

of the latter offense. Careful scrutiny of such a law was essential, the Court held, despite the latitude usually allowed to States in equal protection cases; "lest unwittingly or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws" (id. at 541). The Oklahoma statute failed to withstand such scrutiny because of its unequal treatment of similarly culpable defendants.

"* * * The guarantee of 'equal protection of the laws is a pledge of the protection of equal laws' (*Yick Wo v. Hopkins*, 118 U.S. 356, 369). When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment (*Yick Wo v. Hopkins*, *supra*; *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337)" (ibid.).

The principle asserted in *Skinner*, that the equal protection guarantee requires a rational basis for discriminating in the punishment and rights accorded like offenders, has consistently been applied by the Supreme Court. See *Pennsylvania v. Ashe*, 302 U.S. 51; *Graham v. West Virginia*, 224 U.S. 616; *Finley v. California*, 222 U.S. 28; *McDonald v. Massachusetts*, 180 U.S. 311; *Moore v. Missouri*, 159 U.S. 673. See also *Ex Parte Wells*, 99 F. Supp. 320, 323-24 (N.D. Cal. 1951), *reversed*, 201 F. 2d 503 (9th Cir. 1952), *cert. denied*, 346 U.S. 861 (1953); *Re Mallon*, 16 Idaho 737, 102 Pac. 374 (1909). In the foregoing Supreme Court cases, unlike *Skinner*, it was held that the statute in question created a reasonable classification of offenders and meted out the more severe penalty for all who were similarly situated. By contrast, in *Skinner*, unequal punishment results for "those who have committed intrinsically the same quality of offense." Substitute the word "treatment" for "punishment" and the provision espoused by Katzenbach would seem to be encompassed. Any attempt to uphold such a distinction is well answered by the language of Justice Black, in *Berra v. United States* (351 U.S. 131 (1956)):

"The Government's contention here also challenges our concept that all people must be treated alike under the law. *This principle means that no different or higher punishment should be imposed upon one than upon another if the offense and the circumstances are the same.* It is true that there may be differences due to different appraisals given the circumstances of different cases by different judges and juries. But in these cases the discretion in regard to conviction and punishment for crime is exercised by the judge and jury in their constitutional capacities in the administration of justice" (id. at 140 (dissenting opinion, discussing question not reached by the majority)). [Emphasis supplied.]

The basic rule governing the application of the equal protection guarantee is that, "a statutory discrimination must be based upon differences that are reasonably related to the purposes of the act in which it is found." *Morey v. Doud* (354 U.S. 457, 465). "Of course, distinctions * * * may be justified by genuinely different characteristics * * *. But distinctions cannot be so justified if the 'discrimination has no reasonable relation to these differences'." Ibid., quoting from *Hartford S.B.I. Ins. Co. v. Harrison* (301 U.S. 459). The statutory classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." *Lappin v. District of Columbia*, *supra*, at 79, quoting with approval, *Gulf. C. & S.F.R. Co. v. Ellis* (165 U.S. 150, 155). To the foregoing principles, the Supreme Court has added a caveat, having particular bearing here:

"Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." *Louisville Gas & E. Co. v. Coleman* (277 U.S. 32, 37, 38); *Hartford S.B.I. Ins. Co. v. Harrison* (301 U.S. 459, 462)." *Morey v. Doud*, *supra*, at 464. [Emphasis supplied.]

If a State legislature were to enact a mandatory death sentence for murders committed in the State's capital city, while leaving the jury discretion whether to impose capital punishment for murders in other areas of the State, such a discrimination would almost certainly be held invalid on equal protection grounds. See *United States v. Meyers* (143 F. Supp. 1, 4 (D. Alaska 1956)); *State ex rel White v. Wyandotte County Commrs.* (140 Kan. 744, 39 P. 2d 286, 289-90 (1934)); *State v. Fowler* (193 N.C. 290, 136 S.E. 709 (1927)); *Ex parte Falk* (42 Ohio St. 638 (1885)). Why then should a similar discrimination effected by Congress be held consistent with the guarantee of equal protection?