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### **“Shuffling Sam”**

You may wonder what the Supreme Court was doing during the 1959 Term, my term with the Chief. *Brown* had been decided several years before, and Governor Faubus' rebellion at Central High in Little Rock had been dealt with the previous term in *Cooper v. Aaron*. The revolution wrought by *Mapp*, *Gideon* and *Miranda* lay ahead, as did *Loving v. Virginia*, voiding bans on interracial marriage, and *Baker v. Carr* and *Reynolds v. Simms*, requiring “one person, one vote” in legislative and congressional districting. So you could think the Court was simply resting on its oars during the 1959 Term.

Not true.

Sam Thompson had been arrested in Louisville on 57 previous occasions for various alleged minor offenses when two policemen found him doing a dance or “shuffle” in a restaurant and arrested him again. Asked what he was doing, Thompson said he was waiting for a bus to take him home. Asked whether he had purchased anything, he told the policemen that he had purchased a plate of macaroni and a beer. The policemen arrested him and he asked why. The police charged him with loitering and disorderly conduct. At trial in the Louisville police court, the owner of the restaurant confirmed that Mr. Thompson was present in his restaurant when he was arrested, that the owner had not sold Thompson macaroni and beer but did not know whether his waitresses had, that Thompson was a more or less frequent patron and had never done anything that warranted asking him to leave and that he had not been asked to leave or done anything that warranted asking him to leave on the occasion of his arrest. The police court convicted Thompson anyway and fined him \$10 on each charge, or 10 days in jail if he failed to pay the fines.

Unfortunately for Louisville, Mr. Thompson did odd jobs from time to time for a lawyer in Louisville named Louis Lusky. Lusky thought the police were harassing Thompson, so Lusky sued Louisville for false arrest on Thompson's behalf. However, if Thompson paid the fines or served his time it would bar the false arrest suit under Kentucky law. But the conviction could not be appealed to a higher court in Kentucky because the fines were too small and the jail term too short. So Lusky sought a stay of the judgment to permit him to petition the U.S. Supreme Court for certiorari. The intermediate appellate court in Kentucky granted a stay, observing that there did not appear to be any evidence that Thompson had committed any offense. The Kentucky Supreme Court vacated the stay because the intermediate court lacked jurisdiction, but then granted a stay of its own on the same grounds.

Unfortunately too for Louisville, Louis Lusky was not unknown to the Justices. He had clerked for Chief Justice Stone when Stone wrote *Carolene Products*, and authored the famous footnote in that case suggesting that the presumption of constitutionality may have limited application to legislation that restricts those political processes that may ordinarily be expected to bring about repeal of undesirable legislation or to legislation directed at minorities who are subject to discrimination. *United States v. Carolene Products*, 304 U.S. 144, 152 n.

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4 (1938). Justice Frankfurter thought the footnote slighted the Fourth Amendment and regarded Lusk as a bad fellow for writing such a bad footnote. Other Justices viewed the footnote as an important contribution to our constitutional jurisprudence.

When the case was argued before the Court, Lusk commented shortly after he began his oral argument that the Louisville police had arrested Thompson 57 times for minor offenses. Frankfurter snapped, "Where is that in the record?" Lusk replied, "Page 2." Frankfurter was uncharacteristically quiet for the rest of the argument. The Court questioned counsel for Louisville closely, but he was unable to point to any evidence in the record to supply any of the elements of a loitering offense. The basis for the disorderly conduct charge was said to be that one of the policeman had said that Thompson was "disorderly" when arrested, but the only basis for that appeared to be that Thompson had asked why he was being arrested and had protested that he had done nothing wrong.

The Chief assigned the opinion for a unanimous Court to Justice Black, whose straightforward account of the case is fun to read. Black's opinion said that the question was not whether the evidence was sufficient to support the conviction, a matter of no importance constitutionally, but whether there was any evidence at all to support the conviction. There was none. Fining or jailing a person without any evidence at all obviously violates the Due Process Clause of the Fourteenth Amendment. The conviction was reversed.

So the Supreme Court was not napping during the 1959 Term. It would be a sad state of affairs if you could be fined or jailed for no reason at all. Of course, sometimes it doesn't hurt to know a very good lawyer.

*Thompson v. City of Louisville*, 362 U.S. 199 (1960).

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### **"Gotcha"**

When *Brown v. Board of Education* was first argued during the 1953 Term while Fred Vinson was still alive, the Court split badly over the case. The Court put the case over in conference for further discussion week after week, and finally Justice Frankfurter, who supported the petitioners, persuaded his colleagues to schedule the case for reargument during the 1954 Term. Vinson died during the summer recess, Ike appointed Earl Warren to succeed him, and Warren supplied the patient leadership needed to produce the historic result, to Frankfurter's delight: a single short unanimous decision announcing that separate is not equal and that the day of *Plessy v. Ferguson* was over.

For five terms after that, the Court was unanimous in cases arising from efforts to dismantle Jim Crow. That ended during the 1959 Term in a case involving a golf course in Greensboro, North Carolina. The course was on city-owned land but was operated by an ostensibly private club whose members did not include African Americans. Leon Wolfe and five friends, all African Americans, wanted to play on the course, but when they presented themselves at the clubhouse they were told they could not play. They put money on the counter to pay the greens fees and proceeded to play anyway. They were arrested and convicted of criminal trespass.

Their original convictions were set aside on appeal for procedural flaws, and the case was remanded for retrial. In the meantime, Mr. Wolfe and his friends, joined by additional plaintiffs, obtained a federal court order enjoining racial discrimination in the operation of the golf course, based on their exclusion from the course and other evidence. That decision was affirmed by the Fifth Circuit. *Simkins v. Greensboro*, 149 F.Supp. 562 (M.D.N.D. 1957), *aff'd*, 246 F.2d 425.

At retrial on the state criminal trespass charge, the defendants claimed that the charges were barred by the federal court decision under the Supremacy Clause and the Fourteenth Amendment. The trial court rejected their proffer of the federal court proceedings, and they were convicted by a jury even though it was instructed not to convict if their exclusion from the golf course had been based on their race.

On appeal to the North Carolina Supreme Court, the defendants claimed, as they had below, that their convictions were precluded by the federal court decision. Unfortunately, through inadvertence they neglected to include their proffer of the federal court proceedings in their record on appeal. The North Carolina court stated that “for reasons best known to themselves the appellants elected not to include” their proffer in the appellate record and affirmed the convictions on the counterfactual premise that the trial court did not have the federal court decision and record before it.

Mr. Wolfe and his friends appealed to the U.S. Supreme Court. The Court requested and the State supplied a true and correct copy of the missing portion of the trial court record. Nevertheless, the Court decided to dismiss the appeal because it concluded that the state supreme court decision rested on an adequate state procedural ground that the state court had “consistently and repeatedly” followed, “without exception,” as Justice Stewart wrote in the opinion for the Court. Initially, only the Chief, who knew a “gotcha” when he saw it, disagreed.

When Stewart circulated his draft opinion dismissing the appeal, the Chief expressed his acute distress in a blistering dissent which he dictated and circulated without giving his clerks a chance to muck it up. The next day, the Chief called me into his office and told me that Justice Brennan had offered to switch his vote if the Chief would tone down the dissent. He sent me off to find out what would satisfy Brennan.

Brennan sent me to the library to check further on the claim that the North Carolina court had consistently decided cases as Stewart’s opinion asserted when federal claims were not involved. I discovered a number of cases in which the state court had exercised discretion to correct the record on appeal to decide kindred non-federal issues. I added those citations to the Chief’s dissent and made some other changes Brennan suggested. The Chief approved and circulated the revised dissent.

The new citations prompted Stewart to circulate a revised draft of his own that undertook to distinguish them. In addition to Brennan, Justices Black and Douglas were not convinced and joined the dissent. But four votes are not a majority, and the Court dismissed the appeal in a 5-4 decision. The Chief and his allies did not succeed in helping the appellants. But Mr. Wolfe and his friends could take pride for their early part in the vigorous struggle to slay Jim Crow, culminating in enactment of the 1964 Civil Rights Act.

*Wolfe v. North Carolina*, 365 U.S. 177 (1960).

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### **Dean Acheson**

The law clerks had their own dining room where they had lunch every day and chatted about pending cases and current events. We invited each justice or some other notable to join us from time to time during the term. Frankfurter and Black, though advocating very different approaches to the work of the Court, both were charming and witty. Douglas, who had once said that law clerks were “the lowest form of life” and had only a single clerk himself, was gracious and told us how Truman had invited him to join the ticket when Truman ran for election in 1948. Charlie Whittaker said that left to his own devices he would have supposed that “due process of law” meant only that a court followed its own prescribed rules of procedure, but it was too late in the day for that.

One day we had a former Brandeis clerk named Dean Acheson join us for lunch. A major topic of conversation that year was who would run in November to succeed Ike. Acheson gave us his rundown on the various possible candidates. When he got to Adlai Stevenson he said, “Adlai can’t make up his mind. About anything. He asks everyone what he should do. Why, if he were here, he would even ask you what you think he should do.” With that endorsement of the value of our advice to ponder, we returned to work after lunch.

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### **Prisoners’ Petitions**

In those pre-Xerox days, in addition to its regular docket the Court had a “Miscellaneous Docket” which contained all the *in forma pauperis* petitions from prisoners and other poor people. Instead of filing enough copies of their petitions for all the Justices, *in forma pauperis* petitioners filed only a single copy, which was sent to the Chief Justice’s chambers. The Chief had instructed the Clerk’s Office to docket all prisoners’ petitions regardless of technical deficiencies under the rules.

Each Justice’s law clerks except Justice Frankfurter’s prepared a one to three page “cert memo” for the Justice for each case on the regular docket, stating what court the case came from, the facts regarding the Court’s jurisdiction, what issues the petition or appeal presented, and the reasons for granting or denying review asserted by the parties. Frankfurter reviewed the petitions and appeals himself.

Since there was only a single copy of the *in forma pauperis* petitions, the Chief’s clerks prepared the cert memos for those cases for the entire court, which were typed with enough carbon copies on very thin paper (called “flimsies”) to distribute to all the Justices’ chambers. The Chief told us to make sure all the prisoners’ complaints were investigated carefully and stated fairly so that their lack of counsel did not prejudice them, and the Chief would have the Clerk’s Office obtain the record or call for a response in cases warranting it.

The folders containing petitions from prisoners on death row were marked “Special” on a conspicuous bright pink label, to alert us to turn to them immediately. As far as I know the Chief had no misgivings about the death penalty, but he did not want a petitioner to be executed while his petition gathered dust on a shelf in our office.

I took a particular interest in these cases so I often took a few of the files home at night to review. Frankfurter told the Chief he didn't like my memos. Black told the Chief he liked my memos. This amused the Chief, who reported it to me and told me to keep doing what I was doing. The Court took action of one kind or another in more of these cases during the 1959 Term than in any previous term.

One night I opened one of the files that I had taken home from the accumulation in our office that did not bear the pink "Special" label for death cases. I was startled to discover that it was from a prisoner on death row, in Maryland as I recall. I do not now remember what his offense was or what grounds he may have had for seeking review, but to this day I do remember how he closed his petition: "Help me if you can for I am not guilty." Innocence is not a ground for review as such, but I had a troubled night. The Clerk's Office checked immediately the next morning to find out whether the petitioner was still alive and whether a date had been set for his execution. He had not been executed and no date had been set. The individual in the Clerk's Office responsible for the screw-up and I were both mightily relieved.

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### **Justice Never Sleeps**

Clifton Poret and Edgar Labat, two African Americans on Louisiana's death row, had been convicted of raping a white woman in New Orleans. Their case case bounced up and down in the Louisiana and federal courts until the Fifth Circuit ruled that they had exhausted their state remedies and thus were entitled to a hearing on their federal habeas corpus petition. U.S. District Judge J. Skelly Wright heard their case. He was well regarded and was later appointed to the U.S. Court of Appeals for the D.C. Circuit.

Part of the evidence against the petitioners at their trial for rape was the testimony of a mentally deficient individual named Earl Howard. Howard had testified that he had seen the defendants in the vicinity of the crime. After their conviction, Howard signed a statement contradicting his trial testimony and then signed additional statements contradicting his prior statements. At their habeas hearing, the petitioners claimed that Howard's testimony was perjured and that the police had obtained the perjury by coercion. Wright heard a total of 24 witnesses, but he was not convinced that Howard's testimony, though "leaving much to be desired," was either perjured or coerced. He denied the petition, and the Fifth Circuit affirmed. *Labat v. Sigler*, 162 F.Supp. 574 (E.D. La. 1958), *aff'd*, 361 F.2d 375 (1960).

The petitioners sought a stay of execution in the Supreme Court. Although the case was from the Fifth Circuit to which Justice Black was assigned, for some reason, probably unavailability of the Justices in question, the application for a stay ended up in the Chief's chambers but was then considered by Justice Brennan. The Court had recently ruled that knowing use of perjured testimony voids a conviction, but Wright had not been convinced that Howard's testimony was either perjured or coerced. My own impression was that Howard probably lacked capacity to perjure himself but tried very hard to please everyone by giving them answers he thought they wanted. A conviction based in part on evidence like that troubled me, but Justice Brennan thought (quite rightly, I'm sure) that the brethren would have no interest in expanding the rule against knowing use of perjured testimony to reach this kind of knowing use of inherently unreliable testimony. So he denied the stay.

Nevertheless, Poret and Labat filed a petition for cert claiming that African Americans had been systematically excluded from the petit jury and that they had diligently preserved their claim in that regard throughout the prior proceedings. The Court remanded for a disposition of that claim. *Poret and Labat v. Sigler*, 362 U.S. 375 (1960). Six years later, after the petitioners had spent 13 years on death row and after extensive further proceedings, the Fifth Circuit voided their convictions, concluding that African Americans had indeed been systematically excluded from the trial jury. *Poret and Labat v. Bennett*, 365 F.2d 698 (5<sup>th</sup> Cir. 1966).

As the late Yogi Berra might have said, Justice never sleeps, but sometimes takes quite a while to wake up.

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### Rehnquist

Leaving aside judicial interests, the Court today differs quite a bit from the Court in the 1959 Term. In the years since the 1959 Term the Court has imposed page limits on briefs and cut the time for oral argument in half in most cases. The nine Justices have twice as many law clerks today as they had in the 1959 Term. They fill more pages of the U.S. Reports with their opinions today than they did then. They receive a great many more petitions from which to choose cases to hear. Yet they manage to decide only about half as many argued cases in the typical year now than they did in the 1959 Term.

During the 1959 Term most of the Justices wrote their own opinions and their clerks assisted in polishing; they added a citation here and a footnote there, as Louis Lusky did in *Carolene Products*. I understand that today the process is reversed and most chambers prepare opinions in much the same way a large law firm prepares a brief. With variations from Justice to Justice and case to case, the Justice indicates to the clerks in general terms what he wants the opinion to cover, clerks prepare a draft, and the Justice revises or rewrites as suits him or her.

Currently all the Justices except Justice Alito participate in a “cert pool,” in which only a single cert memo is prepared for all the Justices participating in the pool, for each petition for cert or appeal. This frees up a great deal of time for clerks to assist in the preparation of opinions. This may mean that many cases in which cert is denied receive close attention from fewer pairs of eyes than in earlier times, although not everyone may agree.

There have been suggestions that with the advent of the cert pool and the larger role clerks play in the preparation of many opinions some clerks today fancy themselves junior justices. I do not know whether that is true or not, but we certainly had no such illusions during the 1959 Term. None of the Justices then needed advice from the likes of us to decide anything. So far as I know, none of the clerks then had an agenda of his own. The only agenda was the Justice’s, if he had one.

To be sure, a former Jackson law clerk named Rehnquist had recently published an article in one of the weekly magazines in which he claimed that the law clerks were too liberal and had too much influence. But you had to take Rehnquist with a grain of salt. He was the fellow who advised Justice Jackson in *Brown v. Board of Education* that there was no reason not to follow *Plessy v. Ferguson*.

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### Calling “Balls and Strikes”

Before her appointment to the Court, then Judge Sotomayor suggested in her famous “wise Latina’ remark that diversity of experience contributes to the collective wisdom of a court. The Justices in the 1959 Term were all men and all white, as were all their predecessors. So too the clerks, with only the exceptions of Lucile Loman, a woman who served as a clerk for Justice Douglas during the 1944 Term, and William Coleman, an African American who clerked for Justice Frankfurter during the 1948 Term. Today, of course, three women, one of whom is a Latina, and one African American are serving on the Court, and the clerks are somewhat more diversified.

From at least one perspective, however, the Court is less diversified than it was in the 1959 Term, and that is with respect to the range of professional experience the Justices bring to the Court. To begin with, seven of the Justices sitting today attended the Harvard Law School, whereas seven of the Justices sitting during the 1959 Term attended seven different law schools other than Harvard. But much more significantly, today all of the Justices except Justice Kagan served on a lower federal appellate court before they came to the Court. In contrast, in the 1959 Term, a majority of the Justices, the Chief, Black, Frankfurter, Douglas and Clark, had no prior judicial experience before coming to the Court (unless one counts the few months Justice Black served as a police judge when he was very young). But when they came to the Court, they brought with them a wealth of other experience.

Prior service on a lower federal appellate court (not to mention attendance at Harvard), is not a sensible prerequisite for appointment to the Court. The jobs are different. A lower court judge is bound to follow Supreme Court precedent. A Justice needs the judgment to understand both the value of precedent and when fidelity to the Constitution requires departure from prior decisions, as in *Brown v. Board of Education*. A lower court judge may just get by with the ability to “call balls and strikes.” But a Justice needs the experience and wisdom to judge what the words of a general charter, written in the 18<sup>th</sup> Century to establish a Republic and bridge fundamental contradictions in colonial society, and then amended immediately and again after the Civil War and then again more recently to greatly expand human rights, mean in cases arising in today’s world.

The five Justices on the Court during the 1959 Term who lacked prior judicial experience when they were appointed all made substantial contributions. Black and Frankfurter went on to become giants of constitutional jurisprudence. And Earl Warren went on to become the most consequential Chief Justice since John Marshall. From the standpoint of equal justice under law America was a better place for us all when Warren laid down his judicial robes than it was when he first put them on.

