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Editor's note: The comment below is a brief critique of an article by Professor Jerry Beatty of Simpson College which recently appeared in this *Review*. Professor Beatty's rebuttal follows immediately.

STATE COURT EVASION OF UNITED STATES SUPREME COURT MANDATES: A RECONSIDERATION OF THE EVIDENCE

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INTRODUCTION

In a recent issue this journal published an article by Professor Jerry Beatty¹ in which the author "examine[d] the litigation in state courts subsequent to a remand by the Supreme Court"² As Beatty notes, it has been nearly 20 years since such a study has appeared and his findings are quite intriguing. He reports eight cases of true evasion³ and ten instances of "quasi-evasion."⁴ This is a significant increase over the number of such occurrences in previous decades⁵ and should be very troubling to those concerned with the legitimacy of the Supreme Court.

Professor Beatty has undoubtedly produced a timely and provocative article. However, he claims much more for it. By examining the "litigation in state cases following Supreme Court remands" he purports "to determine the magnitude of state court evasion of Court mandates."⁶ This he cannot do. Examining the percentage of state court evasions of Supreme Court mandates in cases remanded to the states does exactly that and no more. Such a study is admirable but it is incorrect to claim that by this method one has uncovered "the extent to which state courts use their discretion in a manner inconsistent with the Court's mandates."⁷ This definition of evasion is unrealistically re-

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1. Beatty, *State Court Evasion of United States Supreme Court Mandates During the Last Decade of the Warren Court*, 6 VAL. U.L. REV. 260 (1972).

2. *Id.*

3. *Id.* at 263.

4. *Id.*

5. Only four such instances are found in the 1930's and just two in the following decade. Note, *Final Disposition of State Court Decisions Reversed and Remanded by the Supreme Court, October Term, 1931, to October Term, 1940*, 55 HARV. L. REV. 1357 (1942); Note, *Evasion of Supreme Court Mandates in Cases Remanded to State Courts Since 1941*, 67 HARV. L. REV. 1251 (1954).

6. Beatty, *supra* note 1, at 285.

7. *Id.* at 260.

stricted. It uncovers only the smallest fraction of evasions⁸ and leads to a grossly distorted picture as to the true degree of state court evasions.⁹ The scope of the problem can only be appreciated by an examination of the various means by which state courts avoid the effect of Supreme Court mandates.

METHODS OF EVASION

No study has yet been published which investigates the dimensions of the problem systematically and thoroughly. There are, however, a number of case studies which analyze the responses of state courts to particular rulings of the Supreme Court. The findings of these works lead one to conclude that "[f]ar more frequently than is generally acknowledged . . . the state courts either ignore the Supreme Court ruling or evade it"¹⁰ The studies indicate that the state courts often ignore, repudiate or narrowly construe Supreme Court decisions.

Ignoring the Mandate

Ignoring a Supreme Court decision is perhaps the easiest way to mitigate its effects. In a study of southern state supreme court decisions in the area of civil rights, Kenneth Vines notes that "[i]n about half of the cases the decisions cited no precedents from federal courts bearing on civil rights."¹¹ Similarly, in examining the impact of the Supreme Court ruling in *Zorach v. Clauson*¹² (which validated early release from public school for religious instruction), Frank Sorauf reports "several instances where the *Zorach* decision has, surprisingly, been ignored when directly relevant"¹³

Stephen Wasby has explored the influence on the Oregon state

8. Under Beatty's definition it is not considered evasive if state courts not directly involved in the litigation disregard the rulings of the Supreme Court. For example, if a case on appeal to the United States Supreme Court from California is reversed and remanded to that state for final disposition, and California and 20 other states evade the ruling, the total number of evasions (according to Beatty's definition) is one.

9. One writer finds that "[m]ore significant than the state judges' treatment of cases remanded to them is their application and interpretation of doctrines announced by the Supreme Court which are supposed to bind all judges in future cases." J. PELTASON, *FEDERAL COURTS IN THE POLITICAL PROCESS* 60 (1954).

J. PELTASON, *FEDERAL COURTS IN THE POLITICAL PROCESS* 60 (1954).

10. H. JACOB, *JUSTICE IN AMERICA* 218 (2d ed. 1972).

11. Vines, *Southern State Supreme Courts and Race Relations*, 18 WEST. POL. Q. 5, 16 (1965).

12. 343 U.S. 306 (1952).

13. Sorauf, *Zorach v. Clauson: The Impact of a Supreme Court Decision*, 53 AM. POL. SCI. REV. 777, 790 (1959).

courts of the Court's holdings in *Everson v. Board of Education*¹⁴ and *Cochran v. Louisiana State Board of Education*¹⁵ (which cases allowed state benefits to parochial school students).¹⁶ He found that the Oregon Supreme Court has avoided the thrust of these rulings by acting "as if the U.S. Supreme Court cases didn't exist."¹⁷ Similarly, in a study of responses of eight courts to the Supreme Court decision in *Mapp v. Ohio*¹⁸ (which excluded illegally seized evidence from the courtroom), David Manwaring finds that the Texas Court of Criminal Appeals "has shown a marked reluctance to cite either *Mapp* or the other federal precedents"¹⁹

The cases noted above seem to be far from exceptional. One author has attempted to investigate systematically the frequency with which appellate courts cite each other.²⁰ While not explicitly addressing the matter under discussion here, his findings provide some indication of the extent to which the Supreme Court is ignored. Stuart Nagel examined all cases covered in *Shepard's Citations* for the years 1955-59. A recalculation of his figures reveals that, out of 2,541 state court citations, federal courts are cited only 165 times (6.5 percent).²¹

Repudiation

State courts will occasionally recognize the existence of a federal precedent only to repudiate it. Probably the most famous example of this phenomenon is *Fairfax's Devisee v. Hunter's Lessee*,²² in which the state court refused to honor a Supreme Court order invalidating that state's confiscation of land belonging to an alien enemy. Repudiation, however, is by no means exclusively an historical phenomenon. In *Kent v. United States*²³ the Supreme Court held that minors have a right to a hearing with counsel before a juvenile court may waive jurisdiction over the case. When the Texas legislature subsequently passed a statute in line with the holding, it was "held unconstitutional by the Texas court."²⁴ In *Minersville School District v. Gobitis*²⁵ the Court sustained

14. 330 U.S. 1 (1947).

15. 281 U.S. 370 (1930).

16. S. WASBY, *THE IMPACT OF THE UNITED STATES SUPREME COURT* 201 (1970).

17. *Id.*

18. 367 U.S. 643 (1961).

19. Manwaring, *The Impact of Mapp v. Ohio*, in *THE SUPREME COURT AS POLICY-MAKER* 24 (D. Everson ed. 1968).

20. Nagel, *Sociometric Relations Among American Courts*, 43 Sw. Soc. Sci. Q. 136 (1962).

21. *Id.* at 138.

22. 11 U.S. (7 Cranch) 684 (1813).

23. 383 U.S. 541 (1966).

24. WASBY, *supra* note 16, at 154.

25. 310 U.S. 586 (1940).

the right of states to require mandatory flag salutes. Manwaring found, however, that three state courts "directly repudiated the Gobitis precedent."²⁶ The same author found that three states had also repudiated the *Mapp* decision.²⁷

Narrow Construction

State courts often evade Supreme Court rulings by interpreting the decision very narrowly or by finding that the case before them is distinguishable from the relevant High Court ruling. In *Betts v. Brady*,²⁸ for example,

the Court ruled that the defendants in noncapital cases were entitled to state-appointed counsel if special circumstances were present making it impossible for the defendant to represent himself adequately. However, in only 11 out of 139 state appellate cases concerning this issue were special circumstances found.²⁹

In reference to another decision, Edward Beiser reports that although "[i]t was generally understood that *Baker v. Carr* required lower courts to deal with apportionment cases . . . six of the nineteen state supreme courts 'ducked' apportionment questions"³⁰

Other decisions have been emasculated in the same manner. The Court's ruling in *Kent v. United States*³¹ has been distinguished at least three times.³² In the landmark case of *Miranda v. Arizona*³³ the Supreme Court held that a criminal suspect must be informed of his constitutional rights before being questioned. However, "there have been a number of instances" where the decision was held inapplicable to cases before the state courts.³⁴ Another author points out that one state has

26. D. MANWARING, *RENDER UNTO CAESAR* 193 (1962).

27. A New Jersey court stated that "in searching for guiding authority we are of course led principally to federal cases. This is not to acknowledge their binding efficacy." Manwaring, *supra* note 19, at 9. In California the courts "doggedly cited *Mapp* only to hold it irrelevant." *Id.* at 14. Finally, the Texas court "showed a marked reluctance to acknowledge itself to be bound by [*Mapp*] . . ." *Id.* at 24.

28. 316 U.S. 455 (1942).

29. Levine & Becker, *Toward and Beyond a Theory of Supreme Court Impact*, 13 AM. BEHAV. SCI. 561, 562 (1970).

30. Beiser, *A Comparative Analysis of State and Federal Judicial Behavior: The Reapportionment Cases*, 62 AM. POL. SCI. REV. 788, 793 (1968).

31. 383 U.S. 541 (1966).

32. WASBY, *supra* note 16, at 154.

33. 384 U.S. 436 (1966).

34. WASBY, *supra* note 16, at 158.

tacitly disobeyed the mandate of *Miranda* by "narrow or nonapplication."³⁵

In *Tumey v. Ohio*³⁶ the Supreme Court explicitly found that the practice of judicial officers receiving remuneration from fines imposed on defendants deprived defendants of due process. However, Kenneth Vandlandingham reports that, although subsequent to the *Tumey* decision

attempts have been made to invalidate convictions in justice courts where it appeared that justices were financially interested in returning convictions, the majority of such efforts have proved unsuccessful . . . because most state supreme courts hold that circumstances present in such cases are unlike those of the *Tumey* case.³⁷

Turning again to the *Mapp* decision, Manwaring finds that the courts in Michigan, New Jersey, Texas, Pennsylvania, and New York have distinguished the case away.³⁸ The author notes that in its objective

to make federal search and seizure precedents binding on the state courts, the Court met with only partial and very spotty success. . . . Aside from the basic changeover to the exclusionary rule, no state changed its behavior³⁹

CONCLUSION

As the above survey indicates, many state courts manage to circumvent United States Supreme Court mandates. Even though no studies to date have realistically measured the extent to which state courts evade such decisions, the fragmentary evidence available indicates that the practice is rather widespread.⁴⁰ Indeed, it may well be the rule rather than the exception. It appears, therefore, that Professor Beatty's conclusion that "most state courts have an admirable record of compliance"⁴¹ is unfounded.

35. Note, *Gideon, Escobedo, Miranda: Begrudging Acceptance of the United States Supreme Court's Mandates*, 21 U. FLA. L. REV. 346, 359 (1968).

36. 273 U.S. 510 (1927).

37. Vanlandingham, *Pecuniary Interest of Justices of the Peace in Kentucky: The Aftermath of Tumey v. Ohio*, 45 KY. L. J. 609 (1957).

38. Manwaring, *supra* note 19, at 9, 23, 24.

39. *Id.* at 24.

40. For additional examples see Murphy, *Lower-Court Checks on Supreme Court Power*, 53 AM. POL. SCI. REV. 1017 (1959); Paulson, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91 (1950); Warren, *Federal and State Court Interference*, 43 HARV. L. REV. 345 (1930); Weisberg, *Supreme Court Review of State Court Decisions Involving Multiple Questions*, 95 U. PA. L. REV. 764 (1947).

41. Beatty, *supra* note 1, at 284.

