
40. Hearings, Volume 7 (testimony of L. C. Graves, page 252, and James R. Leavelle, page 262).

the eyewitness closest to Oswald, refused to identify him.[41] The Davis sisters were confused as to whether they called the police before or after they saw Oswald leave the car and walk across the lawn.[42] William Scoggins, the taxi driver and an eyewitness to the Tippit murder, made his identification at the same line-up with William W. Whaley, the driver in whose taxi Oswald made part of the trip from the Depository Building to his rooming house, and it appears from the latter and other sources[43] that Oswald's remonstrances against being placed with the other persons in the line-up were so pronounced that any person could have picked him out as the accused without ever having seen him before. There are, however, a number of other witnesses who, while they did not see the actual shooting, did see Oswald leave the scene, and who would not be easy to attack.

Importance of Physical and Documentary Evidence

If we assume that our defense counsel was very, very lucky, he would be able, if Oswald stood trial, either to exclude or impeach the testimony of a large number of key persons whose accounts add so much to the strength of the report. This is not to say that what would be left, granting the unlikely event of success in all these endeavors, would leave room for a reasonable doubt of Oswald's guilt, but the surprising fact is that the conviction in such an event would depend to an amazing degree on documentary evidence and its interpretation by experts. In other words, the circumstantial evidence is either more cogent or less subject to attack than the direct.

Both the rifle recovered in the Depository Building and the pistol found on Oswald's person were traced to his possession by documents with the aid of handwriting experts.[44] The snapshots which Marina Oswald gave to police officers also are established by expert testimony identifying the rifle and pistol Oswald was holding, proving that the pictures were made with his camera. While testimony that Oswald brought the dismantled rifle to the Depository Building is subject to attack because both the Fraziers many times described the brown package Oswald brought from Irving to Dallas on the day of the assassination as being much smaller than it would have had to be to contain the weapon,[45] the bag itself found at the scene was shown to have been made from materials to which Oswald had access, and the mute testimony of the object overpowers the statements of the witnesses. All fingerprints on the boxes from which the assassin fired were latent; sophisticated criminological procedures were necessary to develop and identify them.[46] Expert testimony further links the rifle with Oswald through the shirt fibers caught on its surface.[47] Other testimony established that the bullet found in the Presidential limousine was fired by the rifle that was recovered,[48] while the autopsy report[49] and ballistics firing tests[50] make plain the manner in which the shots hit their mark. If the green and brown blanket found in the Paine garage were admitted, expert testimony links fibers from it with those in the brown paper bag,[51] suggesting that Oswald removed the rifle from the blanket and carried it to the Depository Building in the bag, while human hairs found in the blanket itself were linked with body hairs taken from Oswald after his arrest.[52]

To the lawyer and prosecuting attorney, the Warren Report, conceived as a criminal investigation carried to utmost limits, illustrates the importance of utilizing the laboratory and the expert as sources of the most cogent evidence in criminal proceedings. It also points up the usual difficulties in dealing with the testimony of living witnesses. To the historian, on the other hand, it displays the wealth of detail without which an understanding of the environment and background of the tragedy is impossible.

Report Clears Away the Speculation

The report has both here and abroad cleared away a fog of speculation which could have induced unfortunate international tensions. It has made a real contribution in the difficult area of proving a negative—no foreign Communist state, no internal extremist society, no atmosphere of hate and prejudice for which every American might have to bear a share of guilt, contributed to the event. It has also been helpful in pointing the way toward protection of our standards of fair trial from undue publicity, toward reforms in protective procedures and toward desirable future legislation. It represents a new synthesis which may be followed to advantage in future historicolegal investigations.

41. REPORT 166.
42. HEARINGS, Volume 3 (testimony of Barbara Jeanette Davis, page 345) and Volume 6 (testimony of Virginia Davis, page 460).
43. HEARINGS, Volume 6 (testimony of William W. Whaley, page 428) and Volume 7 (testimony of Daniel Lujan, page 243).
44. REPORT 569-570.
45. HEARINGS, Volume 7 (testimony of Buell Wesley Frazier, page 531) and Volume 2 (testimony of Linnie Mae Randle, page 245).
46. REPORT 563-566.
47. REPORT 591-592.
48. REPORT 557-558.
49. REPORT 538-546.
50. REPORT 580-586.
51. REPORT 591.
52. REPORT 590.

Public Opinion Surveys in Legal Proceedings

Since public opinion surveys are finding increasing use in legal proceedings, Mr. Roper suggests that lawyers should know more about research techniques and standards. He explains the foundations of good public opinion research and some of the limitations of surveys. He suggests how certain conflicts between the requirements of the law and good research practice might be resolved.

by Burns W. Roper • *of New York City*

THE INCREASING USE of public opinion surveys as evidence in legal or quasi-legal proceedings requires an increased understanding on the part of the legal profession of the values, limitations and criteria for judging public opinion research. Because of this fact, the intent of the article by Edward F. Sherman, "The Use of Public Opinion Polls in Continuance and Venue Hearings", in the April, 1964, issue of the *American Bar Association Journal* was laudable. However, Mr. Sherman's article revealed some misconceptions about research techniques and standards which this article will attempt to clarify.

My purposes are (1) to discuss some of the requirements for good research; (2) to discuss the limitations of public opinion surveys; (3) to correct some of the misconceptions created by Mr. Sherman's article; and (4) to discuss some of the conflicts between the requirements of the law and the requirements of good research practice and to suggest how these conflicts might be mutually resolved.

Sampling and Semantics Are the Foundations

The two foundations of public opinion research are sampling and semantics. The problems of sampling are not faced in the normal processes of the law, but semantics is, of course, as important to the law as to research. Both professions are alike in that they pay careful attention to the fine points of question wording. Both know a leading question when they hear one, and a good deal of the preliminary work in a public opinion survey is devoted to making sure none is asked. Before a questionnaire goes into the field, it is carefully pretested by trained researchers, sensitive to the subtleties of questionnaire response, so that the final questions can be worded as clearly and neutrally as humanly possible. Semantic purity is particularly important when the issue asked about is of small interest to the respondent. On crucial issues, people know what they think and say so no matter how they are asked the questions; on matters to which they have given little thought and have little feeling, they can be swayed easily by suggestive questioning.

Both lawyers and researchers understand and face the problems of semantics, but in certain situations the interests of the two professions are strikingly at variance. For example, some years ago in a proceeding before the Federal Communications Commission,[1] the RCA Communications Company contended that Western Union was receiving more than its allotted share of telegrams sent overseas—and they had done a survey to prove it. Certain semantic problems arose when the survey was being designed. The plan was to have interviewers call or visit Western Union offices and, in the researcher's originally intended wording, state that they wished to send a "cable" to certain selected cities overseas to which Western Union had no quota. RCA's lawyers objected to this wording, however, because a cable is an underwater conduit (used extensively by Western Union) and hence the use of the term "cable" might conceivably be construed as meaning the sender did not want through-the-air, or radio, transmission, which was RCA's method. The word "wire" was ruled out on the same grounds. Because of an opposite connotation, "radiogram" could not be used either.

Interviewers were finally told to send "overseas telegrams", but not without qualms on the part of the questionnaire designer, who was concerned that the use of such uncommon, although correct, terminology would alert the

1. *In the Matter of the Western Union Telegraph Company*, Docket No. 10151, December 20, 1954, paragraphs 154 and 155.

might be more than *repair* in the ordinary sense, but in the technical patent law sense, only repair was involved.

Mr. Justice Harlan noted that he would affirm substantially for the reasons given in the majority opinion in the court of appeals.

The case was argued by Frank A. Neal for petitioners and by Carlisle M. Moore for respondent.

Search Warrants . . . validity

Aguilar v. *Texas*, 378 U. S. 109, 12 L. ed. 2d 723, 84 S. Ct. 1509, 32 Law Week 4499. (No. 548, decided June 15, 1964.) *On writ of certiorari to the Court of Criminal Appeals of Texas. Reversed and remanded.*

This decision overturned petitioner's conviction of illegal possession of narcotics on the ground that no probable cause was shown for the issuance of the search warrant involved in his arrest.

The warrant was obtained by two members of the Houston police force on the strength of an affidavit that they had "reliable information from a credible person and do believe that heroin . . . and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law". When the officers went to execute the warrant, they announced that they were police with a warrant and heard a commotion in the house. They forced their way in and seized the petitioner in the act of attempting to dispose of a packet of narcotics. At the trial, petitioner objected unsuccessfully to the introduction of the evidence obtained as a result of the execution of the warrant. He was convicted and sentenced to twenty years for illegal possession of narcotics, and the Texas Court of Criminal Appeals affirmed.

Speaking through Mr. Justice Goldberg, the Supreme Court reversed and remanded. The Court noted that *Ker* v. *California*, 374 U. S. 23 (1963), had held that the Fourth "Amendment's proscriptions are enforced against the States through the Fourteenth Amendment" and that "the standard of reasonableness is the same" under both amendments.

The purpose of requiring a search warrant, the Court went on, is to substitute the "informed and deliberate determinations of magistrates" for "the hurried action of officers" in determining probable cause for the issuance. A reviewing court must insist that the magistrate perform his "neutral and detached" function and not serve merely as a rubber stamp for the police, the Court said. The difficulty here was that the affidavit merely stated suspicion and belief without any statement of adequate supporting facts: the "mere conclusion" that petitioner possessed narcotics was not even that of the affiant, the Court pointed out, but was that of an unidentified informant, and there was no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein. While an affidavit may be based on hearsay, the Court added, the magistrate must be informed of some of the underlying circumstances from which the informant reached his conclusions and some of the circumstances which led the officer to believe that the informant was "credible" or that his information was reliable.

Mr. Justice Harlan, concurring, noted that but for *Ker* v. *California*, he would have voted to affirm.

Mr. Justice Clark, joined by Mr. Justice Black and Mr. Justice Stewart, wrote the dissenting opinion which argued that neither of the cases relied on by the Court was in point and that courts of appeals have often approved affidavits similar to the one at issue here. The dissent declared that the Court had substituted "a rigid, academic formula for the unrigid standards of reasonableness and 'probable cause' laid down by the Fourth Amendment itself . . .".

The case was argued by Clyde W. Woody for petitioner and by Carl E. F. Dally for respondent.

Segregation . . . sit-ins

Bell v. *Maryland*, 378 U. S. 226, 12 L. ed. 2d 822, 84 S. Ct. 1814, 32 Law Week 4664. (No. 12, decided June 22, 1964.) *On writ of certiorari to the Court of Appeals of the State of Maryland. Judgment vacated and cause remanded.*

This case, the first of a group of "sit-in" demonstration cases, involved a demonstration by a group of Negro students in a Baltimore restaurant. The Court disposed of the case without reaching the due process and equal protection issues raised during argument.

Petitioners, twelve Negro students, went to a Baltimore restaurant in 1960 to engage in a "sit-down". They were told that they would not be served, "solely on the basis of their color", and were requested to leave. When they refused to leave, the owner of the restaurant swore out warrants and had them arrested for violation of Maryland's criminal trespass law which makes it a misdemeanor to "enter upon or cross over the land, premises or private property of any person or persons . . . after having been duly notified by the owner or his agent not to do so". The convictions were affirmed by the Maryland Court of Appeals.

The Supreme Court's opinion was written by Mr. Justice Brennan. The Court vacated the judgment and remanded on the basis of a public accomodation statute enacted in Maryland after the state court of appeals had affirmed. The statute accords petitioners a right to be served in a public restaurant and makes illegal refusal to grant them service solely because of their race.

The Court cited the common law rule that when the legislature repeals a criminal statute its action requires dismissal of pending criminal proceedings based on the statute. The Court discussed the effect of the Maryland general saving statute which, in certain circumstances, "saves" state convictions from the common law effect of supervening enactments and expressed its opinion that this statute probably would not be held applicable to save the convictions at issue here. However, the Court remanded for a decision by the Maryland Court of Appeals on the effect of the two statutes.

could be recovered. The case had been before the Court in 1961 (365 U. S. 336), and at that time Mr. Justice Whittaker reversed and remanded for a Court that was divided six to three, with Mr. Justice Brennan concurring in the result. In the present decision, Mr. Justice White and Mr. Justice Goldberg joined Mr. Justice Brennan and the three Justices still on the Court who dissented in 1961 to make the 1961 dissent the views of the new majority.

Respondent, Convertible Top Replacement Company, Inc., was the assignee of a patent for a top-structure for convertibles. Structures using the patented combination were included as original equipment on convertibles manufactured by General Motors and Ford in 1952-1954. General Motors had a license to use the patent; Ford did not. Petitioner, which was not licensed to use the patent, produces fabric components to replace worn-out convertible tops. The first suit was brought against petitioner in 1956 for infringement. The lower courts found infringement, holding that the convertible top replacement fabrics constituted "reconstruction" rather than "repair". Under patent law, "reconstruction" of a patented article without authority constitutes infringement; "repair" does not. The Supreme Court reversed, holding that only repair was involved.

On remand, the district court read the Supreme Court's 1961 opinion as requiring dismissal of the complaint against both Ford and G.M., but the court of appeals reinstated the judgment as it applied to Ford cars on the theory that since Ford infringed the patent by making and selling top-structures without authority, persons who purchased automobiles from Ford likewise infringed by using and repairing the structures. Petitioner was guilty of contributory infringement when it supplied replacement fabrics.

The Supreme Court's opinion was delivered by Mr. Justice Brennan. The decision turned on an agreement signed by Ford in 1955 whereby Ford agreed to pay $73,000 for the use of the patent and received a license to manufacture replacement top fabrics. The agreement in effect was a release to Ford and its customers, but the agreement expressly did not release petitioner.

The Court held that petitioner could not be held for contributory infringement for sales it made after the signing of the 1955 agreement, for after that date Ford car owners had authority, under the agreement, to use and repair the patented structures. Hence, they did not commit direct infringement, and without direct infringement, there could be no contributory infringement.

It was otherwise with respect to petitioner's sales before the agreement. The old common law rule that release to one joint tortfeasor is a release to all has been repudiated by statute, the Court pointed out, so that a release given to a direct infringer for past infringement, which clearly intends to save the releasor's rights, does not automatically surrender those rights.

The Court remanded the case for a determination of the damages that were to be recovered from petitioner for the infringing preagreement sales. Four of the majority took the position that probably only nominal damages could be recovered since the statutory measure of damages for patent infringement is damages suffered by the patent owner, not the recovery of the infringer's receipts. The reasoning was that respondent could not have licensed petitioner's sales, for to do so would have violated the rule that a patentee cannot derive its profit from the unpatented supplies with which the patent is used, thus extending its monopoly to unpatented elements.

It was noted that Mr. Justice Harlan considered that the question of damages was not ripe for decision and the discussion of it did not represent his views.

Mr. Justice White, concurring, took the view that petitioner was liable for tops it sold after, but not before it received notice that there was an infringement.

Mr. Justice Black, joined by the Chief Justice, Mr. Justice Douglas and Mr. Justice Clark, wrote a dissent which pointed out how the change in the personnel of the Court had led to a reversal of its 1961 position. The dissent argued that the 1961 decision was right and that it was unjust to allow respondent to try to prove that it settled with Ford for less than its full damages. The principal infringer was Ford, the dissent said, and when Ford obtained a complete release, all innocent purchasers of Ford cars containing the infringing devices are entitled to be released. The dissent argued that the legislative history of the patent act supported its view.

The case was argued by Charles Hieken for petitioners and by Elliott I. Pollock for respondent.

Patents . . . *repair or reconstruction?*

Wilbur-Ellis Company v. *Kuther*, 377 U. S. 422, 12 L. ed. 2d 419, 84 S. Ct. 1561, 32 Law Week 4490. (No. 109, decided June 8, 1964.) *On writ of certiorari to the United States Court of Appeals for the Ninth Circuit. Reversed.*

The renovation of a fish-canning machine so that it packed five-ounce cans instead of one-pound cans was "repair" rather than "reconstruction", the Court held in this case, and so no infringement of the patent on the machine was involved.

Petitioner purchased four fish-canning machines second-hand which were covered by a patent owned by respondent. The machines were in corroded condition, and required cleaning and sandblasting to make them usable. Petitioner had the machines renovated and in the process resized six of the thirty-five elements so that the machines could pack five-ounce cans instead of one-pound cans. Both the district court and the court of appeals held for respondent in the infringement suit that followed.

The Supreme Court reversed, speaking through Mr. Justice Douglas. The Court said that the decision in No. 75, *supra*, controlled here. The machines were not spent, the Court noted, and had years of usefulness in them. The resizing meant no invasion of the patent, because the patent did not cover size, and the size of the cans serviced by the machine was no part of the invention. All petitioners had done was within the patent rights purchased. It

Attorneys at Law . . . *contingent fees*

A new general rule on contingent fee contracts went into effect on January 1, 1965, in Massachusetts by order of the Supreme Judicial Court of that state. Subject to the terms and prohibitions in the rule, written contingent fee contracts in Massachusetts will not now be regarded as champertous if they are made "in good faith reasonably to comply with this rule".

Unlike other states (except Maine), Massachusetts has taken a strict attitude toward champerty and contingent fees. The rule there has been that an attorney not previously interested in a case (*i.e.*, having no pre-existing fiduciary relationship) may agree to prosecute a case in return for a fee equal to a share of the recovery, if in any event a debt to the attorney from the client is to exist for the services. *Sullivan* v. *Goulette*, 182 N. E. 2d 519 (1962).

The new Massachusetts rule, designated Rule 14, requires contingent fee agreements to be in writing in duplicate, each copy signed by the lawyer and the client, with one copy to be mailed or delivered to the client. The attorney is required to retain his copy for three years after the settlement of the litigation or the termination of services, whichever occurs first. A form of agreement is set out in the rule, but other forms consistent with the rule may be used.

Contingent fee agreements are prohibited in these situations: "(a) in respect of the procuring of an acquittal upon or any favorable disposition of a criminal charge, (b) in respect of the procuring of a divorce, annulment of marriage or legal separation or (c) in connection with any proceeding where the method of determination of attorneys' fees is otherwise expressly provided by statute or administrative regulations."

The rule provides that contingent fee agreements shall "be subject to review by a court of competent jurisdiction prior to the expiration of one year following the making of the agreement or one year following the date of last rendition of services thereunder". If a court grants relief before the services have been completed, the rule continues, the court may discharge the agreement or order its performance on modified terms, and it may prescribe terms that will compensate the attorney reasonably for services rendered and expenses incurred.

The rule excludes contingent fee arrangements on the collection of commercial accounts and insurance company subrogation claims from the requirements for a written agreement.

(*Rule 14*, Supreme Judicial Court of Massachusetts, effective January 1, 1965, 201 N. E. 2d xiv.)

Attorneys at Law . . . *visitors to Texas*

The State Bar of Texas has been rebuffed by the Texas Supreme Court in an attempt to have Melvin M. Belli barred from future law practice in the state.

Mr. Belli served as chief counsel for Jack Ruby, who was convicted in a trial in Dallas of the murder of Lee Harvey Oswald, the accused assassin of President Kennedy. The State Bar of Texas sought an extraordinary writ to prohibit Mr. Belli from again appearing as counsel in Texas state courts on the basis of allegations that he had forfeited his nonresident privileges because of his conduct during and after the Ruby trial. The Bar charged that Mr. Belli made statements which "maligned the trial judge, the opposing counsel, the jury and the entire spectrum of judicial administration in Dallas County".

According to a Texas Supreme Court rule, "a reputable nonresident attorney" not licensed in Texas may participate in a particular proceeding if a resident attorney is also employed and personally participates with the nonresident.

The Texas Supreme Court, denying the State Bar's motion for leave to file its petition, said: "When and if respondent [Belli] seeks to participate in the trial of a particular case in the future, the matter of his qualification as 'a reputable nonresident attorney' under Rule X(i) will be addressed to the discretion of the court in which the case is pending."

(*State Bar of Texas* v. *Belli*, Supreme Court of Texas, October 7, 1964, *per curiam*, 382 S. W. 2d 475.)

Criminal Law . . . *right to counsel*

Building on the United States Supreme Court's 1964 decisions in *Massiah* v. *United States*, 377 U. S. 201, and *Escobedo* v. *Illinois*, 378 U. S. 478, the Supreme Court of California has reversed the capital-offense conviction of a San Quentin prisoner who killed a fellow inmate. The court held that the defendant's confessions were inadmissible because they were made at a time when he did not have counsel.

Massiah was reversed by the United States Supreme Court because the trial court had admitted incriminating statements made by the defendant after he had retained his own counsel and was free on bail after being indicted, the statements being made in the absence of counsel. In *Escobedo* an Illinois conviction was reversed because of the admission of preindictment statements made by the defendant during an interrogation in the absence of counsel after he had requested a lawyer and his lawyer had attempted, but was prevented, from, seeing him. In this case the Court declared that a person being questioned by police is entitled to counsel under the Sixth Amendment when "the investigation is no longer a general inquiry into an unsolved crime but has begun to focus" on the person under questioning and "the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not warned him of his absolute constitutional right to remain silent."

In the California case the body of the inmate who was killed was discovered early in the morning, and physical evidence soon linked the defendant to the crime. He was questioned by prison officials and members of the prosecuting attorney's office. Early in the afternoon he freely and voluntarily admitted the killing and his part in it. This and later incriminating statements were admitted at his trial. At no time during the questioning did he ask for an attorney and he was not warned of his right to remain silent.

The California Supreme Court ruled: "We hold, in the light of decisions of the United States Supreme Court, that, once the investigation focused on defendant, any incriminating statements given by defendant during interroga-

tion by the investigating officers became inadmissible in the absence of counsel and by the failure of the officers to advise defendant of his right to an attorney and his right to remain silent. The admission into evidence of a confession obtained in such a manner requires reversal."

The court refused to read *Massiah* and *Escobedo* as requiring the defendant to make a request for an attorney. It declared that "the constitutional right to counsel precludes the use of incriminating statements elicited by police during an accusatory investigation unless that right is intelligently waived; that no waiver can be presumed if the investigating officers do not inform the suspect of his right to counsel or his right to remain silent. . . . We find no strength in an artificial requirement that a defendant must specifically request counsel; the test must be a substantive one: whether or not the point of necessary protection for guidance of counsel has been reached."

The court refused to consider the admission of the confessions harmless error or to find the case one for the application of a California constitutional provision that "No judgment shall be set aside or new trial granted, in any case, on the ground of . . . the improper admission or rejection of evidence . . . unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

Two judges, dissenting, felt that the conviction should not be reversed in view of the constitutional provision. "The evidence of the murder was extremely strong", they said. "It was indicated by three voluntary confessions and corroborated by circumstantial evidence. It was a cold and deliberate murder."

(*California* v. *Dorado*, Supreme Court of California, August 31, 1964, Tobriner, J., 61 A.C. 892, 394 P. 2d 952, 40 Cal. Rptr. 264.)

Criminal Procedure . . . *jury composition*

A Georgia state court has held that a charge of deliberate and systematic exclusion of Negroes from jury lists may be raised by a white defendant. The court ruled that a criminal defendant is entitled under the Fourteenth Amendment of the Federal Constitution and the due process provisions of the Georgia Constitution to a jury drawn from a cross section of the community.

The white defendant, who had been active in voter registration drives among Negroes, was indicted for assault with intent to murder a police officer. His motion to quash the indictment and his challenge to the array of jurors alleged that there were no Negroes on the grand jury that indicted him or the traverse jury panel; that, indeed, no Negro had done jury service in the county although 46 per cent of the population over twenty-one was colored and 27 per cent of the names on the tax digest, which was maintained on a segregated basis and from which the names of jurors were drawn, were those of Negroes. The trial court denied the motion on the ground that it set forth "no legal basis" even though every allegation be taken as true.

The Court of Appeals of Georgia reversed, indicating that the defendant should be entitled to present proof of his allegations, which, if true, would invalidate his indictment because the grand jury was not selected according to Georgia law.

Although the United States Supreme Court has not decided a case exactly like this one, the court declared that the Supreme Court had spoken "in language that leads us to believe that a defendant need not be a member of the Negro race to complain of the systematic exclusion of Negroes from the jury list. The exclusionary practice condemned by the Fourteenth Amendment does not depend upon the exclusion from juries of a group to which the defendant belongs or identifies himself, but on the resulting failure of the jury to represent a cross section of the community." The court pointed out, however, that were it necessary for the defendant to show prejudice to himself, "judicial notice might be taken that where prejudice exists against the advocacy of the Negro's full privileges and duties of citizenship, a white person active in promoting participation in government by Negroes would be the object of as strong adverse prejudice as would a Negro engaged in such activities, and perhaps stronger."

The court emphasized that Georgia statute law provides no ground for excluding Negroes as a group. "Whenever Negroes have been systematically excluded from jury service in Georgia," it stated, "it has been in defiance of, rather than in compliance with, Georgia law. Never in its history has Georgia systematically excluded Negro citizens as a class from jury service. On the contrary, it has always been the law that they are not so excluded by law."

(*Allen* v. *Georgia*, Court of Appeals of Georgia, Division No. 2, July 7, 1964, Hall, J., 137 S. E. 2d 711.)

Radio & Television . . . *equal time*

When is a use not a use? This was the question the Federal Communications Commission had to answer shortly before the 1964 Presidential election when Barry Goldwater, the Republican candidate for President, and Louis E. Jaeckel, the American Party candidate, requested that the three radio and television networks grant them equal time to reply to a radio-television appearance by President Johnson, a candidate for re-election, the time for which had been contributed by the networks.

The commission used a simple formula to answer the question: it ruled that the President's speech was "a report of the President to the American people concerning specific, current and extraordinary events" and thus it did not constitute a "use" of the broadcast facilities within the meaning of "use" in the statute requiring equal time to political candidates for the same office. The Johnson talk, carried on Sunday night, October 18, concerned the change in leadership of the Soviet Union, the explosion by the People's Republic China of a nuclear device, and the British general election — all of which events had occurred in the previous week.

Crux of the controversy was Section 315 of the Communications Act, 47