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children would seem to be necessary. Allowing a child to make his own decision is not a viable alternative where the religion and way of life of a devout sect stand firmly against further formal education.

Quite obviously the majority opinion in *Yoder* did not consider the rights of the children. A dissenting opinion in the Wisconsin Supreme Court decision suggested that a *guardian ad litem* should have been appointed to represent those interests,⁴⁹ and the suggestion has merit. The Supreme Court might well have ruled the same way had the children been represented, especially since the rights of the two groups of children are almost equally balanced.⁵⁰ Nevertheless, because the case was decided without accounting for this crucial aspect of the case, the Court made its important ruling in a practical vacuum.⁵¹

W. KIMBALL GRIFFITH

Constitutional Law—Standards for the Right to Speedy Trial

The right to speedy trial, guaranteed by the Constitution,¹ has seldom been dealt with by the United States Supreme Court. It was not until 1967 with the case of *Klopfer v. North Carolina*² that the right to speedy trial was established as "fundamental" and applied to the states through the due process clause of the fourteenth amendment. Concurring in *Dickey v. Florida*,³ Justice Brennan subsequently pointed out that the Court had never attempted to set standards by which the right to speedy trial is to be judged. In the recent case of *Barker v. Wingo*,⁴ the Supreme Court undertook the task of providing constitutional guidelines to be used by both state and federal courts in assessing this

⁴⁹49 Wis. 2d at 452 n.1, 182 N.W.2d at 549 n.1 (Heffernan, J., dissenting).

⁵⁰The rights of those who lose the two years of education seem to be more substantial to this writer; even this small additional factor might warrant a different result.

⁵¹See generally Dixon, *Religions, Schools and the Open Society: A Socio-Constitutional Issue*, 13 J. PUB. L. 267, 304 (1964).

¹U.S. CONST. amend. VI provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

²386 U.S. 213 (1967), noted in 46 N.C.L. REV. 387 (1968).

³398 U.S. 30, 39 (1970).

⁴92 S. Ct. 2182 (1972).

important right. In *Barker* the Court refused to declare that the Constitution required the trial of a criminal case within any specific time limits⁵ and adopted instead an *ad hoc* balancing test.⁶

Willie Barker and his accomplice, Silas Manning, were indicted on September 15, 1958, for the brutal murder of an elderly couple in Christian County, Kentucky. Although Barker's trial was set for October 21, 1958,⁷ the prosecution did not believe that Barker could be convicted unless Manning testified against him. In order to preclude Manning from successfully asserting his fifth amendment right against self-incrimination when called as a witness to testify against Barker, Kentucky first sought to convict Manning in a separate trial.⁸ After five trials Manning was finally convicted of the murder of one victim in March 1962.⁹ Conviction for the murder of the other victim followed with a sixth trial in December 1962.¹⁰

In June 1959 after having spent ten months in jail, Barker obtained his release by posting a five thousand dollar bond, and he remained free until he was ultimately brought to trial. The Commonwealth requested and was granted eleven continuances in Barker's trial without objection from the defendant. Barker finally moved to dismiss the indictment after the Commonwealth asked for a twelfth continuance in February 1962.¹¹ The court denied Barker's motion to dismiss the indictment and granted the motion for the continuance.¹² The thirteenth and fourteenth continuances were subsequently granted without objection from Barker.¹³

After the conviction of Manning in December 1962, the Commonwealth moved to set Barker's trial for March 1963.¹⁴ The fifteenth and sixteenth continuances were granted over Barker's objection due to the illness of the chief investigating officer in the case.¹⁵ Finally, in October 1963, more than five years after his indictment, Willie Barker was brought to trial. With Manning as the chief prosecution witness, he was convicted and sentenced to life imprisonment.¹⁶ The Kentucky Court of

⁵*Id.* at 2188.

⁶*Id.* at 2192.

⁷*Id.* at 2185.

⁸Brief for Respondent at 2-3 & n.1, *Barker v. Wingo*, 92 S. Ct. 2182 (1972).

⁹92 S. Ct. at 2185.

¹⁰*Id.*

¹¹*Id.*

¹²*Id.*

¹³*Id.*

¹⁴*Id.*

¹⁵*Id.* at 2185-86.

¹⁶*Id.* at 2186.

Appeals affirmed the conviction.¹⁷

In 1970 Barker petitioned the federal district court for a writ of habeas corpus. The court rejected the petition but granted Barker leave to appeal in forma pauperis. The decision was affirmed by the Court of Appeals for the Sixth Circuit.¹⁸ The Supreme Court subsequently granted Barker's petition for certiorari.¹⁹

In affirming the conviction, a unanimous Supreme Court ruled that whether the right to speedy trial has been violated must be determined on a case-by-case basis. The Court indicated that the following factors should be considered: (1) the defendant's assertion of his right; (2) the prejudice to the defendant; (3) the length of the delay; and (4) the reason for the delay.²⁰

In holding that the assertion by the accused²¹ of his right to a speedy trial is only one factor to be considered, the Court has rejected the so-called "demand-waiver doctrine," which requires an accused to demand a speedy trial or waive his right thereto.²² The Court felt that the "demand-waiver doctrine" was inconsistent with its holdings which have refused to uphold waivers of other constitutionally protected rights on the basis of acquiescent conduct by an accused.²³ For example, in *Boykin v. Alabama*,²⁴ the Court reversed the conviction of a defendant because the record failed to show that his guilty plea was intelligently and voluntarily made. The right to assistance of counsel as similarly guaranteed in *Carnley v. Cochran*²⁵ unless it were waived intelligently and understandingly.²⁶

The United States Court of Appeals for the Second Circuit has established specific time limits within which criminal defendants must

¹⁷Barker v. Commonwealth, 385 S.W.2d 671 (Ky. 1964).

¹⁸442 F.2d 1141 (6th Cir. 1971).

¹⁹404 U.S. 1037 (1972).

²⁰92 S. Ct. at 2192.

²¹In *United States v. Marion*, 404 U.S. 307 (1971), the Court held that the sixth amendment right to speedy trial is applicable only after a person has in some way become an accused and that those not yet accused are protected by the applicable statute of limitations.

²²See, e.g., *United States v. Perez*, 398 F.2d 658 (7th Cir. 1968), cert. denied, 393 U.S. 1080 (1969); *United States v. Lustman*, 258 F.2d 475, 478 (2d Cir.), cert. denied, 358 U.S. 880 (1958), where the "demand-waiver doctrine" was applied.

²³"We reject, therefore, the rule that a defendant who fails to demand a speedy trial forever waives his right." 92 S. Ct. at 2191.

²⁴395 U.S. 238 (1969).

²⁵369 U.S. 506, 516 (1962), "Presuming waiver from a silent record is impermissible."

²⁶But cf. *Illinois v. Allen*, 397 U.S. 337 (1970), in which the defendant, through his disruptive behavior in the courtroom during his trial, lost his right to confront witnesses under the sixth and fourteenth amendments.

be brought to trial in the district courts of the Second Circuit.²⁷ Specific time limits within which an accused must be brought to trial have also been recommended by the American Bar Association²⁸ and are required by statute in many states. Some state statutes require that the accused be brought to trial within a specific number of days or months²⁹ or court terms.³⁰

Interestingly, in *Barker* the Court made no mention of its amendment of rule 50(b) of the Federal Rules of Criminal Procedure in April 1972.³¹ This amendment, effective October 1, 1972, was promulgated under the supervisory power of the Court and requires all federal district courts to:

prepare a plan for the prompt disposition of criminal cases which shall include *rules relating to time limits* within which procedures prior to trial, the trial itself, and sentencing must take place, means of reporting the status of cases, and such other matters as are necessary or proper to minimize delay and facilitate the prompt disposition of such cases.³²

In refusing to impose specific time limits as a constitutional requirement in *Barker*, the Court concluded that to proclaim judicially such limits would involve it in action more appropriate for the legislative branch of the government.³³ The Court also referred to *United States*

²⁷2D CIR. R. REGARDING PROMPT DISPOSITION OF CRIMINAL CASES provides in part:

In all cases the government must be ready for trial within six months from the date of the arrest, service of summons, detention, or the filing of a complaint or a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest. If the government is not ready for trial within such time, or within the periods as extended by the district court for good cause under Rule 5, and if the defendant is charged only with non-capital offenses, then, upon application of the defendant or upon motion of the district court, after opportunity for argument, the charge shall be dismissed.

Rule 5 gives the periods of delay which are to be excluded in determining the six month period. See Statement of the Circuit Council to Accompany Second Circuit Rules Regarding Prompt Disposition of Criminal Cases, Appendix, 28 U.S.C.A. (1972 Supp.).

²⁸ABA, PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SPEEDY TRIAL §§ 2.1-3 (1967).

²⁹*E.g.*, ILL. ANN. STAT. ch. 38, § 103-5(a) (Smith-Hurd 1970) (120 days from arrest); IOWA CODE ANN. §§ 795.1-2 (Supp. 1972) (30 days from date held to answer to indictment; 60 days from indictment to trial).

³⁰*E.g.*, W. VA. CODE ANN. § 62-3-21 (1966).

³¹*Reported*, 11 CRIM. L. REP. 3009 (1972).

³²*Id.* at 3014 (emphasis added).

³³The Court stated: "But such a result would require this Court to engage in legislative or rulemaking activity, rather than in the adjudicative process to which we should confine our efforts." 92 S. Ct. at 2188.

*v. Ewell*³⁴ where it warned of a deleterious effect upon the interests of both the accused and society if a requirement of unreasonable speed were imposed as a constitutional mandate upon the nation's trial courts.³⁵

The Court in *Barker* identified three interests of the accused that should be assessed in determining prejudice: (1) prevention of oppressive pretrial incarceration; (2) minimization of the anxiety and concern of the accused; and (3) limitation of the possibility that the defense will be impaired.³⁶ After weighing these factors in the *Barker* case, the Court found it "clear that the length of delay between arrest and trial—well over five years—was extraordinary"³⁷ but that there was no violation of Barker's constitutional rights since the prejudice was minimal,³⁸ and most importantly, because Barker apparently did not want a speedy trial.³⁹

This holding seems to have relegated the right to speedy trial to a level inferior to other sixth amendment rights. For instance, right to counsel has been upheld even without a showing of actual prejudice.⁴⁰ Similarly, denial of the right to confront witnesses is constitutional error which lack of prejudice will not cure.⁴¹ In the principal case, the Court's finding that there was only minimal prejudice to the defendant's interest is at least questionable. It has been validly asserted "that memories fade, evidence is lost, and the burden of anxiety upon any criminal defendant increases with the passing of months and years."⁴² The ravages of time might not be evident in the record of the case on appeal, but there can be little doubt of their potentially grave prejudicial effect on the defendant's case.⁴³

The right to speedy trial may be undergoing the same evolutionary process as other sixth amendment rights. For example, in *Duncan v. Louisiana*,⁴⁴ the Court extended the sixth amendment right to trial by

³⁴383 U.S. 116 (1965).

³⁵"A requirement of unreasonable speed would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself." *Id.* at 120.

³⁶92 S. Ct. at 2193.

³⁷*Id.* at 2193-94.

³⁸*Id.* at 2194.

³⁹*Id.* The Court felt Barker was counting on Manning being acquitted, and the state then dropping the charges against him.

⁴⁰*Williams v. Kaiser*, 323 U.S. 471, 475 (1945). *But cf.* *Coleman v. Alabama*, 399 U.S. 1 (1970).

⁴¹*Brookhart v. James*, 384 U.S. 1 (1966).

⁴²*United States v. Mann*, 291 F. Supp. 268, 271 (S.D.N.Y. 1968).

⁴³*See United States v. Provoo*, 17 F.R.D. 183, 203 (D. Md.), *aff'd*, 350 U.S. 857 (1955).

⁴⁴391 U.S. 145 (1968).

jury in criminal cases to state actions. The Court held that only petty offenses could be tried without a jury but did not draw a distinct line between petty and serious offenses.⁴⁵ Faced, in the jury trial context, with the same problem, as in the speedy trial context, of drawing a distinct line between the constitutional and unconstitutional, the Court declined to establish such restrictions at the first opportunity. Instead, it watched developments as the lower courts struggled with its nonspecific guidelines. Finally, pressed to supply a precise answer two years later in *Baldwin v. New York*,⁴⁶ the Court looked to a federal statute, section one, chapter eighteen of the United States Code, and adopted, as a constitutional standard for state as well as federal cases, its definition of a petty offense as one for which imprisonment is not authorized for more than six months.⁴⁷ Similarly, in *Barker* the Court may have declined to set precise time limits in order to be able to evaluate the action that will be taken by lower courts as they endeavor to apply the broad standards adopted in *Barker*. In a future case where the defendant claims that he has been denied the right to a speedy trial, the Court may again look to federal law for guidance and adopt the time limits which are being prepared pursuant to amended rule 50(b) of the Federal Rules of Criminal Procedure.

Another sixth amendment right which has undergone an evolutionary process is the right to counsel. In *Betts v. Brady*,⁴⁸ the Court found that whether or not a defendant had been denied due process of law, for want of counsel at his trial, depended on the totality of circumstances to be determined on a case-by-case basis. In *Gideon v. Wainwright*,⁴⁹ the Court overruled *Betts*. Justice Harlan in his concurring opinion in *Gideon* commented on the passing of the totality of circumstances rule.⁵⁰ The *Barker* standards, which require a case-by-case approach similar to the guidelines adopted in *Betts* and overruled in *Gideon*, could well meet the same fate.

The balancing test adopted by the Court makes no provision for society's interest in having those accused of criminal behavior brought swiftly before the courts. Although recognized by the Court,⁵¹ this interest was not reflected in the standards adopted. This conclusion is illus-

⁴⁵*Id.* at 161-62.

⁴⁶399 U.S. 66 (1970).

⁴⁷*Id.* at 71.

⁴⁸316 U.S. 455 (1942).

⁴⁹372 U.S. 335 (1963).

⁵⁰*Id.* at 349.

⁵¹92 S. Ct. at 2186.

trated by the facts of the *Barker* case, itself, in which a man accused of a brutal murder was free on bail for over four years. Society's interest is given greater emphasis in amended rule 50(b) of the Federal Rules of Criminal Procedure.⁵²

In assessing the possible remedies which could be imposed where the right to speedy trial has been violated, the Court found dismissal to be the only possible alternative and called it "indeed a serious consequence because it means that a defendant who may be guilty of a serious crime will go free, without having been tried."⁵³ The Court considered dismissal to be more drastic action than the exclusion of illegal evidence under the fourth amendment.⁵⁴ However, this conclusion does not seem to consider the fact that many cases reversed under the exclusionary rule are never retried because the prosecutor realizes that he cannot secure a conviction without the excluded evidence. In those cases where the defendant is not retried, the charges have, in effect, been dismissed.

The development of the right to a speedy trial continues to lag behind other constitutional protections afforded to the criminal defendant. The Supreme Court in *Barker* has taken a step toward full protection of this right, but until explicit time limits are established, a substantial risk of violation of this important right will remain in our system of criminal justice.

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Environmental Law—Expanding the Definition of Public Trust Uses

Public concern for protecting the environment has recently been manifested in efforts to preserve the coastal wetlands.¹ Public pressure has resulted in the passage of comprehensive coastal zone management acts in three states² and a variety of less comprehensive measures in a

⁵²FED. R. CRIM. P. 50(b), *reported*, 11 CRIM. L. REP. 3014-15, provides in part: "The district plan shall include special provisions for the prompt disposition of any case in which it appears to the court that there is reason to believe that the pretrial liberty of a particular defendant who is in custody or released pursuant to Rule 46, poses a danger to himself, to any other person, or to the community."

⁵³92 S. Ct. at 2188, *see* ABA, *supra* note 28, § 4.1.

⁵⁴92 S. Ct. at 2188.

¹*See* E. BRADLEY & J. ARMSTRONG, A DESCRIPTION AND ANALYSIS OF COASTAL ZONE AND SHORELAND MANAGEMENT PROGRAMS IN THE UNITED STATES (Univ. of Michigan Sea Grant Technical Report No. 20, 1972).

²FLA. STAT. ANN. § 161.011-.45 (Supp. 1972); R.I. GEN. LAWS ANN. §§ 46-23-1 to -12