NO EVIDENCE TO SUPPORT A CONVICTION—THE SUPREME COURT'S DECISIONS IN *THOMPSON v. CITY OF LOUISVILLE* AND *GARNER v. LOUISIANA*

Twice in the last two years, the Supreme Court of the United States has overturned state criminal convictions on due process grounds for what the Court termed an absolute lack of evidence.[1] The novelty of such action warrants close examination of the decisions.

The first case, *Thompson v. Louisville*,[2] involved an alleged violation of municipal loitering and disorderly conduct ordinances. Although "disorderly conduct" was not defined by that ordinance, it expressly outlawed sleeping, lying, loafing, or trespassing without prior consent of the owner or controller of the property involved by any person without visible means of support or unable to give a satisfactory account of himself. The undisputed evidence showed that the defendant, who was a local handyman and self-supporting, had amused himself by dancing or shuffling his feet to the music of a jukebox while waiting in a tavern approximately half an hour for a bus. The tavern proprietor failed to object to his conduct, but defendant had not obtained his prior consent. The arresting police officer testified that defendant had been "very argumentative" after arrest. Defendant was convicted despite his contention that conviction on either charge based on this evidence would violate the due process clause of the fourteenth amendment. After allowing certiorari directly to the Louisville Police Court,[3] the Supreme Court stated that the issue was the existence of any evidence rather than the sufficiency of evidence to sustain the conviction,[4] and decided that the only basis for conviction consistent with the loitering ordinance and the evidence that defendant had means of support was that he was "unable to give a satisfactory account of himself while loitering in the cafe, without the consent of the manager." [5] The Court then ruled that the facts of record established none of the elements of the crime: defendant's statement to the arresting officer that he was waiting for a bus was a sufficient account of himself; loitering or loafing did not embrace shuffling one's feet to music; and the proprietor's failure to object to defendant's presence constituted consent.[6] The Court also found no

[1] Garner v. Louisiana, 368 U.S. 157 (1961); Thompson v. City of Louisville, 362 U.S. 199 (1960).

[2] 362 U.S. 199 (1960). This case has been popularly referred to as the "Shufflin' Sam" case. See Blank, *The High Court and "Shufflin' Sam,"* Reader's Digest, Nov. 1961, p. 94; Time, April 4, 1960, p. 15.

[3] Determinations of the police court on minor matters are not appealable or reviewable by other Kentucky Courts. KY. REV. STAT. §§ 26.010, 26.080 (1959); 362 U.S. at 202 n.4 (1960) (citing unreported Kentucky cases). Thus the police court was the "highest court" within the meaning of 28 U.S.C. § 1257 (1958).

[4] 362 U.S. at 199.

[5] *Id.* at 204.

[6] *Id.* at 205.

evidence of disorderly conduct, stating that arguing with an arresting policeman could not be proscribed by the state.[7]

The second case, *Garner v. Louisiana*,[8] involved alleged violations of a disturbing-the-peace statute. The statute stated that "disturbing the peace is the doing of any of the following in such a manner as would foreseeably disturb or alarm the public . . . [enumerating various specific acts,[9] and] (7) Commission of any other act in such a manner as to unreasonably disturb or alarm the public." [10] The undisputed facts [11] showed that defendants, who were Negroes, took seats at a segregated lunch bar in a privately owned department store. They were informed that they would be served if they moved. After their failure to do so, the store manager summoned police who ordered the defendants to leave the lunch counter and arrested them for disturbing the peace when they refused. Apparently the manager never asked the defendants to leave. When the Louisiana Supreme Court refused to review defendants' convictions,[12] they secured certiorari, contending, *inter alia*, that their convictions were not based upon any evidence of guilt, and were therefore unconstitutional under the rule of the *Thompson* case.[13] The majority of the Court examined the language and construction of the statute and the Louisiana cases defining disturbing the peace and concluded "that Louisiana law requires a finding of outwardly boisterous or unruly conduct in order to charge a defendant with 'foreseeably' disturbing or alarming the public." [14] Rejecting the

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[7] *Id.* at 205-06. The Court did not develop the point that arguing with policemen cannot be prohibited as disorderly conduct, but cryptically cited Lanzetta v. New Jersey, 306 U.S. 451 (1939), which held a state criminal statute void for vagueness. See Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 76 (1960). In stating that "merely 'arguing' with a policeman is not, because it could not be, 'disorderly conduct' as a matter of the substantive law of Kentucky. . . ." the *Thompson* Court may have meant that "disorderly conduct" could not be interpreted to embrace arguing with policemen—in which case *Lanzetta* is irrelevant because it dealt with a statute which had too many meanings, not one which would require distortion to fit certain conduct. A lack-of-notice analysis would have been more fruitful, see notes 45-52 *infra* and accompanying text, or the Court might have questioned the power of the state to proscribe arguing with police officers, see note 61 *infra* and accompanying text. *Lanzetta* is relevant to the anticipation argument but not to the question of the state's power to proscribe the activity because the Court in *Lanzetta* assumed that the state had such power.

[8] 368 U.S. 157 (1961).

[9] Specific acts enumerated by the statute but not involved in *Garner* were: "(1) Engaging in a fistic encounter; or (2) Using of any unnecessarily loud, offensive or insulting language; or (3) Appearing in an intoxicated condition; or (4) Engaging in any act in a violent and tumultous manner by any three or more persons; or (5) Holding of an unlawful assembly; or (6) Interruption of any lawful assembly of people . . . ." LA. REV. STAT. § 14:103 (1950).

[10] *Ibid.*

[11] There were actually three cases involved, Garner v. Louisiana, Briscoe v Louisiana, and Hoston v. Louisiana, but the Court stated that variances in the facts were immaterial. 368 U.S. at 159. The facts described in text are those of the *Hoston* case. *Id.* at 159-60.

[12] *Id.* at 161.

[13] See Brief for Petitioner, p. 3.

[14] 368 U.S. at 169.

possibility that the Louisiana courts had reinterpreted the statute,[15] the Court held that defendants' passive presence at the lunch counter was not evidence of boisterous or unruly conduct, and thus not evidence of public disturbance within its interpretation of Louisiana law. The Court further held that even if the proscription encompassed peaceful and orderly conduct which might cause "imminent public commotion," there was nothing in the record to suggest that such commotion was imminent.[16]

Thus in their essentials, the two cases were identical: they both came from the lowest state court without a clarifying opinion by the state supreme court; they both involved breach-of-the-peace type laws firmly embedded in our common-law heritage;[17] and in both cases, the Supreme Court supplied a construction of the law demanding evidence which it found had not been produced.

The correctness of the holding of the Supreme Court in both cases—that the state may not constitutionally convict a person without *any* evidence of guilt—might seem self-evident.[18] However, the following analysis will attempt to demonstrate that the Supreme Court's "no evidence" terminology is inaccurate and improper if "no evidence" is to be used in the manner indicated by the opinions.[19]

I. "No Evidence" as Characterization of Evidence

A loitering ordinance is a characterization-type law;[20] it proscribes a course of conduct—Z—, for example loafing, which cannot be objectively determined, and requires the trier of the case to decide whether the acts evidenced—X and Y—should be characterized as Z-type conduct.[21] If an appellate court states that there is no evidence to support a conviction based on a characterization-type proscription, the court may mean either that X

[15] The Court gave two reasons for its refusal: there was no indication that the Louisiana Supreme Court had done so; it was unwilling to infer that an inferior court "intended to overrule a long-standing and reasonable interpretation of a state statute by that State's highest court." *Ibid.*

[16] *Ibid.* The majority rejected a contention by the state that the court below might have taken judicial notice of the history of racial segregation and the passions and tensions which could have given rise to a disturbance. *Id.* at 173.

[17] See, *e.g.*, King v. Summers, 1 Lev. 159, 91 Eng. Rep. 772 (1664). See also 4 Blackstone, Commentaries *142-53.

[18] Two law reviews commenting on the *Thompson* case were content to state that the no-evidence rule is obviously required by the Constitution. *The Supreme Court, 1959 Term*, 74 Harv. L. Rev. 81, 108 (1960); 62 W. Va. L. Rev. 384, 386 (1960). See also Note, 14 Stan. L. Rev. 328, 331-33 (1962).

[19] Should the prosecutor rest after merely stating that defendant was guilty of the crime, a finding of no evidence to support a conviction would be not only clearly warranted but the most accurate use of "no evidence."

[20] As distinguished from an objective proscription. See generally Freund, *The Use of Indefinite Terms in Statutes*, 30 Yale L.J. 437 (1921).

[21] In many cases involving such laws the jury will be asked whether X and Y occurred and whether they constituted a breach of the law. In sending the case to the jury, the judge interprets the law as possibly, but not necessarily, proscribing X and Y. *Cf.* Holmes, The Common Law 126-27 (1881). The jury does not infer violation of the law from X and Y but decides whether to characterize X and Y as violations. *Cf.* Devlin, *Law, Democracy, and Morality*, 110 U. Pa. L. Rev. 635 (1962). See generally Prosser, Torts § 39 (2d ed. 1955); Bohlen, *Mixed Questions of Law and Fact*, 72 U. Pa. L. Rev. 111 (1924).

and Y cannot reasonably be inferred from the other evidence presented, or that X and Y activity is not encompassed by the proscription. Only the former use of "no evidence"—to denote insufficient proof of X and Y—is accurate; for to say that X and Y activity does not constitute conduct within the ambit of the proscription is to reinterpret the statute by characterizing X and Y, not to measure a quantum of evidence.[22]

An objective criminal statute proscribes particular acts which in theory may be determined by the trier of the case without characterization of evidence. For example, when a defendant is charged with speeding, proof of fact X, that he exceeded the speed limit, conclusively establishes the objective crime Z. Z will be proved by convincing the trier of the case that he should infer X from facts R, S, and T,[23] the existence of which can also be determined without characterization.

A. "No Evidence" in Thompson

Since loitering is a characterization-type proscription and there clearly was evidence in *Thompson* of conduct which the lower court had characterized as "loitering," the only "no evidence" line of analysis open to the Court was to find that defendant's acts—X and Y—were not proscribed by the ordinance. This necessarily involved redefining the statute—a prerogative of the state courts only—by recharacterizing X and Y under the guise of a "no evidence" finding—a faulty approach for even a state appellate court. The Court attempted to avoid this double misuse of "no evidence" by delineating three elements of proof required by the ordinance to establish the crime of loitering: that defendant could not give a satisfactory account of himself; that defendant was sleeping, lying, loafing or trespassing; that defendant did not have the owner's consent.[24] However, since each element itself required additional characterization,[25] this refining process only further obscured the Court's holding. The Court may have thought that by refining the crime into these elements, it could treat the Louisville loitering ordinance as an objective law. The Court stated that "there simply is no semblance of evidence from which any person could reasonably infer that petitioner could not give a satisfactory account of himself or that he was loitering or loafing there (in the ordinary sense of the words) with-

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[22] This analysis does not mean to deny that words may have different meanings in different contexts, but rather to suggest that "no evidence" is most meaningfully used to denote unreasonableness of inference, *i.e.*, as an extreme of "insufficiency of evidence." Compare American School of Magnetic Healing v. McAnnulty, 187 U.S. 94, 109-110 (1902).

[23] For example, evidence of the impact with which defendant's car struck a tree, or eyewitness testimony.

[24] 362 U.S. at 204-05.

[25] What is a "satisfactory account of himself" is open to speculation; certainly reasonable courts could differ on its meaning. While "sleeping," "lying," and "trespassing" may not require characterization, "loafing" obviously does—it is at least arguable that anyone sitting at a bar is loafing. "Prior consent" is a legal conclusion, the meaning of which must be supplied either implicitly or explicitly by the courts of Kentucky.

out 'the consent of the owner or controller' of the cafe." [26] Thus the apparent basis for the Court's holding was that the Louisville Police Court had made an unreasonable inference from the facts rather than an unreasonable characterization of them. But since the elements employed as evidentiary yardsticks by the Court were not objective, but themselves required further characterization, the Court must have been using "no evidence" to express dissatisfaction with the characterization below and not to describe a quantitative deficiency of the evidence.

Even had the Supreme Court succeeded in reducing loitering to objective elements, or if loitering were an objective crime, the Court could not properly have used the "no evidence" analysis.[27] When a lower state court convicts or when a state appellate court upholds a conviction against attacks on sufficiency of evidence, it holds, in effect, that the conduct proved was proscribed.[28] Otherwise, it would be convicting the defendant for a crime

[26] 362 U.S. at 205.

[27] There is a line of analogous cases from which it might be argued that the Supreme Court may apply the no-evidence rationale to objective law cases. The Court has stated many times in cases involving statutory presumptions that unreasonable presumptions, those involving no "rational connection between the fact proved and the ultimate fact presumed . . . ." Mobile, J. & K.C.R.R. v. Turnipseed, 219 U.S. 35, 43 (1910), are violative of the fourteenth amendment due process clause. See Tot v. United States, 319 U.S. 463, 467 (1943) (dictum); Morrison v. California, 291 U.S. 82, 90 (1934); Manley v. Georgia, 279 U.S. 1, 5-6 (1929); McFarland v. American Sugar Ref. Co., 241 U.S. 79, 86 (1916); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 82 (1911). Read literally, these cases seem to hold that state legislatures may not act too illogically in their formulation of rules of evidence. Assuming that the cases stand for such a proposition, there seems to be no reason to treat state judiciaries differently, *i.e.*, to allow irrational inferences from the evidence.

However, the presumption cases have been severely criticized for the broadness of their language. See McCORMICK, EVIDENCE § 313 (1954); Morgan, *Federal Constitutional Limitations upon Presumptions Created by State Legislation*, in HARVARD LEGAL ESSAYS 323 (1934); 4 WIGMORE, EVIDENCE §§ 1353-56 (3d ed. 1940); Brosman, *The Statutory Presumption*, 5 TUL. L. REV. 17, 178 (1930-31); Keeton, *Statutory Presumptions—Their Constitutionality and Legal Effect*, 10 TEXAS L. REV. 34 (1931). Under Wigmore's explanation of these cases, although the legislatures purported to be making only rules of evidence, they actually made substantive changes in the law which were unconstitutional, *i.e.*, in making an irrational inference from fact X to proscription Z the legislature was in effect proscribing X which in these cases was constitutionally protected activity. 4 WIGMORE, *op. cit. supra* § 1353. Although criticized for the practice, the Supreme Court periodically decides cases which may be read broadly to hold that government, both federal and state, must do only what it purports to do. The presumption cases fit this interpretation, as do Vitarelli v. Seaton, 359 U.S. 535 (1959) (federal) and Baker v. Carr, 30 U.S.L. WEEK 4203 (U.S. March 26, 1962) (state). See also Konigsberg v. State Bar, 353 U.S. 252 (1957) (state). As to conflicts with basic principles of our federal system created by such control of the states, see Baker v. Carr, *supra* at 4245-46 (Frankfurter, J., dissenting); cases cited note 28 *infra*.

If *Garner* and *Thompson* were objective cases, a requirement that government do what it purports to do would give the Supreme Court power to weigh sufficiency of evidence, *i.e.*, to test the logic of an inference from the evidence, and power to require state courts to articulate changes in the criminal law or be bound by their previous interpretations. The Supreme Court might also choose to reject changed interpretations of criminal proscriptions—whether articulated or unarticulated—by any court other than the highest court of the state—highest in the sense of having the ultimate power to interpret the proscription involved—because of the undesirability of diverse interpretations within a state.

[28] Probably the best statement to the effect that a state court, in holding that there is sufficient evidence of a crime, interprets the statute to proscribe the conduct

other than the one for which he was indicted, clearly an unconstitutional procedure.[29] Thus if a person is convicted of murder in state A on evidence which would establish merely larceny in other jurisdictions, that which other states call larceny must be murder under state A law.[30] If the United States Supreme Court then holds that there is "no evidence" or insufficient evidence upon which a murder conviction can be based, it substitutes its interpretation of the statute for that of the state A court. Thus in *Thompson,* the Supreme Court, by characterizing the evidence differently than had the Kentucky court, interpreted the Louisville loitering ordinance as not proscribing the defendant's conduct.[31]

B. "No Evidence" in Garner

The *Garner* case is identical to *Thompson* in most respects. A characterization-type statute is involved which proscribes acts that would "foreseeably [and do unreasonably] disturb or alarm the public;"[32] the Court treated the statute as proscribing "outwardly boisterous or unruly conduct" or "peaceful and orderly conduct . . . [likely to cause a] public commotion,"[33] and held that there was "no evidence to support a finding that . . . [defendants] disturbed the peace . . ." under Louisiana law.[34]

proved is found in the head note to Herndon v. Lowry, 301 U.S. 242 (1937); "The affirmance by the Supreme Court of a State of a conviction under a statute as having support in the evidence, necessarily construes the statute as authorizing punishment for the act so proven." This head note is a generalized paraphrase of a similar statement by the Court, *id.* at 255. See Gryger v. Burke, 334 U.S. 728, 731 (1948); Fiske v. Kansas, 274 U.S. 380, 387 (1927); Herbert v. Louisiana, 272 U.S. 312 (1926); *cf.* Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921).

[29] See Cole v. Arkansas, 333 U.S. 196 (1948). Since state courts are presumed to act constitutionally, Darr v. Burford, 339 U.S. 200, 205 (1950); *Ex parte* Royall, 117 U.S. 241, 252 (1886), and since inclusion of the activity proved by the evidence within the proscription is the only other constitutionally acceptable theory sustaining the conviction below the Supreme Court should assume that the proscription has been interpreted to bar defendant's conduct, and pass on the constitutionality of such interpretation.

[30] The state is, of course, limited by the fourteenth amendment. The proscription must be so phrased as to give notice in two senses—notice that certain activity is penalized by the statute and notice of what will be the crucial issues at trial. *Compare* Connally v. General Constr. Co., 269 U.S. 385 (1926), *with* Cole v. Arkansas, 333 U.S. 196 (1948). See also notes 48-49 *infra* and accompanying text.

[31] Of the cases cited by the *Thompson* Court to support its no-evidence rule, 362 U.S. at 206 n.13, all but one, Schware v. Board of Bar Examiners, 353 U.S. 232 (1957), are irrelevant. The Court might also have cited Konigsberg v. State Bar, 353 U.S. 252 (1957). The holdings of both *Schware* and *Konigsberg* are ambiguous. They may be "characterization" cases involving an illegitimate Supreme Court reinterpretation of a state standard, or holdings that the states could not constitutionally punish the activity evidenced. See 106 U. PA. L. REV. 753 (1958); note 46 *infra* and accompanying text. The Court also cited United States *ex rel.* Vajtauer v. Comm'r, 273 U.S. 103 (1927) (review of federal court deportation decision); Moore v. Dempsey, 261 U.S. 86 (1923) (trial dominated by mob passions); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (unequal protection and administration of the law); Akins v. Texas, 325 U.S. 398 (1945) (discrimination in selection of grand jury); Tot v. United States, 319 U.S. 463 (1943) (federal statutory presumption); Mooney v. Holohan, 294 U.S. 103 (1935) (knowing use of perjured testimony by prosecutor).

[32] LA. REV. STAT. § 14:103 (1950); see text accompanying note 9 *supra.*

[33] 368 U.S. at 169.

[34] *Id.* at 173.

The Court made it clear that its analysis rested on a determination of the evidence necessary to support a finding of disturbing the peace followed by a decision as to whether the record contained any such evidence.[35] As in *Thompson,* the elements of the crime as defined by the Court required further characterization.[36] Thus again in *Garner,* the Court's true holding was that the Louisiana statute did not proscribe the defendant's conduct—peaceful "sit-in" demonstrations.

C. The Error of Characterization by the Supreme Court

In both *Thompson* and *Garner,* the Supreme Court, without benefit of a state supreme court opinion explaining the basis of conviction below, was confronted with a decision of the lowest state court[37] embodying either an apparently unreasonable construction of the law[38] or an apparent departure from prior cases interpreting the statute. The majority and Mr. Justice Frankfurter, concurring, recognized in *Garner* that the Court had to decide the case on the basis of the statute as construed by the courts of Louisiana,[39] but were unwilling to assume that the lower court had adopted an unprecedented construction of the statute.[40] This reluctance to accept the trial court's interpretation of the statute may have stemmed from a confusion of the federal courts' role in determining what state law is for purposes of independently applying it—as in a diversity action—with the Supreme Court's appellate function of review of state court action in the actual case before it. In the former instance the federal courts are charged with determining what the state judicial system would do if it had to decide the case then before the federal court.[41] In the latter instance the state judicial system has already decided this case. Therefore, state law for the purposes of Supreme Court review must be what the state court actually did.[42] By apparently requiring in *Garner* and *Thompson* that the state

[35] *Id.* at 170.

[36] Neither "boisterous conduct" nor "likely to cause a public disturbance" convey the same meaning to all reasonable men.

[37] In *Thompson,* no other court had jurisdiction to review the decision, 362 U.S. at 202, and in *Garner,* the Louisiana Supreme Court refused to review. 368 U.S. at 161; see note 40 *infra.*

[38] See Thompson v. City of Louisville, 362 U.S. 199, 204-06 (1960).

[39] See 368 U.S. at 165-69, 174-75.

[40] *Id.* at 169. This was so despite the fact that the Louisiana Supreme Court had had the opportunity, but declined to review the lower court decision, stating that "'the rulings of the district on matters of law are not erroneous.'" *Id.* at 161.

[41] Since the lower state courts necessarily look to the highest court of the state, this will usually mean a guess as to what the highest state court would decide on these facts. See Fidelity Union Trust Co. v. Field, 311 U.S. 169, 178-79 (1940). Where the highest state court would not have the opportunity to decide the legal issue in question, see note 43 *infra,* the focus should then be on the highest court that would have such opportunity. See also Bernhardt v. Polygraphic Co., 350 U.S. 198, 205 (1956) (Frankfurter, J., concurring); HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 628-30 (1953); 110 U. PA. L. REV. 602 (1962).

[42] See Gryger v. Burke, 334 U.S. 728, 731 (1948) (interpretation of state criminal statute by trial court binding on Supreme Court); Herndon v. Lowry, 301 U.S. 242, 255 (1937); Fiske v. Kansas, 274 U.S. 380, 387 (1927); Herbert v. Louisiana, 272 U.S. 312, 316 (1926); 106 U. PA. L. REV. 753, 757 (1958). *Cf.* Bahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 289 (1921). *But see* note 27 *supra.*

supreme court explicitly declare a novel statutory meaning or affirm a trial court's characterization of evidence in order to bind the Supreme Court on appellate review,[43] the Court has imposed an unwarranted and severe limitation on a state's power to interpret its own law.[44]

II. "No Evidence" as Embodying Established Constitutional Guarantees

The Supreme Court should have affirmed the convictions by acknowledging that the state courts had reinterpreted the statutory proscriptions to encompass the activities in question, unless such reinterpretation was constitutionally barred. A possible bar is that change of proscription in this manner did not adequately apprise the defendants of what conduct the state deemed criminal or of what the state's theory of prosecution would be at trial;[45] or, the reinterpretation might be barred because it proscribed conduct that is constitutionally protected from any criminal sanctions.[46]

The stronger attack on such reinterpretation is to contend that a reasonable man could not have understood the statutes to bar tapping his feet to music in a tavern or participating in a passive sit-in demonstration. Indeed, Mr. Justice Harlan, concurring in *Garner,* treated *Thompson* as holding that a disorderly conduct conviction based on arguing with a

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[43] Note that this approach by the Supreme Court in *Thompson* makes it virtually impossible for the state courts to interpret the loitering ordinance differently than the Supreme Court has since the court most likely to apply and interpret the municipal ordinance would be the Louisville Police Court and most determinations by that court are not reviewable by any higher state court. See note 3 *supra.*

[44] Thus it appears that Mr. Justice Harlan had the better argument in *Garner*; the no-evidence approach should have been eschewed in favor of an analysis of the statute as applied. Even he, however, seemed to differ with the majority not on basic issues but rather as to whether the Louisiana Supreme Court had expressly construed the statute involved. He stated: "[T]he Court's view that the statute covers only non-peaceful conduct is unacceptable, since I believe that the Louisiana Supreme Court decided the opposite in these very cases. I think that State Supreme Court's refusal to review these convictions, taken in light of its assertion that the rulings of the district judge on matters of law are not erroneous, must be accepted as an authoritative and binding state determination that the petitioners' activities, as revealed in these records, did violate the statute . . . ." 368 U.S. at 187 (Harlan, J., concurring). He accepted *Thompson* as correctly decided, but distinguishable, apparently assuming that the Kentucky court in *Thompson* did not interpret the loitering ordinance in any way other than its face meaning and that there simply was no evidence to support a conviction on that meaning. See *id.* at 185, 189-90 (Harlan, J., concurring). If that was his basis for distinguishing *Thompson,* Mr. Justice Harlan committed the same error as the majority. Except for the peculiar circumstances of the Louisiana Supreme Court's refusal to review in *Garner,* he was willing to ignore the effect of the lower court determinations.

[45] See note 30 *supra.*

[46] See, *e.g.,* Marsh v. Alabama, 326 U.S. 501 (1946); Cantwell v. Connecticut, 310 U.S. 296 (1940); Meyer v. Nebraska, 262 U.S. 390 (1923). *Cantwell* would probably form the basis of the protected activity argument in *Thompson.* For the argument in *Garner,* see the concurring opinions by Justices Douglas and Harlan, 368 U.S. at 176, 185. Compare Taylor v. Louisiana, 30 U.S.L. Week 3374 (U.S. June 4, 1962) (citing *Garner* in a protected activity situation); see generally Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion,* 110 U. Pa. L. Rev. 473 (1962). The merits of the theory are beyond the scope of this Note.

policeman was unconstitutional because of lack of notice.[47] It is clearly unconstitutional to penalize a man for doing an act that he could not reasonably be expected to know was proscribed. "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." [48] It is evident that a sudden and unreasonable—in light of the wording of the law—departure from previous interpretations violates this notice requirement.[49]

The notice argument is especially forceful in the *Garner* context because of the possibility of infringing on first amendment rights. Mr. Justice Harlan, citing *Cantwell v. Connecticut* [50] in his concurring opinion, states: "[W]hen a state seeks to subject to criminal sanctions conduct which, except for a demonstrated paramount state interest, would be within the range of freedom of expression . . ., it cannot do so by means of a general and all-inclusive breach of the peace prohibition. It must bring the activity sought to be proscribed within the ambit of a statute or clause 'narrowly drawn . . . .'" [51]

A determination that the evidence adduced relates only to activity that could constitutionally be proscribed—on the ground of either notice or protected activity—can be said to be a finding of "no evidence" of any punishable conduct.[52] Although such a use of "no evidence" had not been expressly stated before these cases were decided, the Court may have used "no evidence" in this sense.[53] If such was the Court's intention, the opinions are singularly uninformative and misleading.[54] Aside from the cryptic statement that "merely 'arguing' with a policeman is not, because it could not be, 'disorderly conduct' as a matter of the substantive law of Kentucky" [55] and citation of *Lanzetta v. New Jersey* [56] in reference

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[47] 368 U.S. at 190 (Harlan, J., concurring). *Cf.* Cole v. Arkansas, 333 U.S. 196 (1948).

[48] Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).

[49] *Cf.* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 454-55 (1948); Herndon v. Georgia, 295 U.S. 441, 446-55 (1935) (Cardozo, J., dissenting); Note, 109 U. PA. L. REV. 67, 73-74 n.34 (1960).

[50] 310 U.S. 296 (1940).

[51] 368 U.S. at 202 (Harlan, J., concurring).

[52] *Cf.* American School of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902). To determine whether the activities could constitutionally be proscribed the Supreme Court must examine the facts independently. See, *e.g.*, Moore v. Michigan, 355 U.S. 155 (1957); Lisenba v. California, 314 U.S. 219 (1941); Norris v. Alabama, 294 U.S. 587 (1935); Fiske v. Kansas, 274 U.S. 380 (1927). The only limits on such scrutiny of the facts are those inherent in the appellate process. See Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 172-75 (1953).

[53] Konigsberg v. State Bar, 353 U.S. 252 (1957) and Schware v. Board of Bar Examiners, 353 U.S. 232 (1957) might be explained as holding that there was "no evidence" in this sense.

[54] *Cf.* Torrance v. Salzinger, 297 F.2d 902, 905-06 (3d Cir.), *cert. denied*, 30 U.S.L. WEEK 3363 (U.S. May 21, 1962) (dictum).

[55] 362 U.S. at 206.

[56] 306 U.S. 451 (1939). See note 7 *supra*.

to the disorderly conduct conviction, there is no indication in *Thompson* that the Court did anything other than to recharacterize the evidence.[57] Similarly, the Court in *Garner* used the *Thompson* approach with only two hints that "no evidence" might have been used to subsume constitutional bars to reinterpretation of the proscription: its citation of *Cole v. Arkansas*[58] for tangential points;[59] and its closing statement: "Such activity, in the circumstances of these cases, is not evidence of *any* crime and cannot be so considered . . . by . . . the courts."[60]

III. Conclusion

In these two cases, the Supreme Court overturned state criminal convictions because it found "no evidence" upon which a conviction could be based. The enigmatic opinions have led one court of appeals to interpret *Thompson* and *Garner* as creating a new constitutional right—the right not to be convicted of a crime if "proof of some essential element of the alleged crime" is lacking.[61]

At worst, these cases arrive at what may be the correct result by way of inapt terminology, and in the process make a deep incursion upon basic principles of federalism—"no evidence" becomes characterization of evidence. At best, these opinions have coined a new label for an old concept and have unnecessarily clouded the law.[62]

J. E. G.

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[57] Indeed, all the other indications are to the contrary, see notes 22, 25-26 *supra* and accompanying text.

[58] 333 U.S. 196 (1948). This is clearly a notice case; the Court held unconstitutional a conviction where the indictment charged violation of section 1 of the statute and the conviction rested on section 2.

[59] 368 U.S. at 164 & n.10.

[60] *Id.* at 174 (emphasis added). The strongest indication that the Court in *Thompson* and *Garner* used "no evidence" to signify that the proscriptions could not constitutionally be interpreted to bar the activity proved is its vigorous insistence in both cases that it was deciding on the basis of *no* evidence as distinguished from insufficient evidence. See 362 U.S. at 199; 368 U.S. at 162-63.

[61] Torrance v. Salzinger, 297 F.2d 902, 905-06 (3d Cir.), *cert. denied*, 30 U.S.L. Week 3363 (U.S. May 21, 1962) (Hastie, J.) (dictum); *cf.* Commonwealth *ex rel.* Torrance v. Salzinger, 406 Pa. 268, 177 A.2d 619, *cert. denied*, 30 U.S.L. Week 3363 (U.S. May 21, 1962).

[62] The psychological problem in *Thompson* was, no doubt, partly to blame for the Court's faulty analysis. A clear case of injustice was presented in which the defendant was obviously a victim of police harassment. A holding of "no evidence" dramatized the injustice. *But see* Terminiello v. Chicago, 337 U.S. 1, 11 (1949) (Frankfurter, J., dissenting). The *Thompson* opinion may also have been shaped in part by the emphasis in petitioner's argument on the "no evidence" rationale. The only reference to statutory construction is found in the Reply Brief for Petitioner, p. 9. Note that both *Thompson* and *Garner* were before the Supreme Court on certiorari. Counsel in both cases may have overlooked their right to an appeal and shaped their arguments accordingly. See Judicial Code, 28 U.S.C. § 1257(2) (1958); Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921).