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STUDENT COMMENTS

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SUCCESSIVE STATE AND FEDERAL PROSECUTIONS FOR THE SAME OFFENSE: BARTKUS V. ILLINOIS REVISITED

Despite the clear importance traditionally ascribed to constitutional protections against double jeopardy,[1] state and federal courts have nonetheless ignored the bar where a second prosecution for an allegedly illegal act occurred in a governmental jurisdiction different from that of the first trial.[2] In a long line of decisions culminating with the United States Supreme Court's decision in *Bartkus v. Illinois*,[3] the courts have consistently held that such prosecutions are constitutionally permissible.[4]

In *Bartkus* the petitioner was tried and acquitted of a federal charge of robbing a federally insured bank. On substantially the same evidence he was subsequently tried in an Illinois court for violation of a state statute. The Supreme Court affirmed the state court decision, ruling that the double jeopardy clause of the fifth amendment did not apply to the states.[5] Further, the Court said that the lower court decision should be upheld even assuming the applicability to the states of the double jeopardy protections because under a theory of dual sovereignty there was no violation of the double jeopardy clause. The latter doctrine, in essence, states that every citizen of the United States is also a citizen of a state or territory, that he owes allegiance to two sovereigns, and that he may be punished for a single act which violates the laws of both.[6]

Ten years later, in *Benton v. Maryland*,[7] the Court reversed its former position and ruled that the double jeopardy clause was applicable to the states through the due process clause of the four-

[1] Although its exact origin is unknown, double jeopardy is one of the oldest principles found in the legal tradition of western civilization. It appears to have been known to the Greeks and Romans, and evidence of it is found in the early writings of the Canon Law. In England, some form of former jeopardy plea may have existed as early as the Twelfth Century, and by the time of Blackstone its principles were firmly embedded in the common law.

Protection in the United States against double jeopardy has its origin in the fifth amendment of the United States Constitution and in the constitutions of forty-five states. The remaining five states (Connecticut, Maryland, Massachusetts, North Carolina, and Vermont) include the double jeopardy protection in their common law. For excellent discussions of the history of double jeopardy see Bartkus v. Illinois, 359 U.S. 121, 151–55 (Black, J., dissenting); Sigler, *A History of Double Jeopardy*, 7 AM. J. LEGAL HIST. 283 (1963).

The common law of former jeopardy is grounded on the maxim that no man ought to be brought into jeopardy of his life more than once for the same offense. It stems primarily from recognition of the unfairness of allowing the state with all its resources to repeatedly attempt to convict an individual of an alleged offense, thereby subjecting him to considerable embarrassment, expense and anxiety. The guarantee apparently also recognizes that repeated prosecutions hamper judicial economy and, more important, increase the likelihood of convicting an innocent man. *See* Green v. United States, 355 U.S. 184, 187–89 (1959).

[2] Bartkus v. Illinois, 359 U.S. 121 (1959); Abbate v. United States, 359 U.S. 187 (1959). For excellent articles in the field of successive prosecutions by state and federal governments see Fisher, *Double Jeopardy, Two Sovereignties, and the Intruding Constitution*, 28 U. CHI. L. REV. 591 (1961); Comment, *Double Prosecution by State and Federal Governments: Another Exercise in Federalism*, 80 HARV. L. REV. 1538 (1967); Comment, *Successive Prosecutions by State and Federal Governments for Offenses Arising Out of the Same Act*, 44 MINN. L. REV. 534 (1960).

[3] 359 U.S. 121 (1959).

[4] *E.g.*, Jerome v. United States, 318 U.S. 101 (1943); United States v. Lanza, 260 U.S. 377 (1922); Moore v. Illinois, 55 U.S. (14 How.) 13 (1852); United States v. Marigold, 50 U.S. (9 How.) 560 (1850); Fox v. Ohio, 46 U.S. (5 How.) 410 (1847).

[5] In ruling that the double jeopardy clause is inapplicable to the states, the Court relied upon Palko v. Connecticut, 302 U.S. 319 (1937). There, the Court held that the Bill of Rights does not apply to the states through the fourteenth amendment except in cases where a denial of a right would be so "repugnant to the conscience of mankind" as to constitute a denial of due process. The Court decided that though the prohibition against double jeopardy was important, its use was generally not essential to a fair and enlightened system of justice except where, for example, there was evidence that the state was "attempting to wear the accused out by a multitude of cases with accumulated trials." *Id.* at 327–28.

[6] The clearest formulation of this doctrine can be found in Moore v. Illinois, 55 U.S. (14 How.) 13, 20 (1852), and in United States v. Lanza, 260 U.S. 377, 382 (1922).

[7] 395 U.S. 784 (1969).

teenth amendment. Hence, of the two rationales used by the Court in *Bartkus* only the concept of dual sovereignty remains at issue. There have been indications since the *Bartkus* decision, however, that even this principle may be eroding,[8] primarily because of the Court's growing concern for the preservation of individual rights and protections. Therefore, it seems relevant to again examine the viability of the *Bartkus* doctrine. Specifically, it is the purpose of this brief commentary to consider the prospects for a judicial repudiation of *Bartkus* and, also, to examine various alternatives to the *Bartkus* rule.

Prospects for the Judicial Repudiation of Bartkus: The Decline of the Dual Sovereignty Doctrine

The dual sovereignty principle was originally formulated by the United States Supreme Court in three decisions occurring between 1847 and 1852.[9] The rationale behind the doctrine is unclear, although some commentators suggest that the burning issues of slavery and state sovereignty forced the Court in at least one of these early cases to either avoid ruling in a way which might restrict the states' power to punish criminal offenses or risk violent opposition from the Southern states.[10] The Southern states genuinely feared that a rule which could prevent them from prosecuting a crime once it had been pre-empted by the federal government would undermine their law enforcement system and thereby ultimately threaten their sovereignty. Hence, the Court's willingness to allow the Constitution's concern for protection of citizens against double jeopardy to be subordinated to the dual sovereignty theory was motivated by its concern for the continued well-being of the federal system. It is this same regard for the smooth functioning of the federal system which provided the rationale for the Court's reaffirmance of the dual sovereignty rule in *Bartkus v. Illinois*.[11]

In recent years, the Supreme Court has appeared less convinced of the federal system's need for a rigid application of the dual sovereignty principle. In reappraising the relations between the sovereign states of the federal system, the Court has acknowledged that the hostile atmosphere which necessitated the harsh application of the dual sovereignty theory in 1847 may no longer exist to its former degree.[12] In addition, the Court has shown increased concern for the effect of the doctrine on individual rights and interests.[13]

The key developments have occurred in the areas of protection against self-incrimination and illegal search and seizure. In the past, when dealing with these areas, the courts adhered strictly to the principles of dual sovereignty, with little regard for the doctrine's effect on individual rights and interests.[14] Accordingly, they had held that the fourth[15] and fifth[16] amendments placed no limitations on state activities and, conversely, that state constitutional guarantees placed no restraint on federal actions.[17] Although these decisions preserved separate spheres of state and federal

[8] *E.g.*, Murphy v. Waterfront Commission, 378 U.S. 52 (1964); Elkins v. United States, 364 U.S. 206 (1960).

[9] Fox v. Ohio, 46 U.S. (5 How.) 410 (1847); United States v. Marigold, 50 U.S. (9 How.) 560 (1850); Moore v. Illinois, 55 U.S. (14 How.) 13 (1852).

[10] Comment, 80 Harv. L. Rev., *supra* note 2, at 1541. For a detailed analysis of pressure brought on the Court during this period see 2 C. Warren, The Supreme Court in United States History 83–273 (1926).

[11] The Court underscored its point by citing the case of Screws v. United States, 325 U.S. 91 (1944), where the defendant was convicted of a certain federal offense having a maximum penalty of only two years imprisonment. The defendant was also subject to indictment under a similar statute in the state court providing the death penalty. Although the state never indicted the defendant, the court in dictum noted that this would have been permissible. 325 U.S. at 108 n.10.

In *Bartkus*, the Court contended that to allow federal prosecution of a comparatively minor offense to prevent state prosecution "would be a shocking and untoward deprivation of the historic right and obligation of the states to maintain peace and order within their confines." For example, in *Bartkus* the state of Illinois had a special interest in the defendant beyond the commission of a particular crime. Finding Bartkus guilty as charged made him an habitual offender under Illinois law and thereby subjected him to life imprisonment. Hence, the Court felt that a rule barring successive state-federal prosecutions could work to defeat the interest of sovereignties, such as Illinois, in implementing effective law enforcement policies.

[12] Murphy v. Waterfront Commission, 378 U.S. at 55–56.

[13] *E.g.*, Elkins v. United States, 364 U.S. at 215.

[14] *See* Parsons, *State-Federal Crossfire in Search and Seizure and Self-Incrimination*, 42 Cornell L. Q. 346 (1957); Comment, *Federal-State Cooperation in the Area of Self-Incrimination and Double Jeopardy*, 55 Nw. U.L. Rev. 110 (1960).

[15] The fourth amendment reads as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[16] The fifth amendment reads in part: "... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb...."

[17] Wolf v. Colorado, 338 U.S. 25 (1949); Twining v. New Jersey, 211 U.S. 78 (1908).

influence, and thereby may have served some vague interest of the federal system,[18] they also opened the way for the state and federal governments to do together what they had long been forbidden to do individually.[19]

For example, although the exclusionary rule of the fourth amendment generally prevents the federal courts from accepting evidence illegally obtained by federal officers,[20] the Supreme Court, under its so-called "silver platter" doctrine, once held it permissible to admit evidence illegally obtained by state authorities[21] or private parties.[22] Thus, state troopers could illegally seize evidence not admissible in a state court and then turn it over "on a silver platter" to a federal court which could make full use of it so long as no federal participation was shown.[23] Hence, through such "hand-in-glove" activities, state and federal authorities could together easily circumvent constitutional and statutory protections against illegal searches and seizures.

The dual sovereignty principle also served for all practical purposes to nullify the privilege against self-incrimination. For instance, in *Jack v. Kansas*[24] the Supreme Court held it constitutional for a state court to compel testimony even though it might subject the witness to prosecution in the federal courts. Correspondingly, in *Feldman v. United States*,[25] the Court held that the federal courts could constitutionally receive such evidence.[26] In that opinion the Court again disregarded the personal interests and liberties involved, and instead relied upon the principle of dual sovereignty.

> ... ever since *Barron v. Baltimore* ... one of the settled principles of our Constitution has been that these amendments [The Bill of Rights] protect only against invasion of civil liberties by the Government whose conduct they alone limit. Conversely, a state cannot by operating within its constitutional powers restrict the operations of the National Government within its sphere. The distinctive operations of the two governments within their respective spheres is basic to our federal constitutional system, howsoever complicated and difficult the practical accommodations to it may be.[27]

The Court's traditional position towards the dual sovereignty theory began to erode shortly after the *Bartkus* case when in *Elkins v. United States*[28] it ruled that evidence illegally seized by state officials would be inadmissible in a federal court.[29] The decision's importance here lies in the Court's approach to the problem. For the first time, the Court recognized that the increase in federal-state cooperation could conceivably frustrate the rights of the individual. Hence, the Court chose to consider the challenged act in light of its effect on the accused,[30] and, ultimately, to allow the interests of federalism to be subordinated where necessary to adhere to fundamental constitutional protections.[31]

The Court, however, did not abandon its concern for federalism. On the contrary, it attempted to justify its arguments partly in terms of its beneficial effect on the federal system.[32]

> The very essence of a healthy federalism depends upon the avoidance of needless conflict between state and federal courts. Yet when a Federal Court sitting in an exclusionary state admits evidence lawlessly seized by state agents, it not only frustrates state policy but frustrates that policy in a

[18] *See* notes 9–11 *supra* and accompanying text.

[19] For instance, state troopers could illegally seize evidence not admissible in a state court and then turn it over to a federal court which could make full use of it as long as no federal participation was shown. Gambino v. United States, 275 U.S. 310 (1927); Burdeau v. McDowell, 256 U.S. 465 (1921). *See also* Lustig v. United States, 338 U.S. 74 (1949); Weeks v. United States, 232 U.S. 383 (1914).

[20] Lustig v. United States, 338 U.S. 74 (1949); Weeks v. United States, 232 U.S. 383 (1914).

[21] *Id.*

[22] Burdeau v. McDowell, 256 U.S. 465 (1921).

[23] Lustig v. United States, 338 U.S. 74 (1949); Gambino v. United States, 275 U.S. 310 (1927). Similarly, the protection against illegal searches and seizures is not binding upon the states. Wolf v. Colorado, 338 U.S. 25 (1949), and state courts have had no compunctions about receiving into evidence the ill-gotten gains of federal officers. *E.g.*, Terrano v. State, 59 Nev. 247, 91 P.2d 67 (1939); State v. Lacy, 212 N.W. 442 (N.D. 1927); *See also* Comment, 55 NW. U.L. REV., *supra* note 14. *Contra*, Parsons, *supra* note 14.

[24] 199 U.S. 372 (1905). The defendant was found guilty of contempt for refusing to comply with a statute compelling him to testify in a state court. This he refused to do despite a statutory provision granting him immunity from state criminal prosecutions based on his testimony. The defendant claimed that the statute did not protect him from a federal action based on the same testimony.

[25] 322 U.S. 487 (1944).

[26] *Id.* at 492. In the federal courts, the fact that testimony may result in prosecution for a state crime is no excuse for failure to testify.

[27] 322 U.S. at 490–91.

[28] 364 U.S. 206 (1960).

[29] Shortly thereafter, the Court applied its rule in the converse situation, indicating that evidence illegally obtained by federal officials would similarly be excluded from state prosecutions. Mapp v. Ohio, 367 U.S. 643, 657–58 (1961).

[30] 364 U.S. at 215.

[31] *Id.* at 221.

[32] *Id.*

particularly inappropriate and ironic way. For by admitting the unlawfully seized evidence the Federal Court serves to defeat the States' effort to assure obedience to the Federal Constitution.[33]

A second important change in the Court's application of the dual sovereignty principle occurred in *Murphy v. Waterfront Commission*.[34] There the Court held that a witness in a state proceeding may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits could not be used in any way by federal officials in connection with a criminal prosecution against him. The decision vindicated the minority position in *Feldman v. United States*,[35] *Knapp v. Schweitzer*,[36] and *Mills v. Louisiana*[37] which criticized the Court for leaving a loophole through which state and federal authorities working together could circumvent a portion of the Bill of Rights—in this case the right against self-incrimination. The principle in *Murphy* seems similarly applicable to a *Bartkus*-type situation where a federal authority could sidestep the double jeopardy provision by employing the services of the state which, through its authority, could act as a façade for a second federal prosecution.

Together, the *Elkins* and *Murphy* decisions indicate a substantial modification of the dual sovereignty principle. The Court has departed from its formal, syllogistic approach to the problem and become more concerned with the general picture as determined by the balancing of the various personal and institutional interests involved. Nonetheless, the *Bartkus* rule has remained secure. All federal court decisions since that case have followed the Court's position.[38] Moreover, the Court itself has avoided a rehearing of the issue in several instances.[39]

The nearest the Court has come of late to dealing with the separate sovereignties problem within a double jeopardy context occurred in *Waller v. Florida*.[40] In that case the Court found that successive trials of a person for the same act in both a state and municipal court constituted a violation of the Constitution's double jeopardy protection.[41] The state had argued that such double prosecutions are permissible under the dual sovereignty rationale of *Bartkus v. Illinois*, analogizing the relationship between a municipality and the state to that which exists between a state and the federal government.[42] Although this argument created the opportunity to reconsider the merits of *Bartkus*, the Court avoided the issue and instead ruled that the separate sovereignty approach used in *Bartkus* was inapplicable to the state-municipal situation.[43]

The Court found the relationship between state and municipal governments more closely corresponded with that existing between the United States and its territorial governments, to which the Supreme Court had specifically found the dual sovereignty principle inapplicable.[44] In *Grafton v. United States*[45] the Court had held that while the government of a state does not derive its powers from the federal government, a territorial government owes its existence wholly to the United States and, hence, trial of a person for the same offense in both a federal and territorial court amounts to two trials by the same sovereign power.[46] Similarly, the Court in *Waller* reasoned that the power to charge a person in a municipal court springs from the same organic law that creates the state courts.[47] It followed, then, that the Court would conclude that the trial of the defendant first in a municipal court and then in a state court for the same offense also amounted to trial twice in the same sovereignty and, hence,

[33] This argument may eventually form the rationale for extending greater protection to citizens of those states having statutes forbidding successive state-federal prosecutions. It could be argued, for example, that prosecuting a person in a federal court after he had already undergone a state trial would frustrate the policy of the state which had, as shown by enacting a statute, intended to save its citizens from the rigors of successive prosecutions.

[34] 378 U.S. 52 (1964).

[35] 322 U.S. 487 (1944) (Black, J., dissenting).

[36] 357 U.S. 371 (1958) (Black, J., dissenting).

[37] 360 U.S. 230 (1959) (Warren, C. J., dissenting).

[38] *E.g.*, Ferina v. United States, 340 F.2d 837 (8th Cir.), *cert. denied*, 381 U.S. 902 (1965); Hoopengarner v. United States, 270 F.2d 465 (6th Cir. 1959).

[39] Waller v. Florida, 397 U.S. 387, 395 (1970); Hutul v. United States, 416 F.2d 607 (7th Cir. 1969), *cert. denied*, 90 S.Ct. 573, *reh. denied*, 90 S.Ct. 1519 (1970); Ferina v. United States, 340 F.2d 837 (8th Cir.), *cert. denied*, 381 U.S. 902 (1965).

[40] 397 U.S. 387 (1970).

[41] *Id.* at 395.

[42] *Id.* at 392.

[43] *Id.* at 394.

[44] Grafton v. United States, 206 U.S. 333 (1907).

[45] 206 U.S. 333. In *Grafton* a soldier in the United States Army was acquitted by a general court-martial convened in the Philippine Islands for the alleged killing of two men. Subsequently, the soldier was charged and convicted of the same offense in a Philippine court. At that time the islands were a federal territory. The Supreme Court held that the first prosecution by the United States court was a bar to a subsequent prosecution by a territorial court since both were arms of the same sovereign.

[46] 206 U.S. at 354–55.

[47] 397 U.S. at 393.

violated the double jeopardy protections applied to the state through the fourteenth amendment.[48]

The Court's ruling in *Waller*, therefore, is not theoretically inconsistent with the application of dual sovereignty principles to a *Bartkus*-like situation. The decision, however, is a significant limitation on the scope of the dual sovereignty principle and, hence, *Waller* may further reflect the Court's increasing willingness to limit the number of situations in which the dual sovereignty principle may facilitate government encroachment upon individual rights and interests.

To date, the sole judicial challenge to *Bartkus* has come from Ohio, where in *State v. Fletcher*[49] a Cuyahoga County Common Pleas Court judge, and subsequently the Ohio Court of Appeals,[50] refused to follow the *Bartkus* decision. Judge Manos, who when speaking for the Common Pleas Court referred to *Bartkus* as an "historic pile of rubble" [51] and accordingly predicted its reversal, suggested that the dual sovereignty rule fails because it assumes that the state and federal governments will, whenever possible, seek to subvert the other by trying to impede the functioning of the other's law enforcement agencies.[52] His point is particularly strong in view of the substantial change that has occurred in relations between state and federal governments, especially in the area of law enforcement. For instance, in the era in which the dual sovereignty doctrine was formulated[53] the states were often at odds with the federal government, which they sometimes looked upon as a rival.[54] At that time, to assert that one sovereignty might use the bar of former jeopardy as a means of subverting the other's criminal law enforcement system, and ultimately its powers, was not entirely unreasonable. Today, however, as the Supreme Court itself has acknowledged, we are in the age of "Cooperative Federalism".[55] More than ever before, the states and the federal government are joining together to wage a united fight against crime,[56] and although day-by-day criminal administration remains primarily a state and local responsibility,[57] the federal government now provides state and local authorities with substantial funds, information, advice, and training.[58] The federal government has also passed statutes aiding the states in coping with certain troublesome areas of law enforcement such as interstate crime operations,[59] and has cooperated in numerous hand-in-glove efforts with state authorities to investigate crimes, gather evidence, and prosecute criminals.[60]

It appears, then, that the dual sovereignty principle is an anachronism, that it has outlived the purposes for which it was created, and that it should either be eliminated or substantially modified. Yet, on the contrary, there are a number of situations in which supporters of the doctrine claim that it is still useful. For instance, in *Screws v. United States*[61] the defendant was convicted in a federal court under a statute with a maximum penalty of two years imprisonment. In the state court, however, the offense carried a death penalty. Hence, some supporters of the *Bartkus* rule contend that its demise would seriously hinder law enforcement by giving the defendant an "easy way" out of trouble. This argument, however, incorrectly assumes that the defendant in all cases would be permitted to choose the court in which he was to be tried.[62] Secondly, there are few situations which would parallel the *Screws* factual context. Also, most criminal matters are still left entirely to state and local authorities[63] and, where there is federal legislation, it is either designed to complement or aid state law enforcement efforts,[64] or is concerned

[48] *Id.*

[49] 15 Ohio Misc. 336, 240 N.E.2d 905, 44 Ohio Ops.2d 498 (Cuyahoga C.P. 1968).

[50] 259 N.E.2d 146, 51 Ohio Ops. 2d 183 (Ct. App. 1970).

[51] 240 N.E.2d at 907.

[52] *Id.* at 911.

[53] *See* note 9 *supra.*

[54] C. WARREN, *supra* note 10.

[55] Murphy v. Waterfront Commission, 378 U.S. 52, 55-56 (1964).

[56] *Id.* at 56.

[57] THE CHALLENGE OF CRIME IN A FREE SOCIETY: A REPORT BY THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE 283 (1967) [hereinafter referred to as CRIME IN A FREE SOCIETY].

[58] *Id.* at 286. For example, the National Crime Information Center, now being developed by the FBI, will provide instantaneous response to computer inquiry by local agencies for information on such things as stolen automobiles and wanted persons. *See also* Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. §§197, 638, 1236 (1968).

[59] *E.g.*, 18 U.S.C. §§2312, 2314 (1969) (penalizes the transportation of stolen goods, vehicles, securities, etc., in interstate or foreign commerce).

[60] *E.g.*, Elkins v. United States, 364 U.S. 206 (1960); Rea v. United States, 350 U.S. 214 (1956); Gambino v. United States, 275 U.S. 311 (1927).

[61] 325 U.S. 91 (1945).

[62] Change of venue will not be granted merely to suit the convenience of the accused, Johnston v. United States, 351 U.S. 215 (1956), but rather must depend upon the existence of factors which would make change of venue necessary for a fair trial.

[63] CRIME IN A FREE SOCIETY, *supra* note 57, at 283.

[64] *See e.g.*, note 59 *supra.*

with matters not normally of state concern.[65] Finally, it is probable that in this age of cooperative federalism, where state and federal governments have a common interest in crime control, state and federal authorities would through negotiation avoid a situation like *Screws* before it ever occurred.

Perhaps the most compelling argument for continuing the *Bartkus* rule is its effect on civil rights actions.[66] Historically, certain states have demonstrated an extreme reluctance to punish persons violating the civil rights laws, especially where public sentiment is hostile to the victim.[67] It has been suggested that even where the state does prosecute, its reluctance can lead to incompetent prosecution.[68] Hence, the option of a second trial in the federal courts seems essential to ensure that fairness prevails in cases of alleged civil rights violations.

This theory, however, has been rejected as unrealistic.[69] In a situation where a "sham" trial can be shown, the defendant can be retried without *Bartkus* simply on the theory that because of the "sham" he was never in jeopardy.[70] It is true, however, that the collusion or incompetency necessary to show a "sham" trial may be difficult to prove, but nevertheless, this defense provides much of the protection given the federal system by *Bartkus* without seriously jeopardizing the rights of individuals in other kinds of trials. In reality, neither protection is really significant in civil rights cases because, except in the most extreme cases,[71] there appears to be a uniform Justice Department policy to avoid prosecutions of alleged civil rights violators where a state has already instituted criminal action of its own against the accused.[72]

It seems that the best indication of federalism's need for *Bartkus*' rigid application of the dual sovereignty rule can be found in the attitudes of the legislators and law enforcement officials themselves. Almost one-third of the states now have statutes barring a state trial after a federal prosecution of the same defendant for the same criminal act,[73] and, to date, there are no hints of dissatisfaction or claims that these statutes adversely affect law enforcement. Similarly, the Federal Government has for certain offenses passed laws permitting a prior state prosecution to act as a bar to prosecution under those provisions, again without any noticeable reperçussions.[74] The Attorney-General of the United States himself has on at least one occasion instructed United States Attorneys to keep second prosecutions to the minimum.[75] Hence, it seems specious to argue that overruling *Bartkus* will seriously hamper law enforcement when the law-makers themselves show little interest in preserving the rule.

The Alternatives to the Bartkus Rule

Bartkus has rightfully been criticized for mechanically subordinating individual rights and interests to those of governmental institutions.[76] The Supreme Court itself has suggested that this may be so, but has reasoned that this is part of the price to be paid for federalism.[77] It seems doubtful, however, that the founding fathers viewed federalism as an end in itself, nor is it likely that they regarded individual rights as a secondary objective. On the other hand, it seems equally questionable whether they intended to completely exalt the individual without some regard for the effect of such a policy on the smooth functioning of the federal system. It seems, then, that the problem is not simply to decide whether to overrule *Bartkus*, but also to find a suitable alternative to that rule which achieves the proper balance between the individual and institutional interests involved.

The most appealing approach seems to be the adoption of one of several selective pre-emption schemes, each of which would abate the rigors of *Bartkus* without seriously hampering law enforcement activity. The first of these was suggested by Walter Fisher, the attorney for *Bartkus*, who proposed that the burden of selection be initially placed on the accused.[78] Under his proposal, if the

[65] *E.g.*, 18 U.S.C. §§1381–85 (1970) (crimes against the military such as enticing desertion and harboring deserters).

[66] For an excellent discussion of this subject, see Comment, 80 Harv. L. Rev., *supra* note 2, at 1551–54.

[67] Comment, *Discretion to Prosecute Federal Civil Rights Crimes*, 74 Yale L.J. 1297, 1298 (1965).

[68] Comment, Harv. L. Rev., *supra* note 2, at 1551.

[69] *Id.*

[70] Smith v. State, 219 Miss. 741, 69 So.2d 837 (1954); *cf.* Newton v. State, 170 P. 270 (Okla. 1918).

[71] *E.g.*, in United States v. Guest, 383 U.S. 745 (1966), a black army officer was murdered while traveling through Georgia. The defendants were prosecuted for murder in Georgia and acquitted by jury verdict.

[72] Comment, 74 Yale L.J., *supra* note 67, at 1298. *See also* United States Commission on Civil Rights, Report (Book 5) at 58–59 (1961).

[73] *See* Comment, 44 Minn. L. Rev., *supra* note 2, at 539 n.31.

[74] *E.g.*, 18 U.S.C. §2117 (1970).

[75] Petite v. United States, 361 U.S. 529, 531 (1960).

[76] *See* Comment, 44 Minn. L. Rev. at 537.

[77] Knapp v. Schweitzer, 357 U.S. 371, 380–81 (1958).

[78] Fisher, *Double Jeopardy and Federalism*, 50 Minn. L. Rev. 607, 610–13 (1966).

accused chose and received a federal trial, a second trial in the state court would then be barred. If, on the other hand, the defendant selected a state forum, the ensuing state action would then be regarded as the final disposition of the matter. To limit the accused's ability to "forum shop" for the jurisdiction with the lightest penalties, the defendant's right to choose his forum is qualified by giving the federal government the option of refusing jurisdiction, thereby ensuring a state trial.

Fisher's plan has the advantage of leaving primary responsibility for criminal law enforcement in the hands of state and local authorities while protecting the rights of the accused. This follows because most criminal matters are still handled by state and local authorities and, accordingly, it is expected that federal authorities will in most cases be inclined to let the state prosecute, even when the accused elects a federal trial. This is precisely the hope of Fisher, who says that to avoid endangering the viability of the Federal system, the federal government must be careful not to pre-empt the states except to the extent necessary to protect special federal interests.[79]

The principal defect of Fisher's approach is evident within the civil rights context. By permitting the accused to select the court in which he is to be tried, Southern civil rights violators could by choosing the state court often ensure a sympathetic jury. This possibility, however, could conceivably be foreclosed by use of a second form of selective pre-emption which would empower the federal government to obtain a stay of state prosecution whenever it believed a federal trial necessary to protect national interests.[80] Accordingly, federal authorities could assert jurisdiction where the government felt civil rights violators would be dealt with lightly. Otherwise, federal authorities would in most cases be expected to leave matters to the states. Hence, as in the first kind of selective pre-emption, the primary responsibility for the administration of criminal law would continue to remain with state and local officials.

A third possibility would be to consider both the state and federal offenses together in a single trial. This result could be realized through adoption of a theory similar to pendent jurisdiction in which a federal court could hear state and federal claims together in a single trial where they "derive from a common nucleus of operative fact." [81] To apply this kind of doctrine to a criminal trial situation seems fully consistent with its basic policy underpinnings which have their roots in the need for the conservation of judicial energy and the avoidance of multiplicity of litigation.[82] Pendent jurisdiction, however, is a matter of judicial discretion and not a constitutional right.[83] There is no precedent for its application to a criminal trial situation. Further, because joining state and criminal prosecutions involves joinder of different plaintiffs,[84] it is questionable whether pendent jurisdiction's requirement of a single cause of action[85] would be satisfied.[86] Hence, pendent jurisdiction is unlikely to be instituted except through reciprocal state and federal legislation.

Considerable attention has been given a certain theory alternatively referred to as the separate interest, social interest, or separate gist theory.[87] Although this theory admits the constitutionality of successive prosecutions, in application it is intended to limit their scope. Essentially, it involves an analysis of the different social interests affected by the offenses against the two sovereignties.[88] Where the interests to be protected by the two statutes are substantially the same, a second prosecution would be barred. Conversely, where the interests sought to be protected are different,

[79] *Id.* at 611.

[80] *See* Comment, 80 HARV. L. REV., *supra* note 2, at 1555.

[81] United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966). As originally conceived, the doctrine of pendent jurisdiction permitted a state claim to be heard in the federal court when its relationship with the state claim permitted the conclusion that the entire action before the court comprised but one constitutional "case." *Id.* at 725. It was derived from the realization noted by the Court in Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 733, at 820 (1824) that "[t]here is scarcely any case, every part of which depends on the constitution, laws, or treaties of the United States." Hence, the Court recognized that to literally follow Article III, section 2 of the Constitution would in most cases prevent the exercise of original jurisdiction. *See* Comment, *The Evolution and Scope of the Doctrine of Pendent Jurisdiction in the Federal Courts*, 62 COLUM. L. REV. 1018 (1962).

[82] United Mine Workers v. Gibbs, 383 U.S. at 726.

[83] *Id.*

[84] *E.g.*, the state and federal governments.

[85] Hurn v. Oursler, 289 U.S. 238, 245 (1933).

[86] *See* United Shoe Workers v. Brooks Shoe Mfg. Co., 191 F. Supp. 288 (E.D. Pa. 1960). In that case the court ruled that separate causes of action were presented when employees attempted to join their own contract claims with that of their union in a suit by the latter under section 301 of the Labor Management Relations Act.

[87] *See* Fisher, *supra* note 78, at 616–19; Comment, 80 HARV. L. REV., *supra* note 2, at 1559–64; Note, 45 CORNELL L. REV. 574, 578–79 (1960).

[88] *Cf.* Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171.

each sovereignty would be entitled to hold separate prosecutions with respect to the interest with which it was concerned. Under this theory the second *Bartkus* prosecution would have been barred since the purposes of both federal[89] and state[90] statutes were to prevent and punish robberies of banks.

There have been a number of cases where the separate interests test has been applied in upholding successive prosecutions.[91] Nonetheless, the theory has come under considerable criticism. For example, Justice Brennan was so disturbed by it that he wrote a separate opinion in *Abbate v. United States* for the sole purpose of expressing his disapproval.[92] Brennan suggested that the rationale behind the test as applied to a multi-jurisdictional context might similarly be used to permit multiple prosecutions in the same jurisdiction. This he said could occur where the questioned conduct violated several ordinances, each of which was enacted to serve a different social interest.

The separate interest theory has also been criticized for the difficult analysis of interests that it would require, especially where several interests intermingle.[93] One commentator, however, has suggested that the analysis required is no harder than that often faced by most judges in their normal duties.[94] Further, it is possible that by giving the judges greater discretion the courts would be better able to preserve the institutional and individual interests involved.[95]

Another alternative to the *Bartkus* rule is to bar a second prosecution where the evidence required to convict is the same as needed in the first trial.[96] This approach, though attractive in theory, can lead to abuses nullifying its protective effect. For example, by making slight variations in the elements of an offense, some states could conceivably circumvent the double prosecution rule.[97] Consequently, some commentators have suggested that it would be better to hinge the raising of the bar simply on whether in both cases the same transaction was involved.[98] This approach is embodied in the Model Penal Code,[99] and was recently approved by Justices Brennan, Douglas, and Marshall in *Ashe v. Swenson*.[100]

There are some critics who contend that protection of the accused would be best afforded by applying a collateral estoppel theory.[101] Under this approach a former judgment would operate as an estoppel as to those issues already considered by another court. Where a state court has determined that the accused did not participate in a certain robbery, the federal court would, under this theory, be prevented from relitigating that issue in a subsequent prosecution of the same defendant.[102]

The doctrine was originally used only in civil suits, but has seen increasing use in the criminal

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might have been convicted upon by proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second.

[97] Mr. Justice Brennan best summed up these abuses in his concurring opinion in Ashe v. Swenson, 397 U.S. 436 (1970) at 451–52: The "same evidence" test . . . does not enforce but virtually annuls the constitutional guarantee. For example, where a single criminal episode involves several victims under the "same evidence" test a separate prosecution may be brought as to each. *E.g.*, State v. Hoag, 21 N.J. 496, 122 A.2d 628 (1956), *aff'd*, 356 U.S. 464 (1958). The "same evidence" test permits multiple prosecutions where a single transaction is divisible into chronologically discrete crimes. *E.g.*, Johnson v. Commonwealth, 201 Ky. 314, 256 S.W. 388 (1923) (each of 75 poker hands a separate "offense"). Even a single criminal act may lead to multiple prosecutions if it is viewed from the perspectives of different statutes. *E.g.*, State v. Elder, 65 Ind. 282 (1879). Given the tendency of modern criminal legislation to divide the phases of a criminal transaction into numerous separate crimes, the opportunities for multiple prosecutions for an essential unitary criminal episode are frightening.

[98] Kirchheimer, *The Act, The Offense, and Double Jeopardy*, 58 YALE L.J. 513, 534 (1949).

[99] MODEL PENAL CODE §§1.07(2), 1.09(1)(b) (Proposed Official Draft, 1962).

[100] 397 U.S. at 453–54 (concurring opinion).

[101] Fisher, *supra* note 2; Perkins, *Collateral Estoppel in Criminal Cases*, 1960 ILL. L. FORUM 533.

[102] Commissioner v. Summer, 333 U.S. 591 (1948); United States v. Moser, 266 U.S. 236 (1924); Cromwell *v.* County of Sac., 94 U.S. 351 (1876). *See also* RESTATEMENT OF JUDGMENTS §45 (1942).

[89] 18 U.S.C. §2113 (1950).

[90] ILL. REV. STAT. ch. 38, §602 (1951).

[91] *E.g.*, Hoopengarner v. United States, 270 F.2d 465 (6th Cir. 1959); United States v. Wapnick, 198 F. Supp. 359 (E.D.N.Y. 1961); Commonwealth v. Taylor, 193 Pa. Super. 360, 165 A.2d 390 (1960).

[92] 359 U.S. at 196.

[93] Note, 45 CORNELL L.Q. 574, 578–79 (1960).

[94] Comment, 80 HARV. L. REV., *supra* note 2, at 1562.

[95] For instance, conviction of certain offenses in a state court may result in long imprisonment, whereas in a federal court the same act may result in only a fine. To avoid allowing a criminal to escape unscathed following a federal trial, the court could permit the second trial by ruling that the federal and state statutes serve separate social interests. For instance, the court might reason that the federal statute was primarily concerned with raising revenue, whereas the state statute was designed to police the activity involved.

[96] Actually, this test is already used by a majority of the courts to determine when double jeopardy exists within a single-jurisdictional context. It originated from the need to determine a test for what constituted two prosecutions for the "same offense." The test was first articulated in The King v. Vandercomb & Abbott, 2 Leach 708, 720, 168 Eng. Rep. 455, 461 (Ex. 1796):

Unless the first indictment were such as the prisoner

law,[103] including cases involving double jeopardy questions.[104] Moreover, in *Ashe v. Swenson*,[105] the Supreme Court ruled that collateral estoppel is embodied in the fifth amendment guarantee against double jeopardy.[106] The doctrine, however, suffers from several defects which may render it useless in a multi-jurisdictional context.

The first defect is not strictly limited to prosecutions by separate sovereigns, but rather clouds the entire use of collateral estoppel in double jeopardy situations. Because the doctrine is an evidentiary rule designed to prevent the expense, vexation, waste, and possible inconsistency of duplicatory litigation, its application is limited only to the precise issues determined by the prior court.[107] Several courts have declined to apply it where they have been unable to determine with certainty which issues had been decided in reaching a general verdict of acquittal,[108] and at least one court has refused to collaterally estop trial of an issue where there was even the slightest possibility that the jury in the first trial reached its verdict without considering it.[109]

The Supreme Court of the United States first considered this issue in *Hoag v. New Jersey*.[110] In that case the accused was tried and acquitted for the robbery of three men who, along with others, had been held up in a tavern. Thereafter, the defendant was indicted and convicted for robbing a fourth victim of the same alleged robbery. On appeal he argued that, because the sole disputed issue in the earlier trial related to his identification as a participant in the alleged robberies, the verdict of acquittal must be taken as having resolved that issue in his favor. Accordingly, he claimed that the doctrine of collateral estoppel barred New Jersey from relitigating the issue of the defendant's identity, and, hence, precluded them from convicting him in the second trial. The Supreme Court, however, allowed the conviction to stand, declaring that it would have to embark on sheer speculation in order to decide that the jury's verdict at the earlier trial necessarily embraced a determination favorable to the petitioner on the issue of "identity." [111]

The Court, however, recently reversed its position in *Ashe v. Swenson*,[112] where, on facts substantially the same as in *Hoag*,[113] it raised the collateral estoppel bar. In that case the Court said:

> [T]he rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration. The inquiry "must be set in a practical frame, and viewed with an eye to all the circumstances of the proceedings." [114]

Hence, the Court may have settled the problem of issue determination, leaving it to the court's discretion to determine when an issue in question had in the earlier trial been central to the prosecutor's case.

The doctrine of collateral estoppel will not be applied where the prior adjudication involved different parties,[115] and hence, there is considerable doubt whether the doctrine can be applied to a dual sovereignty situation. Several courts have

[103] *See* Perkins, *supra* note 101; Comment, *Collateral Estoppel in Criminal Cases*, 28 U. CHI. L. REV. 142 (1960); Sealfon v. United States, 332 U.S. 575 (1948); United States v. Oppenheimer, 242 U.S. 85 (1916).

[104] *E.g.*, Ashe v. Swenson, 397 U.S. 436 (1970); State v. Courmier, 218 A.2d 138 (N.J. 1966).

[105] 397 U.S. 436 (1970).

[106] *Id.* at 1195. This guaranty is similarly applicable to the states through Benton v. Maryland, 395 U.S. 784 (1969).

[107] *E.g.*, United States v. Kramer, 289 F.2d 909 (2d Cir. 1961); United States v. Kenney, 236 F.2d 128, 130 (3rd Cir. 1956); State v. Barton. 5 Wash.2d 234, 105 P.2d 63 (1940).

[108] *E.g.*, Hoag v. New Jersey, 356 U.S. 363 (1958); United States v. Kenney, 236 F.2d 128, 130 (3rd Cir. 1956); State v. Lawrence, 120 Utah 323, 234 P.2d 600 (1950).

[109] United States v. Kenney, 236 F.2d 128, 139 (3rd Cir. 1956).

[110] 356 U.S. 464 (1958).

[111] *Id.* at 472.

[112] 397 U.S. 436 (1970).

[113] In *Ashe*, six men engaged in a poker game at their home were allegedly robbed by three or four masked men. Petitioner and three others were each charged with seven separate offenses—the armed robbery of each of the six poker players and the theft of the car. The petitioner was first tried for robbing Donald Knight, one of the participants in the poker game. Because of weak evidence, the petitioner was acquitted. Thereafter, he was indicted again, this time for the robbery of another participant of the same poker game. Eventually, he was convicted. The petitioner appealed, claiming that the issue of his presence at the poker game had been determined in the first trial and that the state was collaterally estopped from relitigating that issue in the second trial.

[114] 397 U.S. at 444.

[115] United States v. Wapnick, 198 F. Supp. 359 (E.D.N.Y. 1961).

already refused to apply the doctrine in such cases.[116] Yet there is some cause for optimism. In *Sunshine Anthracite Coal v. Adkins*,[117] the Supreme Court held that the fact that the parties are not precisely identical is not necessarily fatal to invoking collateral estoppel.[118] Identification, the Court said, is not a mere matter of form but of substance and, hence, parties nominally different may in legal effect be the same.[119] Also, in another civil case the Court held that a state judgment could be used to estop a second determination of the issue in a federal court.[120] Finally, collateral estoppel is embodied in the Model Penal Code of the American Law Institute as a bar to successive state-federal prosecutions.[121]

One court in applying collateral estoppel to successive prosecutions said the primary considerations should be fairness and fulfillment of reasonable expectations in the light of constitutional and common law goals.

> The doctine of collateral estoppel should not be applied grudgingly. The State's resources are sufficient to enable it to prepare and present its case thoroughly .... The broadening policy considerations in favor of safeguarding individual rights of defendants and the need for conserving public energies as well as public funds, strongly suggest that where a jury has considered and rejected the State's contention in favor of the Defendant's contention on the issue submitted as the crucial one, the matter should be permitted to rest in its entirety.[122]

If a complete reversal of *Bartkus* is desirable, one solution other than court action is for the states to enact legislation making conviction or acquittal in a federal prosecution a bar to a state prosecution. This alternative, however, has its obvious drawbacks. First, it would take time to pass laws of this kind, and second, because many states have not thought it important enough to have such laws, it is conceivable that protection might never be accorded substantial numbers of people. In addition, it would be necessary for Congress to enact similar legislation to protect against a subsequent federal trial.[123] This problem might be overcome under the *Elkins* rationale which would view a second federal trial as an intentional attempt to subvert the laws of the state.[124] This problem is further complicated by the issue of determining which sovereign is to prosecute first. This problem might possibly be solved through negotiation.[125] However, because negotiation may not be constitutionally required, it might be necessary for the state and federal governments to pass reciprocal agreements making such contacts mandatory.

A second solution would be for Congress to simply pre-empt all areas where concurrent state-federal criminal jurisdiction presently exists.[126] Although this result seems constitutionally permissible,[127] it also appears undesirable. First, it would place a burden on the federal law enforcement agencies. Second, it seems likely that ill-feeling would flow from flouting the Supremacy Clause.[128] Presently, criminal law administration

[116] *E.g.*, Ferina v. United States, 340 F.2d 837 (8th Cir. 1965); People v. LoCicero, 230 N.Y.S.2d 384 (App. Div. 1962).

[117] 310 U.S. 381, 402 (1940).

[118] In *Sunshine*, a producer of coal sought to enjoin the Commissioner of Internal Revenue from collecting the 19½% tax laid on sales by producers who did not join the code established by the Bitumimous Coal Conservation Act. The Court ruled that a prior judgment sustaining on review a determination by the Bituminous Coal Commission (which was composed of coal producers) that the producer's coal was "bituminous," and, hence, did not conform with the code, was res judicata as to that point in the subsequent trial with the Internal Revenue Service.

[119] *Id.* at 402. It should be noted, however, that the formal relationship between the parties in this case is closer than that which would exist between the federal government and a state. The Bituminous Coal Commission, although composed of private producers, was quasi-governmental in nature, and might properly be regarded as an agent of the federal government.

[120] Becher v. Contoure Laboratories, 279 U.S. 388 (1929). In this case Oppenheimer (O) was the inventor, and Becher (B) was employed by O to construct it. B, in breach of trust, surreptitiously obtained a patent for the invention as his own. O, however, in a state court obtained a decree holding B a trustee *ex maleficio* of the invention and patent, commanding him to assign the patent to O and forbidding him to use, make, or sell these machines or transfer any rights under the patent. B then brought a suit in the federal court to enjoin O from infringing the patent, but the Court held that the decree of the state court was an estoppel against B.

[121] MODEL PENAL CODE §1.10(2) (Proposed Official Draft, 1962).

[122] State v. Courmier, 46 N.J. 494, 509, 218 A.2d 138, 146–47 (1966).

[123] Abbate v. United States, 359 U.S. 187 (1959).

[124] 364 U.S. 206 (1960). *See* quotation in text accompanying note 33 *supra*.

[125] *See* Note, 45 CORNELL L.Q. 574, 579 (1960).

[126] *See* Comment, *Pre-Emption by Federal Criminal Statutes*, 55 COLUM. L. REV. 83 (1955).

[127] Art. VI of the United States Constitution, generally known as the Supremacy Clause, reads in part as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; ... shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, and any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

[128] *Id. See also* Comment, 55 COLUM. L. REV., *supra* note 126.

is handled primarily on the state and local level.[129] Most federal criminal legislation is designed either to aid state and local authorities in their tasks[130] or to preserve some special federal interest, often of no concern to the states.[131] Therefore, to vastly increase federal criminal responsibility would displace the states from their traditional role, involve the federal government in areas in which they had heretofore not dealt, and, correspondingly, force the federal government to bear the burden and expense of enlarging its crime-fighting facilities. Further, it is indeed questionable whether this country needs or wants to establish a national police force.

Conclusion

Protection of citizens from the rigors of double prosecutions has long been an integral part of this country's constitutional heritage. Yet in the name of federalism, the Supreme Court has appeared willing to put these traditions aside where the double prosecutions occur within a multi-jurisdictional context, even though few, if any, federal interests are served. The Court would do better to abandon its mechanical application of dual sovereignty principles, and instead give greater consideration to the spirit and letter of the Constitution as embodied in the fifth amendment.

> Constitutional interpretation should involve more than dialectics. The great principles of liberty written in the Bill of Rights cannot safely be treated as imprisoned in the walls of formal logic built upon vague abstractions found in the United States Reports.[132]

If, in fact, a new approach to the successive prosecution problem is adopted, the courts and legislatures should nonetheless be mindful of its effects on this country's long Federalist tradition. No scheme should be instituted without regard for the roles and relationships traditionally maintained by the federal and state governments.

The Court already appears to be giving greater consideration to individual rights in other areas where the dual sovereignty concept has effect. Most important, there is no evidence that this flexible application of the dual sovereignty rule has had any noticeable effects on the strength of the federal system. Hence, it is reasonable to hope that this approach will be similarly applied within the double-jeopardy context.

[129] *See* note 57 *supra*.

[130] *E.g.*, 18 U.S.C. §2312 (1952) (stolen autos shipped out of state); 18 U.S.C. §2315 (1952) (stolen property shipped in interstate commerce).

[131] *E.g.*, 18 U.S.C. §§1381–85 (crimes against the military such as enticing desertion and harboring deserters).

[132] Feldman v. United States, 322 U.S. 487 (1944) (Black, J., dissenting).

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PRISONER CORRESPONDENCE: AN APPRAISAL OF THE JUDICIAL REFUSAL TO ABOLISH BANISHMENT AS A FORM OF PUNISHMENT

> Review having therefore been made of the whole matter, it has been resolved . . . to cut him off from the people . . . and to place him in Anathema with the following malediction. . . .
>
> Let him be cursed by the mouth of the Prince of Law, whose name is Crown and Seal.
>
> Let God blot him out of his book.
>
> And we warn you, that none may speak with him by word of mouth nor by writing, nor show any favor to him, nor be under one roof with him, nor come within four cubits of him, nor read any paper composed by him.[1]

In *Davis v. Superior Court*[2] one of the contested issues was the constitutionality of a government order[3] prohibiting the writing and publication of a manuscript entitled "The Face of Justice." The work was neither obscene nor libelous; it did not advocate crime or revolution. Nevertheless, the court upheld the validity of the order. On similar facts, the ordinary citizen would be guaranteed a reversal on appeal. But there was no reversal in this case. Caryl Chessman, the author, was no ordinary citizen. He was a prison inmate, under sentence of death at San Quenton for the crime of murder.[4]

The first amendment provides:

> Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .[5]

It has been thought that these words embrace "preferred rights," [6] and it has been held that the government, in order to restrict expressive freedoms, must show that the exercise of such freedoms gravely endangers some "paramount [state] interest," [7] and that there are no "reasonable alternatives" available to protect that interest.[8] Yet in *Davis*, the court made no effort whatever to isolate any "gravely endangered state interest." The complexities involved in searching for a reasonable alternative were thereby avoided. The court disposed of the constitutional issue quite perfunctorily: "To censor . . . and to forbid communication to and from a prison . . . is not *per se* unreasonable." [9] And in *Lee v. Tahash*,[10] a case involving issues similar to those in *Davis*, the court said:

> Whether improper interpretation, erroneous judgement, or variant administration may be involved in the restriction of some particular correspondence is, without more, mere institutional incident and not matter of judicial concern.[11]

Thus Davis seems clearly in conflict with the principles enunciated in cases involving the first amendment rights of free citizens. It is typical of the seemingly anomalous results courts reach when the first amendment freedoms of prison inmates are at stake. To justify their decisions, the courts employ four principle doctrines. First, courts frequently state that they lack power to interfere with the conduct of the prison system. Second, there is in many decisions the notion that the withdrawal of first amendment rights is necessitated by the objectives of the penal system. Third, many courts hold that the eighth amendment proscription of cruel and unusual punishments preempts judicial inquiry into the alleged suppression of other constitutional rights. The fourth doctrine, seldom articulated, holds that the prison inmate, having been duly convicted of a crime, has forfeited

[1] A. WOLFSON, SPINOZO: A LIFE OF REASON 74 (1932).

[2] 175 Cal. App.2d 8, 345 P. 2d 513 (1959).

[3] The order was issued pursuant to CAL. PENAL CODE §4570 (West 1970).

> Every person who, without the permission of the warden or other officer in charge of any State prison, . . . communicates with any prisoner or person detained therein, or brings therein or takes thereform any letter, writing, literature, or reading matter to or from any prisoner or person confined therein, is guilty of a misdemeanor.

[4] Chessman has since been executed.

[5] U.S. CONST. amend. I.

[6] Kovaks v. Cooper, 336 U.S. 77, 88 (1949). *But see* Frankfurter, J., concurring in *Kovaks*. In Sherbert v. Verner, 374 U.S. 398 (1963), the Court said: "It is basic that no showing merely of a rational relationship to some colorable interest would suffice. . . ." *Id.* at 406.

[7] 374 U.S. at 406 *quoting from* Thomas v. Collins, 323 U.S. 516, 530 (1944).

[8] Shelton v. Tucker, 364 U.S. 479, 487–90, 493 (1960).

[9] 175 Cal. App.2d 20, 345 P.2d 520 (1959).

[10] 352 F.2d 970 (8th Cir. 1963).

[11] *Id.* at 972.

all of his constitutional rights and is in fact the slave of the state.

The purposes of this comment are to illustrate these four doctrines under current case law dealing with prisoner correspondence and to determine whether they are sound.[12]

I. Conferral of Authority Doctrine

Courts often state that they can not, or that they will not assume jurisdiction over the complaints of prison inmates.[13] In *Fussa v. Taylor*[14] the prison warden refused to allow an inmate to correspond with his common law wife. After a recital of the facts, the court did little more than state the following:[15]

> Courts are without power to supervise prison administration or to interfere with the ordinary prison rules or regulations.[16]

The conferral doctrine does seem, on its face, to embody some sound policy reasons which militate against judicial activism where the rights of prison inmates are at issue. Certainly it is true that the difficult task of administering the penal system[17] lies squarely within the orbit of executive power. The authority of administration has been conferred both by the Constitution[18] and by statute.[19] And it is a familiar principle that where power has been conferred, sufficient discretion must accompany it so that it may be effectively wielded.[20]

But the conferral of authority is not a conferral of license. Just as discretion must follow power, so also must judicial scrutiny. Coordinate governmental branches, and the States, must heed the commands of the Constitution, and must respect the individual rights it secures to the citizens. Courts exist to insure such respect. As was said in *Lee v. Crouse*,[21]

> It is true that federal courts have no supervisory powers over . . . prisons. . . . The executive province of administration of prisons is not a shield against *unwarranted* deprivations of constitutional rights. . . .[22]

Thus, in order to protect the executive from unwarranted interference with its administrative duties, while at the same time ensuring that constitutional rights are not unnecessarily infringed, judges must ascertain whether suppression of the asserted right is in any meaningful way related to prison administration or discipline. The necessity

[12] For commentaries on the first amendment rights of prison inmates not restricted to correspondence regulations, *see* Comment, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 Yale L. J. 506 (1963); Comment, *The Right of Expression in Prison*, 40 So. Cal. L. Rev. 407 (1967); Comment, *Black Muslims in Prison: Of Muslim Rites and Constitutional Rights*, 62 Colum. L. Rev. 1488 (1962).

[13] *See, e.g.*, Childs v. Pegelow, 321 F.2d 487 (4th Cir. 1963); Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966); Austin v. Harris, 226 F. Supp. 304 (W.D. Mo. 1964).

[14] 168 F. Supp. 302 (M.D. Pa. 1958).

[15] The warden had testified: "It is difficult from the record, to find any constructive elements whatever in their relationship and we, therefore, do not approve of their corresponding." *Id.* at 303.

[16] *Id.*, *quoting from* Banning v. Looney, 213 F.2d. 771 (10th Cir.), *cert denied*, 348 U.S. 859 (1954).

[17] Sykes tells us:

> Indeed, the glaring conclusion is that despite the guns and the surveillance, the searches and the precautions of the custodians, the actual behavior of the inmate population differs markedly from that which is called for by official commands and decrees. Violence, fraud, theft, aberrant sexual behavior—all are common-place occurrences in the daily round of institutional existence in spite of the fact that the maximum security prison is conceived of by society as the ultimate weapon for the control of the criminal and his deviant actions. Far from being omnipotent rulers who have crushed all signs of rebellion against their regime, the custodians are engaged in a continuous struggle to maintain order—and it is a struggle in which the custodians frequently fail.

G. Sykes, The Society of Captives 42 (1958).

[18] The Constitution charges the Executive with the responsibility to "take Care that the Laws be faithfully executed." U.S. Const. art. II, §3. The Executive carries out this responsibility, in part, through the administration of the penal system.

[19] 18 U.S.C.A. 4042 (1969) provides:

> The Bureau of Prisons, under the direction of the attorney general, shall—
>
> (1) have charge of the management and regulation of all Federal penal and correctional institutions;
>
> (2) provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise;
>
> (3) provide for the protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States;
>
> (4) provide technical assistance to State and local government in the improvement of their correctional systems.

State statutes are similar. *See, e.g.*, Ill. Rev. Stat. ch. 108, §10 (1969).

[20] "If this was not permissible, the wheels of government would often be locked, and the sovereign state find itself helplessly entangled in the meshes of its own constitution." State of Minnesota *ex rel* Railroad and Warehouse Commission v. Chicago, Milwaukee and St. Paul Railroad Company, 38 Minn. 281, 300, 37 N.W. 782, 788 (1888).

[21] 284 F. Supp. 541 (D. Kan. 1967).

[22] *Id.* at 544.

of such an inquiry lies at the heart of the conferral doctrine.

But when confronted with an inmate's claim that his first amendment rights were unconstitutionally infringed, the judiciary has avoided any such inquiry, and thus has seemingly refused to apply the very doctrine it invokes. In *Davis*, the court stated that,

> [The prisoner] must obviously, by the very fact of incarceration, suffer curtailment of the normal freedoms of speech and communication.[23]

If *Davis* had been a case in which the prisoner had claimed denial of his associational rights, or if he had complained that prison regulations denied intra-institutional expression, the quoted passage would seem to make some sense. But *Davis* raised no such issues; rather, the right asserted was that of communicating with the outside society. There would not appear to be even a conceptual inconsistency between incarceration and the exercise of such a right, let alone a factual inconsistency.[24]

Even if the courts expended the time and trouble necessary to determine whether prisoner correspondence regulations bore some relationship to incarceration or efficient penal administration, they would probably find that no such relationship exists. That it does not is convincingly argued in a recent law review comment.[25] At least one court has itself recognized that such is the case. In *Tyler v. Ciccone*[26] an unconvicted prison inmate challenged the constitutionality of censorship regulations which required that prisoner manuscripts be approved by prison officials before they could be mailed.[27] Without explanation the court held that the regulation bore no relationship to prison discipline or security.[28] On that ground it held the regulation unconstitutional as applied to unconvicted inmates. Certainly it would be difficult to construct an argument that the regulation was not related to the discipline of an unconvicted inmate but was related to the discipline of a convicted inmate.

Another criticism goes not merely to the method in which the conferral doctrine is applied (or more properly, misapplied), but to its very terms. The

[23] 175 Cal. App. 2d 8, 20, 345 P.2d 513, 521 (1959).

[24] *See* note 25 *infra*. In *Davis* the court stated:

> All issues in this case flow from the fact that the Warden of San Quentin apparently prohibited this particular inmate from writing manuscripts for publication. The record gives no reason for this ruling. . . .

175 Cal. App. 2d 8, 11, 345 P.2d 513 (1959). Later in the opinion the court said: "Such authority (to restrict prisoner correspondence) is necessary to protect against escape." 175 Cal. App. 2d 8, 20, 345 P.2d 513, 521 (1959).

[25] Comment, 40 So. Cal L. Rev., *supra* note 12. *But see* Comment, 72 Yale L. J., *supra* note 12.

Certain restrictions on the content of correspondence seem justified. Obviously prison authorities have a legitimate interest in preventing escapes which might be planned through correspondence. There would appear to be no justification whatever for volume restrictions on correspondence which are imposed irrespective of the prisoner's prior disciplinary record. The only possible justification directly related to institutional integrity seems to be grounded on administrative considerations. But even here there is ample evidence that such restrictions increase, rather than diminish, the administrative workload. The maintenance of the records required to enforce such restrictions alone consumes more of the censor's time than would the reading of many more letters. *See* H. Barnes and N. Teeters, New Horizons in Criminology 492 (Rev. ed. 1950). The absurdity of the administrative argument is enhanced by the fact that the great majority of prisoners are illiterate, or have few contacts outside the prison walls. *See* R. Donnelly, J. Goldstein, & R. Schwartz, Criminal Law 431 (1962). It is accordingly open to doubt that a lifting of volume limitations on prisoner correspondence would cause even a *de minimus* increase in administrative difficulty. Prisons which have allowed unlimited correspondence privileges have found that the administrative problems are easily overcome. Morris, *Prisons in Evolution*, Fed. Probation, Vol. 29, Dec., 1965, at 20.

There is another group of prison regulations which prohibit the following: Correspondence with newspapers or newspaper employees, mentioning prison news, communicating with outsiders any ideas tending to place the prison, its officials or policy in disrepute. *See* Lee v. Tahash, 352 F.2d 970 (8th Cir. 1965).

One commentator justified such regulations on the ground that to invalidate them would mean conferring on the prisoners the right to exercise leverage over their captors. *See* Comment, 72 Yale L. J., *supra* note 12. This is true, but not undesirable on purely administrative grounds. Extension of the rule of law to the prison community is impossible unless someone is realistically able to subject the prison officials to public accountability.

At least one sociologist notes the possibility that prison regulations which prohibit inmates from publicly criticizing the conduct of prison affairs may themselves be disruptive of institutional tranquility. Sykes states:

> At certain times, as in the case of riots, the inmates can capture the attention of the public; and indeed disturbances within the walls must often be viewed as highly dramatic efforts to communicate with the outside world, efforts in which confined criminals pass over the heads of their captors to appeal to a new audience.

G. Sykes, The Society of Captives 8 (1958).

In the late summer of 1970, inmates of the New York City jails rioted for the express purpose of bringing the inhuman conditions of the institutions to the public's attention. Thus Sykes' observation seems verified.

[26] 299 F. Supp. 684 (W.D. Mo. 1969).

[27] See footnote 2 of the Court's opinion, where the regulation is set forth in full. *Id.* at 686 n. 2.

[28] *Id.* at 688.

doctrine presupposes the propriety of balancing the first amendment against mere administrative considerations in order to determine whether the inmate has the right to communicate with the outside society. But it has elsewhere been uniformly held that the government must justify the restriction of expressive freedoms by showing that their exercise necessarily endangers some "paramount" state interest.[29] Administrative considerations do not ordinarily fit into such a category.[30]

Another criticism that might be made of the conferral doctrine is that it is overbroad. For if the courts are truly fearful of interfering with the administrative duties of the executive, one might reasonably expect the judiciary to give the executive a wide berth of discretion in restricting the right of prisoners to practice the Black Muslim religion. But such has not been the case. In *Banks v. Havener*[31] the court confronted the following facts:

> After approximately three weeks of organized Muslim practice . . . there ensued . . . a violent reprisal against prison authority causing personal injury to some prison employees and extensive property damage, and still another disturbance (one month later). . . .[32]

Yet notwithstanding the very real possibility of further administrative and disciplinary disruptions, the court, rather than deferring to the judgement of the prison officials, substituted its own judgement and labeled such possibilities "speculative at best."[33]

The refusal of the judiciary to meaningfully apply the very doctrine it invokes, the obvious lack of relationship between prisoner correspondence and penal administration, the impropriety of restricting first amendment rights on purely administrative grounds, and especially the refusal of the courts to do so where religious rights are involved,[34] all indicate an obvious truth: prisoner

[29] Sherbert v. Verner, 374 U.S. 398, 406 (1963), *quoting from* Thomas v. Collins, 323 U.S. 516, 530 (1944).

[30] *But see* Braunfeld v. Brown, 366 U.S. 599 (1961).

[31] 234 F. Supp. 27 (E.D.Va. 1964).

[32] *Id.* at 29.

[33] *Id.* at 30. The court said:

> The probability of Muslim-inspired future riots is speculative at best. (There is no evidence to sustain this contention.) The antipathy of the other inmates and the staff, occasioned by the Muslim belief in black supremacy, standing alone is not sufficient to justify the suppression of religious freedom in the Youth Center; neither is the alleged disruptive effect on the rehabilitation program. . . . To justify the prohibition of the practice of an established religion at the Youth Center the prison officials must prove by satisfactory evidence that the teachings and practice of the sect create a clear and present danger to the orderly functioning of the institution. This they have not done.

Id.

[34] The following cases illustrate the approaches taken when the religious rights of prisoners were at stake.

In Lee v. Crouse, 284 F. Supp. 541 (D. Kans. 1967), the petitioner alleged that a prison regulation which prohibited Black Muslim religious services deprived him of his constitutional rights. In deciding to reach the merits of the contention rather than dismiss on the pleadings, the court stated,

> It is true that federal courts have no supervisory powers over state prisons. [T]he executive province of administration of prisons is not a shield against *unwarranted* deprivations of constitutional rights.
>
> . . .

The court did not explicitly enunciate the distinction between what deprivations were warranted and which were unwarranted. But the courts subsequent reasoning suggested that such a determination was to be made by ascertaining whether a deprivation was necessitated by the need for institutional discipline.

That the Black Muslim religion constituted a threat to prison discipline was claimed to be inherent in its basic teachings:

> This positive [Black Muslim] program has a serious negative aspect, for its appeal is augmented by statements, of varying vehemence, condemning and rejecting so-called "white" social, economic, religious, and political institutions; past white exploitation, both real and imagined of the Negro people; and ultimately, the white race itself.

Id. at 546. The court held that such explicit threats constituted a danger to prison discipline, and on that ground upheld the constitutionality of the challenged regulation.

Though the court in *Lee* did not allow the Executive unlimited discretion to suppress rights guaranteed under the free exercise clause, the decision might be criticized because it did not demand a higher degree of accountability. The reasoning of the case seems to rest on considerations enunciated in Desmond v. Blackwell, 235 F. Supp. 246 (1964):

> Certainly with the administration of a large prison population committed to a limited personnel [*sic*], the responsible prison authorities must be vested with discretion. . . . It [the regulation] can not be dictated by the prisoners, and as to the present issue, is reasonable, justifiable, and definitely not arbitrary or capricious [especially with regard to Mr. Muhammed, having in mind the inflammatory nature of his writings].

Id. at 249. The test of constitutionality according to this case is whether the regulation is "arbitrary or capricious." Such a test can be met by ascertaining whether there is a conceptual possibility that the free exercise of the religion will endanger prison discipline.

This approach has been rejected by other courts. In Long v. Parker, 390 F.2d 816 (3rd Cir. 1968), the petitioner alleged, and the prison authorities conceded, that members of the Muslim sect were not allowed to receive the weekly newspaper "Muhammed Speaks." The district court, employing a test like that invoked in *Lee* and *Desmond*, had stated:

> The plaintiffs complain they can not receive the weekly newspaper "Muhammed Speaks." This is

correspondence rights are unprotected by the courts for reasons unrelated to those expressed in the conferral of authority doctrine.

II. Frustration of Penal Objectives Doctrine

Courts often state the conferral of authority doctrine and then, as if to clear up any lingering uncertainties, utter the following:

> Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.[35]

A comparison of the conferral doctrine and the frustration doctrine indicates that they differ only in this: the former purports to justify retraction of first amendment rights only if their exercise conflicts with the necessities of penal administration, or, in other words, if the exercise of the right would in some way threaten the prison's ability to isolate the offender from society; the frustration doctrine, on the other hand, introduces penal objectives other than isolation for consideration.

What are the nonadministrative "considerations underlying the penal system" which justify the withdrawal of first amendment rights?[36] In answering this fundamental question, it is significant to note that courts merely invoke the doctrine; they make no effort whatever to specify which "considerations" they have in mind. This conclusory intonation suggests that, to the extent the doctrine is being used as an explanatory tool, the doctrine is based on non-functional "considerations underlying the penal system." For, as will hopefully become evident, the task of relating the withdrawal of first amendment rights to the functional penal objectives is a highly complicated one, requiring a good deal of sociological analysis.

Actual judicial utilization of the frustration doctrine would seem to stem directly from the predisposition of the public to view crime as a peculiarly moral problem. For when a judge confronts a complaining inmate, he, like any other citizen, confronts not merely a "deviant" whose offense arose from merely natural phenomena or "maladjustment." Instead he confronts a sinner who has proven by his acts that he is an undesireable and fundamentally "immoral" being. And to recognize in the prisoner the right to speak and criticize would, in a significant way, amount to a recognition that "evil" has a right to manifest itself. The moral vision of crime can tolerate no such inconsistency. The sinner's duty is not to speak out and criticize his captors, and thereby claim his sovereignty; his duty is to repent and renounce his own immorality.

The question that must inevitably be asked, however, is whether such a non-functional justification for denying prisoners rights under the free speech clause of the first amendment is itself functionally justified. For as Cardozo has said,

> Few rules in our time are so well established that they may not be called upon any day to justify their existence as means adapted to an end. If they

highly inflammatory material and any such refusal is justified.

Id. at 822, *quoting from* Long v. Katzenbach, 258 F. Supp. 89, 93 (M.D. Pa. 1965). But the appellate court stated that "In so ruling the District Court misconceived the standard which is applicable to the prohibition of such literature." *Id.* at 822. The court rejected the proposition that the literature could be suppressed because it "might" prove inflammatory, since such a proposition was speculative at best:

> Mere antipathy caused by statements derogatory of, and offensive to the white race is not sufficient to justify the suppression of religious literature even in prison. Nor does the mere speculation that such statements may ignite racial or religious riots in the penal institution warrant their proscription. The literature could be suppressed only if the authorities established a "clear and present danger." To justify the prohibitions of religious literature, the prison officials must prove that the literature created a clear and present danger of a breach of prison security or discipline or some other substantial interference with the orderly functioning of the institution.

Id.

In Cooper v. Pate, 382 F.2d 518 (7th Cir. 1967), the constitutional status of the free exercise clause in a prison setting was again considered, and the result was consistent with the *Long* decision. In this case, however, the court answered a question which went unanswered in *Long*: would a particular method of securing prison discipline have to yield to a reasonable alternative in order to accommodate the first amendment right. In *Long* an affirmative answer seems implicit in the court's determination that the clear and present danger test was applicable. *Cooper* explicitly answered the question when the court, in deciding the issues against the prison authorities, stated that they "have not tried the course of permitting worship services for this group under regulation." *Id.* at 522.

See note 60 *infra* for a discussion of *Barnett v. Rodgers*.

[35] Stroud v. Swope, 187 F.2d 850, 851 (9th Cir 1951), *quoting from* Price v. Johnson, 334 U.S. 266, 285 (1947).

[36] It should be noted that the executive is in receipt *only* of power to administer the penal system. See the discussion of the conferral of authority doctrine in the text accompanying notes 13 to 34 *supra*. Hence, one might well wonder about the relevance of these nonadministrative considerations.

The problem is taken up in notes 50, 56, and 59 *infra*.

> do not function, they are diseased. If they are diseased, they must not propagate their kind.[37]

Commentators in this area of the law,[38] in embarking upon a functional analysis, have, in construing the words "considerations" underlying the penal system, focused on the penal objectives of retribution[39] and deterrence.[40] Thus, they have directed attention only to those considerations which alledgedly exercise a directly beneficial influence on society.[41] By providing a model of analysis which ignores the indirectly beneficial consequences which restrictions on prisoner correspondence might serve, the commentators have seemingly made the frustration doctrine untenable.

It appears to be the law that

> Speech is not an absolute, above and beyond control. . . . Nothing is more certain in modern society than the principle that there are no absolutes, that a name, a phrase, a standard has meaning only when associated with the considerations which gave birth to the nomenclature[42]

Thus, in determining whether a specific penal objective (e.g., retribution and deterrence) is a sufficient justification for the withdrawal of a right, the inquiry must be whether the fulfillment of that objective is fundamentally inconsistent with the rationale for protecting freedom of speech. Only if there is such an inconsistency should the right be deemed "withdrawn."

The policy reasons for protecting the first amendment freedoms of members of the free society are well known. Thus the first amendment ". . . was fashioned to assure unfettered interchange of ideas" [43] in the interest of ascertaining truth. The policy consideration would seem to apply irrespective of whether the source of the idea is an ordinary citizen or a prison inmate; in either case, the ultimate victim of repression would seem to be the society itself. As Mattick says,

> [t]he most securely imprisoned population that exists is the general public that is uninformed about the nature and consequences of imprisonment as practiced in America today.[44]

This traditional policy consideration would in no way seem inconsistent with the prison's ability to secure an orderly society by exacting retribution and deterring crime. In fact, not to permit inmates to correspond with the outside society seems fundamentally inconsistent with the fulfillment of those penal objectives.

Retribution may be functionally justified on the ground that it maintains social order by placating the outrage of the victim of the criminal act, or that of his relatives, and associates.[45] Were it not for the fact that the prison inflicts pain on the offender, it is hypothesized that such individuals would seek personal vengence.[46]

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[37] B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 98 (1921).

[38] *See* Comment, 72 YALE L. J., *supra* note 12 and Comment, 40 So. CAL. L. REV., *supra* note 12.

[39] This penal objective is defined in the test accompanying notes 45 and 46 *infra*. In Comment, *The Right of Expression in Prison*, 40 So. CAL. L. REV. 407 (1967), the author submits that retribution is an irrational penal objective, and therefore fails to consider it under his discussion of penal objectives. *Id.* at 411 n. 23. But clearly, the courts lack the competence to make such determinations. *See* note 75 *infra*. Surely the position articulated in Gore v. United States, 357 U.S. 386, 393 (1958), is correct:

> In effect, we are asked to enter the domain of penology, and more particularly that tantalizing aspect of it, the proper apportionment of punishment. . . . [W]hether one believes in its efficacy or futility . . . these are peculiarly questions of legislative policy.

Furthermore, retribution has repeatedly been mentioned as the primary reason for recognizing certain civil (outrageous conduct) and criminal (libel) actions:

> The act in question was one of the greatest indignity, highly provocative of retaliation by force, and the law, as far as it may, should afford substantial protection against such outrages, in the way of liberal damages, that the public tranquility may be preserved by saving the necessity of resort to personal violence as the only means of redress.

Alcorn v. Mitchell, 63 Ill. 553, 554, (1872).

> [T]he refusal to redress an otherwise actionable wrong creates disrespect for the law and encourages the victim to take matters into his own hands.

Linn v. United Plant Guard Workers, 383 U.S. 53, 64 n. 6 (1966).

[40] This penal objective is defined in the text accompanying note 47 *infra*. The author in Comment, note 39 *supra* at 411 states: "Deterrence is discouragement of resumed criminal activity through exposure of the prisoner to the undesirable aspects of prison life." This, of course, is rehabilitation, not deterrence.

[41] They are direct in the sense that they address individuals in the free community and inform them that imprisonment is painful.

[42] Dennis v. United States, 341 U.S. 494, 508 (1951).

[43] Roth v. United States, 354 U.S. 476, 484 (1957).

[44] K. MENNINGER, THE CRIME OF PUNISHMENT 156 (1966), *quoting* MATTICK, *Forward to* "THE FUTURE OF IMPRISONMENT IN A FREE SOCIETY", 2 KEY ISSUES 4–10 (1965).

[45] Meyer, *Reflections on Some Theories of Punishment*, 59 J. CRIM. L.C. & P.S. 595 (1968).

[46] *Id.* at 595. There the author states:

> Originally punishment was an individual responsibility, but as society developed, this type of personal vengeance could no longer be tolerated and the individual was forced to relinquish his right to deal personally with the malefactor, in return for a promise by society to punish the criminal.

But the notion that social order is achieved by providing a kind of vicarious outrage-satiation necessitates that the interested sectors of society be informed of the brutality of prison conditions. Prohibitions on prisoner correspondence, while they do enhance the pain of incarceration, preclude the possibility that the informational function will be effectuated.

Under the rubric of deterrence, the penal system admonishes the law-abiding sector of society to continue on its law-abiding course by informing the free society that deviance is unwise.

> The social significance of punishing offenders is that deviance is thereby defined as unsuccessful in the eyes of conformists, thus making the inhibition or repression of their own deviant impulses seem worthwhile.[47]

If the deterrent function of the prison is to be effectuated, the prison must effectively inform society of the painful aspects of imprisonment. But prohibitions on prisoner correspondence seem to do little more than prevent just that from happening.

Accordingly, restrictions on prisoner correspondence seem directly contrary to the penal functions of deterrence and retribution.

A functional justification of the withdrawal of first amendment rights under the rubrics of deterrence and retribution would seem to be defective for a second reason. It has been held that first amendment rights may be suppressed in the interest of a paramount state interest (here, social order and the rule of law) only where there is no reasonable alternative to that suppression.[48] But if the state's interest is the preservation of social order, and if social order is preserved only through fullfillment of the penal objectives of retribution and deterrence, then it should follow that a reasonable alternative exists. For the penal objectives of retribution and deterrence necessitate only the infliction of pain for their fulfillment.[49] Surely, the quantum of pain inflicted can be preserved through substitution of an alternative for the restriction of first amendment rights.[50]

These two criticisms of the attempt to justify the withdrawal of first amendment rights by citing the necessity of the penal institution to exact retribution and deter crime do not mean that the frustration doctrine itself is unsound, but mean only that the commentators have been wrong in limiting their inquiry to these two penal objectives.

The error lies in thinking that the withdrawal of first amendment rights can be of utility only because it enhances the quantity of pain which the prison is capable of inflicting on its inmates. What must be noted is the qualitative effect which the withdrawal has. For the truth seems to be that imprisonment does not involve merely the restraint of physical liberty in an unpleasant environment. True, imprisonment encompasses that description, but there is more. Properly conceived, it constitutes complete social severance; and in fact it is more a matter of severing associational ties (which are also protected by the first amendment) of every kind than it is an abridgement of freedom of movement. Imprisonment, in a word, is banishment.

Banishment—or the invisibility of the imprisoned inmate—then (which is only possible because of restrictions on first amendment rights) is the concept whose social efficacy must be tested. It has been noted that

> As long as the public continues to view crime as . . . 'a contest between good and evil,' their interest extends only to the point of public resolution, if there is one. And the point of public resolution is the conviction which brings the public drama of a trial to an end. The judge pronounces sentence and the public feels that justice has been done. They seem to forget, altogether, that life goes on in prison and beyond.[51]

If it is true that the public's "forgetfulness" that life goes on in prison is the result of its view that crime is predominantly a moral, as opposed to a naturalistic, problem, then it is a view that is fostered, or at least supported, by restrictions on

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[47] Toby, *Is Punishment Necessary?* 55 J. CRIM. L. C. & P.S. 332, 334 (1964).

[48] Shelton v. Tucker, 364 U.S. 479, 487–90, 493 (1960).

[49] Meyer, *supra* note 45 at 595.

[50] For instance, the term of imprisonment might be lengthened. This raises an interesting question. Only the legislature could take such action, since the executive is not clothed with the powers of an avenging angel. This suggests that only the legislature can be allowed to justify the infliction of pain on grounds of the need to exact retribution and deter crime.

But, at least in the case of federal prisoners, Congress has not explicitly withdrawn first amendment rights. And it has delegated only the power of administration, which as has been argued does not necessitate the withdrawal of first amendment rights. See the discussion of the conferral of authority doctrine.

The question then becomes: How can the executive justify its actions on grounds which only the legislature could invoke? This is a further indication that the state's interest in punishment (*qua* infliction of pain) does not justify restrictions on prisoner correspondence.

[51] MENNINGER, note 44 *supra*, at 155–56.

inmate correspondence. If so, such restrictions should be maintained at all costs, since nearly all criminologists agree that it is the moral view of crime that discourages criminality, and is the real deterrent of deviance.[52]

Hiding the prisoner from society may also be beneficial because it prevents the establishment of a visible, criminal "counter-culture." In this capacity, Sykes notes:

> If the inmate population maintains the right to argue with its captors (the society), it takes on the appearance of an enemy nation with its own sovereignty; and in so doing it raises disturbing questions about the nature of the offender's deviance. The criminal is no longer a man who has broken the law; he has become a part of a group with an alternative view-point and thus attacks the validity of the law itself.[53]

Preventing prisoners from informing the society of the painful aspects of incarceration through correspondence may also protect the penal system from being destroyed by an internal contradiction that it may possess. Thus it might be hypothesized that a punishment, in order to deter crime, must provoke fear; but if it provokes fear, it will not be tolerated by the citizenry. Sykes voices the contradiction as follows:

> And in fact large segments of our society would much prefer to forget about the confined offender, for no matter how just (and efficacious as a deterrent) imprisonment may be, the free community is reluctant to face the conclusion that some men must be held in bondage for the larger good.[54]

Restrictions on prisoner correspondence insulate the society from such a moral dilemma, and inhibit the democratic process from operating to resolve it in favor of the prisoner. At the same time, such restrictions do not completely preclude the social knowledge of the pains of incarceration which deterrence itself necessitates.[55] The occasional prison riot, the fact that the prisoner generally returns to society, and the fact that the prison officials and employees are members of the free community all provide informational links between the prison and the populace. Thus society is familiar with the painful aspects of prison life; but the clarity of its perception is not sufficient to spark it to action and demand reform.

These may appear to be cynical observations. But the question is not whether they are cynical, but whether they operate for a broader social good. If they do, then the justification for prohibiting prisoner correspondence is ultimately that the prison is not a "democratic" institution; in other words, it is not an institution that can serve its function of banishing criminals and preventing crime while at the same time being exposed to direct public scrutiny. If this is the case, then that fact negates the entire rationale for conferring first amendment rights on prison inmates. Applicability of the first amendment presupposes that a net social benefit will arise therefrom.[56]

[52] Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949, 956 (1966).

[53] G. SYKES, THE SOCIETY OF CAPTIVES 75 (1958).

[54] *Id.* at 8.

[55] Andenaes states that "although little research has been done to find out how much the general public knows about the penal system, presumably most people have only vague and unspecified notions. Therefore, only quite substantial changes will be noticed." Andenaes, *supra* note 52 at 970.

Thus if restrictions on prisoner correspondence insulate the public from the often barbaric aspects of prison life, they would also insulate it from the more treatment-oriented aspects of future prisons. Thus rehabilitation might be accomplished without sacrificing deterrent and retributive efficacy.

[56] *See* note 50 *supra*. It may be said in resolving the separation of powers problem therein noted that a prisoner has a right to be free of executive action which is only justifiable (because enhancing the deterrent and retributive capacities of the prison) because it enhances the pains of incarceration. Said another way the prisoner may be said to have a "right" to have his pain prescribed only by the legislature.

But the suppression of the first amendment rights of prisoners can be justified on grounds other than the infliction of pain. The question then changes. It is no longer whether the legislature has prescribed the restriction, which it has not; but rather whether the courts can be confident that the recognition of the "right" will not result in a net social detriment. It is precisely because courts cannot make this determination that they appear justified in refusing to recognize the existence of first amendment "rights." Thus it becomes totally inappropriate to even speak of first amendment "rights" in prison. In view of that fact, it is irrelevant to consider whether the executive is acting strictly in accordance with the specific instructions of the legislature. He does not abuse his discretion by invading a non-existent "right."

Perhaps this is what the court in Lee v. Tahash, 352 F.2d 970 (8th. Cir. 1965) had in mind when, after holding that the first amendment did not apply to prison affairs, it stated:

> Thus the fact that the prison authorities, have refused to allow mailing of some particular letter ... does not *of itself* afford basis for a prisoner to try to get into the federal courts. Nor will the fact that particular refusals seem to him to constitute improper interpretation of the prison regulations, or erroneous judgment on the letters themselves, or different treatment on relation to them than he feels has occurred as to some other prisoner..., *of itself* give rise to any *justiciable* issues.

Id. at 972 (emphasis added).

These considerations, however, do not seem entirely

It must be pointed out there there are no known sociological authorities that directly support the contention that restricting prisoner correspondence is in any way socially beneficial. No one seems even to have considered the question. But the fact that the above considerations must be deemed "speculative" in the sense that their validity has not been proven, should not be used as an excuse for judicial activism.[57] It is enough that the contentions are not per se unreasonable. Here, the words of Justice Jackson seem relevant:

> When the issue is criminality of a hot-headed speech . . . , or circulation of a few incendiary pamphlets . . . it is not beyond the capacity of the judicial process to gather, comprehend, and weigh the necessary material for decision. . . . [but here] we must appraise imponderables. . . . The judicial process simply is not adequate to a trial of such far-flung issues. The answers given would reflect our own predilections and nothing more.[58]

This, then, is the primary defect of the frustration doctrine: it suggests an analysis which courts are incapable of undertaking.[59] Fortunately, and as has been noted, courts have employed the doctrine in a conclusory fashion, and have avoided the quagmires of penology.[60] The doctrine should,

adequate in disposing of the objections to maintaining that the withdrawal of first amendment rights can be functionally justified by non-administrative considerations. It would seem clear (or at least is assumed by this author) that the withdrawal of these rights could be justified if the legislature had, by law, worked the forfeiture. Surely its judgment in matters of penology must be deemed conclusive. The judiciary cannot be allowed to second guess the legislature in an area where courts are so ill-equipped to make determinations. The difficulty is that while the legislature might have worked the forfeiture, it has not; the executive has. And the executive, like the courts, seemingly has no particular expertise in this area (the areas of the non-administrative penal considerations); nor is the executive a law-making organ. The question is one of presumptions. Where the legislature has acted, there is a presumption of rationality. Where the executive has acted in the absence of legislative authorization (and in an area where the executive's jurisdiction is not exclusive) the reverse presumption seems to attach.

The most satisfactory answer to this problem lies in history. At common law, the forfeiture of rights was worked by operation of law. *See* notes 78–81 *infra* and accompanying text. All presumptions were, by judicial act, turned against the convict: even the right to life itself arose only by act of legislative grace. Ruffin v. Commonwealth, 62 Va. (21 Gratt) 790, 796 (1871). The implication is that, at least at common law, legislative silence meant acquiescence to the common law rule. Thus the executive would have been free to act, not because the legislature conferred authority, but because it did not withdraw that authority.

With these historical antecedents, it is not unreasonable to attach the same presumption of legislative acquiescence to the fact that the legislature has not specifically prohibited the executive from interfering with the "right" of prisoners to use the mails. In this setting, the fact that the judiciary itself is incapable of determining whether such restrictions are beneficial or harmful to the society should be deemed decisive.

[57] Morris states:

> Prison, the basic sanction of criminal justice, must be preserved until its alternatives and its modifications are demonstrably of greater social utility. *In our present ignorance of the effectiveness of our armory of punishments against criminals and of their educative and deterrent effects on the community, experimentation cannot be precipitate* . . . .

Morris, *Prisons in Evolution*, FED. PROBATION, Vol. 29, Dec., 1965, at 21–22 (emphasis added).

[58] Dennis v. United States, 341 U.S. 494, 568, 570 (1951).

[59] But this is not a suggestion that courts abandon all efforts whatever to determine whether the exercise of a right in the prison is proper. To so conclude would amount to justifying a retreat to the obviously unsatisfactory conferral of authority doctrine. Judges can hold the prison officials to account when the deprivation they inflict cannot in any reasonable way be related to any possible penal function. Thus non-recognition of the rights to equal protection and due process of law would seemingly prove intolerable even in prison, since the rights to procedural fairness and even-handed treatment in no way conflict with any possible penal function, and are fundamental to even the most rudimentary sense of justice.

Similarly, judges seem warranted in recognizing the existence of rights under the free exercise clause. Religious activities are socially perceived as duties, especially with regard to convicted criminals. Thus they are not properly revocable under the rubrics of retribution and deterrence, since these penal objectives seem satiated only when privileges are withdrawn. Further, granting religious rights could in no way be conceived of as being inconsistent with the prison's capacity to banish offenders.

[60] The avoidance has not been universal. In Barnett v. Rodgers, 410 F.2d 995 (D.C. Cir. 1969), the prisoner, a Black Muslim, claimed that prison authorities were violating his constitutional rights under the free exercise clause of the first amendment. Specifically, the petitioner alleged that prison authorities had denied his request to be fed at least one pork-free meal daily. At the trial, a Muslim minister stated that the religious prohibition of pork was a "life or death matter." *Id.* at 998.

The trial court, noting that no dietary privileges were afforded the inmate practicioners of other religions in the prison, held that there had been no denial of equal protection and on that ground dismissed the action. *Id.* at 999.

The appellate court remanded on authority of cases dealing with the first amendment rights of unincarcerated citizens. In so doing, it held that prison authorities could not infringe upon the right to free exercise without showing that such freedom endangered a paramount state interest, and without showing that there was no reasonable alternative available to protect that interest.

The frustration of penal objectives doctrine was invoked and turned into an instrument of judicial activism. The court demanded on remand that the government show why the prisoner's rights under the

however, be abandoned, for it is just such an ill advised venture which it invites, and further, to the extent that the courts avoid the temptation thus posed, the doctrine is an utter failure as an explanatory tool.

III. Eighth Amendment Preemption Doctrine

Courts occasionally employ the notion that the judiciary is empowered with authority to challenge the conduct of prison officials only when they have transgressed the eighth amendment's proscription of cruel and unusual punishment.[61] The validity of the notion that judicial scrutiny of the first amendment complaints of prison inmates is preempted by the eighth amendment seems to have been assumed by the court in *Lee v. Tahash*,[62] a case which upheld the validity of restrictions on inmate correspondence.[63] The court stated:

> To illustrate justiciability, unlawful administration can exist where there are aspects of institutional treatment of such character or consequences as to shock general conscience or to be intolerable in fundamental fairness. Such treatment is entitled to be held within the ban of the Eighth Amendment as representing cruel and unusual punishment and so constituting unlawful administration of prison sentence.[64]

The court continued:

> It will not ordinarily be possible to bring the actions of prison officials as to correspondence-privilege into this category. . . .[65]

The doctrine appears to be widely relied upon, though seldom so deliberately and clearly stated as in *Lee*. In *Childs v. Pegelow*,[66] the court stated:

> It clearly appears to be the general rule that, *except in extreme cases*, the courts will not interfere with the conduct of a prison, with the enforcement of its rules and regulations, or its discipline.[67]

And in *Labat v. McKeithen*[68] the court said:

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free exercise clause were necessarily withdrawn by the "necessities underlying the penal system." *Id.* at 1000–01.

The court stated that "however attractive the end to be acheived, the means employed must hoard first amendment values." *Id.* at 1000. The court then supplied the rationale for employing such a test:

> Treatment that degrades the inmate, invades his privacy, and frustrates the ability to choose pursuits through which he can manifest himself and gain self-respect erodes the very foundations upon which he can prepare for a socially useful life. Religion in prison subserves the rehabilitative function by providing an area within which the inmate may reclaim his dignity and reassert his individuality.

Id. at 1002. *See* note 59 *supra*, where an attempt to explain the special status accorded religious expression is made.

[61] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

[62] 352 F.2d 970 (8th Cir. 1965).

[63] In this case, the inmate's demands seem to have been clearly unreasonable.

> [Appellant] insisted that . . . , he had a right to send communications to any public officials throughout the United States that he desired. He sought to send out some such letters in sealed envelopes, in disregard of the censorship provisions. He wanted to mail letters to the highest official levels possible making request both for general information and for a vast abstract miscellany of federal and state statutory sections, chapters, codes, procedural rules, court decisions, etc. Thus, he addressed a letter to one of the senators from California, of which state he claimed to be a native, setting out a page-full of such material that he wanted sent to him. He wanted to address inquiries to the Superintendent of Documents and to others about obtaining various statutory sections. He wanted to address a request to one of the federal district judges for Minnesota for legal advice on what it might be possible for him to try to do to get a state-court conviction in California set aside.
>
> Only a part of his correspondence attempts have been mentioned.

Id. at 973.

[64] *Id.* at 972.

[65] *Id.* The court also stated:

> Whether improper interpretation, erroneous judgment, or variant administration may be involved in the restriction of some particular correspondence is, without more, mere institutional incident and not a matter of judicial concern.

Id. at 972.

[66] 321 F.2d 487 (4th Cir. 1963), *cert. denied*, 376 U.S. 932 (1963).

[67] *Id.* at 489 (emphasis added).

[68] 243 F. Supp. 662 (E.D. La. 1965). In *Labat*, a particularly harsh case on its facts, the plaintiff, a Negro prison inmate under sentence of death, had been placed in solitary confinement to await execution. While in solitary he had been corresponding with a white woman who lived in Sweden. This correspondence was terminated when the plaintiff became the object of public interest because of his numerous appeals in which he had sought to overturn his conviction. In answering the woman's inquiry as to why the correspondence had been terminated, a prison official had written:

> Please be advised that you have been denied correspondence privileges because of existing rules and regulations set forth by the Office of the Warden in keeping with the laws of the State of Louisiana. Under said laws, correspondence is not permitted unless the correspondents are of the same race.

Id. at 664. But the court ignored this evidence of official lawlessness and held that it did "not . . . have the power to supervise or regulate the ordinary control, management and discipline of the inmates of prisons

> If the state has the right to deprive him (the prisoner) of his very life . . . then certainly it has the right, as a part of the ultimate punishment, to deprive him of other privileges along the way to the final reckoning.[69]

The preemption theory does not seem to suffer from the major difficulties seen in the conferral and frustration doctrines. Perhaps most important, it sets forth standards which are intelligible and judicially cognizable—whether the treatment of the prisoner is "shocking to the general conscience" or "intolerable in fundamental fairness"—and therefore meets, rather than avoids, the important issues involved in restricting prisoner correspondence. For the doctrine explicitly holds the first amendment does not apply to prisoners, unless the specific deprivation involved is cruel and unusual.

Since the *Lee* court held that the first amendment does not of its own force apply to convicted criminals, no questions arise as to whether it is proper to balance first amendment "rights" against the deeds of prison administration. For the obvious import of the preemption doctrine is that upon conviction, the criminal's rights are automatically converted into privileges in so far as the conversion does not amount to a cruel and unusual punishment. Similarly, because there is no recognition of a "right" the judiciary avoids the impossible task of determining whether prohibitions of prisoners' correspondence is necessitated by the penal objectives.[70]

Notwithstanding the strengths of the preemption doctrine, however, the approach taken by *Lee* raises a question which the court fails to resolve. Why, upon incarceration, are the prisoner's correspondence rights converted into privileges? This seeming anomaly can be justified on a functional level.

The cruel and unusual punishment clause, according to the implications of the preemption doctrine, guarantees rights which are not subject to revocation by the fact of incarceration, no matter how persuasive the penal objectives. To hold otherwise would reduce the clause to a nullity, for the claims of retribution and deterrence are always persuasive.[71] Further, as Andenaes has pointed out:

> It was never a principle of criminal justice that crime should be prevented at all costs. Ethical and social considerations will always determine which measures are considered "proper." As Ball has expressed it: '[A] penalty may be quite effective as a deterrent, yet undesirable.'[72]

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operated by the states." *Id.* at 666–67. The court stated:

> If the state has the right to deprive him of his very life . . . then certainly it has the right, as a part of the ultimate punishment, to deprive him of other privileges along the way to the final reckoning. . . .

Id. at 666.

The prisoner had been placed in solitary confinement pursuant to a state statute providing:

> Until the time of his execution, the convict shall be kept in solitary . . . and no one shall be allowed access to him without an order of the court. . . .

Id. at 663. The court construed the statute as follows:

> Solitary confinement means complete isolation of the prisoner from all human society . . . . If a person in solitary confinement were to be permitted to communicate in writing . . . he would have access . . . at least in a limited sense. . . .

Id. at 665.

[69] *Id.* at 666.

[70] As the court in *Lee* itself notes, the principle of eighth amendment preemption seems too broad to explain the results reached in many cases involving the complaints of prison inmates. The court stated that unlawful administration of the prison sentence exists when the prison officials trench on rights secured "absolutely" to the inmate. Among these rights, the court states, are those of communicating with the courts, and to the free exercise of religion. Lee v. Tahash, 352 F.2d 970 (8th Cir. 1965).

Although the court did not attempt to do so, the recognition of these "absolute" rights could, it would seem, be reconciled with the general rule of preemption. Denial of the right to communicate with the courts would seemingly amount to a denial of the right of a wrongfully convicted inmate to attack his conviction through habeas corpus. But applicability of the preemption doctrine presupposes lawful conviction. Denial of the right to communicate with the courts might also amount to a denial of the prisoner's right to assert the very right which the preemption doctrine accords to him—the right to attack the administration of his sentence as unlawful under the cruel and unusual punishment clause. Applying the preemption theory in such a case would be self-defeating and illogical.

Recognition of the prisoner's right to free exercise of religion does not seem inconsistent with the preemption doctrine. The doctrine presupposes that the deprivation inflicted can properly be said to be a punishment—that is, it presupposes that the withdrawal of the right is conceptually related to the principles underlying the penal system. There is no such relationship in the case of religion, as has elsewhere been noted. And in fact, whereas free exercise is undoubtedly a right vis-à-vis members of the free society, for the prisoner it would seem to become a positive duty.

[71] It seems reasonable to conclude that as a general rule, though not without exceptions, the general preventive effect of the criminal law increases with the growing severity of penalties. Contemporary dictatorships display with almost frightening clarity the conformity that can be produced by a ruthlessly severe justice.

Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949, 956 (1966).

[72] *Id.* at 957. Andenaes also states:

> [T]he prerequisite of general prevention is that the law be enforced. Experience seems to show that ex-

Thus an absolutist construction seems fully warranted.

Analysis of first amendment rights yields an opposite result. An absolutist construction has never been adopted,[73] because these rights confer freedom in a positive sense, and the exercise of such a freedom always presupposes some form of net social benefit. In order for the judiciary to make the judgment that the exercise of correspondence rights will be socially beneficial (because unrelated to penal objectives), it would of necessity be plunging into the domain of penology. In view of inherent limits on juristic knowledge,[74] courts seem functionally warranted in avoiding such a quagmire by simply refusing to hold that the prisoner has rights under the free speech clause of the first amendment. The Supreme Court may have had just such considerations in mind when it refused to impart a "substantive due process" content to the cruel and unusual punishment clause.[75]

cessively severe penalties may actually reduce the risk of conviction, thereby leading to results contrary to their purpose. When the penalties are not reasonably attuned to the gravity of the violation, the public is less inclined to inform the police, the prosecuting authorities are less disposed to prosecute and juries are less apt to convict.

Id. at 970.

[73] Dennis v. United States, 341 U.S. at 508.

[74] For the dangers involved if the judiciary were to engage in the practice of penology, *see* the quoted statement from Rudolph v. Alabama, 375 U.S. 889 (1963). The dissenters apparently do not consider retribution to be a "rational" penal objective. *See also* Comment, 40 So. CAL. L. REV. *supra* note 12, in which a student writer makes the same judgment. The author also states: "Deterrence is discouragement of resumed criminal activity through exposure to undesireable aspects of prison life." *Id.* at 411. This is not deterrence, but rehabilitation. *See* notes 45–46 *supra*.

See the discussion of *Barnett v. Rodgers*, 410 F.2d 995 (D.C. Cir. 1969), in *supra* note 60. The court takes special note only of rehabilitation. Is it, by judicial fiat, dismissing all other penal objectives because some humanitarians think they are irrational? *See also* Meyer, *supra* note 45. Meyer seems to dismiss all penal objectives except rehabilitation.

Compare Andenaes, *supra* note 52. The author, a Scandanavian criminologist, instead of dismissing traditional penal theories, calls for detailed research to determine its efficacy.

[75] In Rudolph v. Alabama, 375 U.S. 889, 891 (1963), the dissenters suggested that the content of the cruel and unusual punishment clause was to be ascertained by determining necessity:

> Can the permissible aims of punishment (*e.g.*, deterrence, isolation, rehabilitation) be achieved as effectively by punishing rape (for instance) less severely than by death (for instance) (*e.g.* by life imprisonment); if so, does the imposition of the death penalty for rape constitute "unnecessary cruelty?"

Id. This view has not been adopted by the Supreme Court. The reasons supplied in Comment, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635 (1965), seem controlling:

> Indeed, the fundamental difficulty with the "legislative ends" approach suggested by the *Rudolph* dissent is that it involves questions that, because of limitations on juristic knowledge, in many instances do not yield even reasonably clear answers. Moreover, even if penalties could be ranked by degrees of deterrent effect, the social value of any increase in deterrence would presumably have to be weighted against the added hardship inflicted. Are appellate courts to undertake the task of determining (and to make constitutional questions turn on their determination) whether a sentence of ten years for robbery will result in significantly more deterrence than one of five years (and whether the benefits of any added deterrence justify the penalty)—or whether a particular defendant must be isolated from society for only the shorter period of time—or whether work on a prison farm would better effect his rehabilitation than confinement in a penitentiary?

Id. at 643.

IV. SLAVE OF THE STATE DOCTRINE

This doctrine was explicitly stated in *Ruffin v. Commonwealth*[76] in 1871:

> He (the prisoner) has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State.[77]

Perhaps embarassed by its harshness, the courts have not enunciated it since that date.

The slave of the state doctrine differs from the frustration doctrine in two significant respects. First, it does not purport to justify the forfeiture of rights by any "considerations underlying the penal system." Second, and of course related to the first, the forfeiture results not upon imprisonment, but upon the commission of the crime, or, in other words, upon the entry of the judgment of guilt.

These properties suggest that the doctrine is not to be explained upon a functional level, but upon a purely historical one.

At common law, when sentence was pronounced for a serious crime, the offender was, by operation of law, placed in a state of attainder.[78] The princi-

[76] 62 Va. (21 Gratt) 790 (1871).

[77] *Id.* at 796.

[78] Ex Parte Garland, 4 Wall (U.S.) 333, 387 (1866). The Court stated:

> The word attainder is derived . . . from the words *attincta* and *attaintura*, and is defined to be "the stain or corruption of the blood of a criminal capitally condemned; the immediate inseparable consequence of the common law, on the pronouncing the sentence of death."

Id.

pal incidents resulting from the attainder were forfeiture of the criminal's estate,[79] corruption of his blood,[80] and civil death.[81]

Of principle interest here is civil death, for it would seem obvious that the slave of the state doctrine is little more than the reassertion of this common law incident. Civil death may be defined as follows:

> Civilly dead is the state of a person who, although possessing natural life, has lost all his civil rights and as to them is considered dead.[82]

Though it appears that few jurisdictions have statutorily embraced civil death as an incident of the commission of crime, some have.[83] One such statute provides as follows:

> A sentence of imprisonment in a state prison for any term less than life or a sentence of imprisonment in a state prison for an indeterminant term . . . forfeits all the public offices and suspends, during the term of the sentence, all the civil rights, and all private trust, authority, or powers of, or held by, the person sentenced.[84]

Notwithstanding the general paucity of civil death statutes in the United States, it would seem that the vestiges of the common law incident persist in statutes providing for the loss of citizenship upon commission of crime.[85] The similarity of result follows because citizenship is nothing more than "the right to have rights":[86]

> CITIZEN: A member of a free city or jural society, possessing all the rights and privileges which can be enjoyed by any person under its constitution and government. . . .[87]

Thus there would appear to be a necessary equivalence between loss of citizenship and civil death.

Additionally, it is perhaps significant to note that while virtually all jurisdictions have explicitly abolished the common law incidents of forfeiture of estate and corruption of the blood,[88] none, so far as is known, has expressed its desire through statute to eliminate civil death. In view of the general rule that the common law survives unless explicitly repudiated by the legislature, judges would appear to be justified, in the presence of legislative silence, in imposing the incident of civil death upon convicted criminals.[89]

Yet judges have not explicitly invoked the incident since *Ruffin v. Commonwealth* in 1871. But they continue to cling to the historical notion that the convicted criminal is civilly dead and is the slave of the state. The universal application, but patent unsoundness, of the conferral doctrine has already been noted. Invocation of this doctrine seems to suggest the teaching of the slave of the state doctrine: the prisoner comes into court with all the normal presumptions of worth and dignity (the presumptions appertaining to citizenship) turned against him. It seems inescapable that it is not the conferral doctrine which provides the

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[79] Holmes v. King, 216 Ala. 412, 413, 113 So. 274, 275 (1916).

[80] *Id.* The corruption of blood forbade either the receipt or transmission of property by inheritance, and estates were forfeited to the crown.

[81] *Id.*

[82] *Id.*

[83] *E.g.*, CAL. PENAL CODE §2600 (West 1970).

[84] N. Y. CIVIL RIGHTS LAW §79 (McKinney Supp. 1970–71).

[85] *E.g.*, ILL. REV. STAT. ch.108, §49 (1969).

[86] Perez v. Brownell, 356 U.S. 44, 64 (1958) (Warren, C. J., dissenting). Mr. Justice Warren, speaking for the dissenters stated:

> Citizenship *is* man's basic right for it is nothing less than the right to have rights. Remove this priceless possession and there remains a stateless person, disgraced and degraded in the eyes of his countrymen. He has no lawful claim to protection. . . . His very existence is at the sufferance of the state within whose borders he happens to be. . . . This government was not established with power to decree this fate.

Id. at 64–65.

In Trop v. Dulles, 356 U.S. 86 (1958), the dissenters prevailed. The court stated that "citizenship is not subject to the general powers of the National Government." *Id.* at 91. But that position must be considered dicta in view of the conclusion that it was denationalization—turning the person into a stateless person—that was at issue. The court stated that denationalization may not be "inflicted as a punishment, even assuming that citizenship may be divested pursuant to some governmental power." *Id.* at 94. Use of denationalization was deemed to be prohibited as a cruel and unusual punishment.

[87] BLACK'S LAW DICTIONARY 310 (4th ed. 1957).

[88] 18 C.J.S. *Convicts* §3 (1961).

[89] In Holmes v. King, 216 Ala. 412, 414, 113 So. 274, 276 (1916), the court said: "In the absence of statute, the doctrine of 'civil death' has been generally denied in this country." The cited authority was Byers v. Sun Savings Bank, 41 Okla. 728, 139 P. 948 (1914). The *Byers* case, as did the *Holmes* case, involved the right of the prison inmate to deal with his own property. When property rights are involved, the *Holmes* statement that civil death is no longer the rule in the absence of statute may be correct. But the quoted passage is incorrect when political rights are being considered. As the court said in *Byers*,

> When a person is convicted of a felony, he is deprived of his political rights, such as the right of suffrage, the right to hold office and to participate in the affairs of government, and, besides this, he is deprived of his liberty to roam at large, which are forfeited to the state. . . .

41 Okla. at 735, 139 P. at 950. *See generally* Comment, *supra* note 83; Annot., 139 A.L.R. 1308 (1942).

rationale for denying the existence of the convict's rights; rather, it is the convict's lack of rights in the first instance which explains the utilization of that doctrine.

Though it is true that the frustration doctrine might provide a rational foundation for denying recognition of the inmate's first amendment rights, it is significant to note that courts employ the doctrine in a conclusory manner, without ever supplying even the slightest hint of a functional analysis. This suggests that courts are not primarily motivated by functional considerations, but are in fact employing the doctrine as a synonym of slave of the state doctrine.

Similarly, utilization of the preemption doctrine seems to rest on an unexplored presupposition that the eighth amendment preempts applicability of the first. Though the doctrine appears, like the frustration doctrine, to be susceptible to rational justification, it would seem probable that invocation of the preemption doctrine is better explained as being nearly synonymous with the slave of the state doctrine.

Finally, the continued vitality of the slave of the state doctrine would seem, more readily than any of the other doctrines, to explain the refusal of courts to resurrect the holding of *Coffin v. Reichard:*[90]

> A prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law.[91]

For the crucial fact that *Coffin* overlooks is that historically the prison inmate has not been viewed as an ordinary citizen whose liberty is being restrained; rather, he has been viewed as a person who has graphically demonstrated that he is not entitled to the presumptions appertaining to citizenship, of which the "retained rights" presumption, as well as any presumption favoring free speech, are examples. Whether one says that the prisoner is the slave of the state, or is placed in a state of attainder by operation of law, the result is the same—*Coffin*'s holding must be reversed:

> The prisoner retains *none* of the rights of an ordinary citizen, except those expressly, or by necessary implication, *given to him* by law.

This, of course, is nothing more than a restatement of the holding of *Ruffin v. Commonwealth.*

[90] 143 F.2d 443 (6th Cir. 1944), *cert. denied*, 355 U.S. 887 (1945).
[91] *Id.* at 445.

If issue were taken with the idea that it is the slave of the state doctrine which breathes life into the other doctrines sub silentio, at least it is true that it accurately describes the actual status of the prisoner when the other doctrines have been invoked to refuse the inmate relief from the oppression of the prison officials. Thus, whether the slave of the state doctrine be regarded as the underlying explanation for, or merely as the consequence of, judicial intonation of the other doctrines, the result is the same: the inmate is subject to the whim of the prison officials in the enjoyment of nearly all of his privileges. He is in fact the slave of the state.

Little attention has been directed to a critique of this doctrine. Perhaps this is explained by the fact that the doctrine has not been explicitly embraced since 1871. Inattention, however, seems unwarranted not only in view of the doctrine's sub silentio vitality even today, but also in view of the fact that the doctrine appears to be constitutionally sanctioned.

As a matter of pure intent, and wholly independent of any functional considerations, the first amendment cannot be said to extend to prison inmates. On its face, the first amendment is a grant absolute in its terms. But when the Constitution was enacted, the common law rule of civil death was equally absolute. And it must have been well known to the Framers. Thus it must be concluded that prison inmates formed no part of the class of persons which the constitution was intended to protect,

> for if the language, as understood in that day, would embrace them, the conduct [of the Framers] would have been utterly and flagrantly inconsistent with the principles which they asserted; and instead of the sympathy of mankind, to which they so confidently appealed, they would have deserved and received universal rebuke and reprobation.[92]

As was said in *Ruffin,*

> The bill of rights . . . has the same force and authority which it has always had, neither more nor less . . . [it is, and always was] a declaration of general principles to govern a society of freemen, and not of convicted felons. . . .[93]

The notion that the bill of rights was not generally intended to protect prisoners is buttressed by the language of the thirteenth amendment:

[92] Dred Scott v. Sandford, 60 U.S. 393, 410 (1856).
[93] Ruffin v. Commonwealth, 62 Va. (21 Gratt) 790, 794, 796 (1871).

> Neither slavery nor involuntary servitude, *except as a punishment for crime* whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.[94]

Thus slavery is constitutionally authorized as a form of punishment. It is equivalent to loss of citizenship or civil death, and necessarily comprehends non-applicability of the Bill of Rights where prison inmates are concerned.[95]

[94] U.S. CONST. amend. XIII.

[95] The scope of the deprivation which the thirteenth amendment authorizes hangs on the construction to be given the terms "slavery and involuntary servitude." In the Civil Rights Cases, 109 U.S. 3 (1883), the Court construed these words when it stated the purpose of the Civil Rights Act of 1866:

> Congress [assumed] . . . to declare and vindicate those fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery.

Id. at 22. If this construction is adopted, the scope of the deprivation authorized by the thirteenth amendment for prisoners includes all those "fundamental rights which constitute the essential distinction between freedom and slavery."

The rights protected by the first amendment fall squarely within that category. They constitute the very essence of freedom. *See* Emerson, *Toward A General Theory of the First Amendment*, 72 YALE L. J. 877 (1963). The author states that freedom of expression is indispensible to the attainment of truth, and enables each member of society to participate in social decision making.

Slavery as punishment for crime—which the thirteenth amendment authorizes—seems necessarily to exclude the existence of rights inextricably associated with the presumptive dignity and worth of the individual citizen. The concept of slavery is the antithesis of the notion that man is noble. Thus a recognition that "suppression of . . . expression is an affront to the dignity of man, a negation of man's essential nature" (*Id.* at 881), means that the denial of first amendment freedoms is again to be conceived of as part and parcel of the idea of slavery.

Some lower court federal cases have adopted a narrower construction of the terms "slavery and involuntary servitude." In Parks v. Ciccone, 281 F. Supp. 805 (W.D. Mo. 1968), the petitioner, awaiting trial for an alleged Dyer Act violation, charged violation of the thirteenth amendment in that he was being treated as if he were a convicted inmate. Specifically, he alleged, *inter alia*, suppression of first amendment rights. The court held there was no violation of the thirteenth amendment in that the inmate was not required to perform labor without compensation. *Id.* at 814. The court also noted, without specification, that unconvicted inmates had more privileges than convicted inmates. This case seems to reject the broad construction of the thirteenth amendment that the Civil Rights Cases suggest. *See also* Tyler v. Harris, 226 F. Supp. 852 (W.D. Mo. 1964); Johnston v. Ciccone, 260 F. Supp. 553 (W.D. Mo. 1966); Jobson v. Henne, 355 F.2d 129 (2d Cir. 1966).

CONCLUSION

The origins of the slave of the state doctrine lie deep in history. The earliest precursor of this doctrine appears to be the ancient penalty of outlawry which existed at an early stage of Roman history. The penalty resulted in the ousting of the offender from society and the deprivation of all rights. Damaska tells us:

> The outlaw's children were considered as orphans, and his wife a widow. Besides losing his family rights, he also lost all his possessions and even his right to life [if we can use that expression], for anybody could kill him with impunity.[96]

In ancient Greece, a more humane approach, "infamy", was adopted.

> It entailed the loss of all rights which enabled a citizen to influence public affairs, such as the right to attend assemblies, vote, make speeches, and hold public offices.[97]

Modern societies, almost universally, have abandoned the harshness of outlawry in favor of the alternative of infamy.[98] Thus there is universal judgment that the prison inmate be excluded from the right to exercise political rights—those rights which enable him to influence the life of the community he has offended. More specifically, the prison inmate typically suffers the following deprivations: loss of citizenship, loss of the right to vote, loss of the right to be elected to public office; disqualifications from positions of influence, prohibitions on public appearance, and disqualification from serving in the armed services.[99]

Thus when confronted with inmate complaints that prison officials have infringed upon rights guaranteed by the first amendment, the courts have been asked to repudiate the consistent judgement of history and of the contemporary world societies and hold that prisoners have the right to exercise an influence upon the public affiairs of the community. For if the first amendment guarantees anything, it (in conjunction with the right to vote) guarantees the right of participation in social decision-making.[100]

[96] Damaska, *Adverse Legal Consequences of Conviction and Their Removal: A Comparative Study*, 59 J. CRIM. L. C. & P. S. 347, 350 (1968).

[97] *Id.* at 351.

[98] *Id.* at 356–60.

[99] *Id.*

[100] The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. . . .

Roth v. United States, 354 U.S. 476, 484 (1957).

The universality of this judgment, then, is one factor which helps explain the reluctance of courts to hold that prisoners may exercise rights which they claim arise under the free speech clause of the first amendment. Another, perhaps, may be the feeling that the banishment of the offender is just. The notion that the prisoner's duty is to maintain his silence as a manifestation of repentence in the face of his previous immorality has a certain immediate persuasiveness. In contractual terms, the idea that the state is entitled as a matter of equity to rescind the social contract following the offender's breach is perhaps not unappealing.

On the functional level, judicial reluctance to change the status quo is enhanced by the inherent limitations on juristic knowledge, for judges are incapable of dealing with the many and complex questions which entry into the domain of penology would necessarily require them to answer. In an area where there appears to be so much uncertainty—even for criminologists[101]—the possibility that judicial activism would result in diminution of the prison's capacity to secure an orderly society is great indeed. And the result of error well might mean social catastrophe.

There can be no doubt that if the courts adhere to their present course of judicial restraint, they will be sanctioning results which seem harsh and inhuman. They will be holding that the pronouncement of excommunication which introduced this comment does not present justiciable issues.

It is in the very harshness of this position that the most rational blueprint for change is to be found. Thus if denial of the prisoner's right to communicate with the outside society today seems harsh and inhuman, it may, with the passage of time, be held so intolerable in fundamental fairness, and so shocking to the general conscience as to constitute cruel and unusual punishment.

In themselves, restrictions on prisoner correspondence may not seem capable of rising to the level of gross and shocking indignities; but such restrictions must be viewed in a context of the nearly absolute isolation the modern penal institution imposes. In such a context the crucial connection between the inmate's identity as a human being and his need to manifest himself through the fundamental act of speech may be recognized. As Sykes has observed,

> In a very fundamental sense, a man perpetually locked by himself in a cage is no longer a man at all; rather he is a semi-human object, an organism with a number. The identity of the individual, both to himself and to others, is largely compounded of the web of symbolic communications by which he is linked to the external world; and as Kingsley Davis has pointed out, ". . . the structure of the human personality is so much a product of social interaction that when this interaction ceases, it tends to decay." [102]

[101] *See generally* Andenaes, *supra* note 52.

[102] SYKES, *supra* note 17, at 6.

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RECENT TRENDS IN THE CRIMINAL LAW

CRUEL AND UNUSUAL PUNISHMENT

In *People v. Tenorio*, 3Cal.3d 89, 89 Cal. Rptr. 249, 473 P.2d 993, (1970), the California Supreme Court overruled its prior holding in *People v. Sidener*, 58 Cal.2d 645, 25 Cal. Rptr. 697, 375 P.2d 641 (1962), and held that a trial judge has the discretionary power to sentence violators of the Health and Safety Code of California as first-time offenders irrespective of similar prior narcotics convictions. In so holding, the Court determined that §11718 of the State Health and Safety Code, which placed sentence discretion exclusively with the prosecutor, invaded the judicial province, and thereby violated the state constitutional provision for a separation of powers.

The companion case to *Tenorio*, *People v. Clark*, 3Cal.3d 97, 89 Cal. Rptr. 253, 473 P.2d 997 (1970), raised the additional question of whether an automatic and supplementary sentence for recidivism was cruel and unusual punishment. The judge in the trial court had deemed "brutal" the state's statutory requirement of a mandatory fifteen year minimum sentence without possibility of probation or parole in cases where there were two or more prior convictions for narcotics possession. The California Supreme Court in *Clark* proceeded to hear argument on the question of the possible 8th amendment violation, but then decided *Tenorio*, and did not feel compelled to reach the constitutional issue. The court nonetheless expressed a willingness to reconsider the issue in appropriate circumstances.

INDIGENT IMPRISONMENT

In *Williams* v. *Illinois*, 399 U.S. 235 (1970), the Supreme Court held that where the total time of an indigent's imprisonment exceeded the maximum period fixed by statute (that is, where the fine which accompanied the jail sentence could be "worked off" by further imprisonment at a prescribed rate per day), an invidious discrimination resulted based upon a defendant's ability to pay his fine. Thus, under the rubric of the fourteenth amendment equal protection guarantee, the Court invalidated an Illinois law which permitted the imprisonment of an indigent criminal defendant "in default of payment of a fine beyond the maximum authorized by the statute regulating the substantive offense," 399 U.S. at 241. The Court did not feel that its holding would upset any compelling state interest in view of the reasonable alternatives to indigent imprisonment as a means to meet fines and costs. The California Supreme Court in *In re Antazo*, 3Cal3d 100, 89Cal. Rptr. 255, 473 P.2d 999 (1970) has extended the application of the *Williams* decision. The indigent defendant in that case was sentenced to probation, but his freedom was conditioned upon payment of costs and fines, nonpayment of which subjected him to "work-off" in jail at a prescribed rate per day. Following the reasoning of *Williams* the court held that imprisonment of an indigent in those circumstances constituted a violation of equal protection of the law. The reasoning and analysis of *Williams* and *Antazo* laid the foundation for prohibition of incarceration for the involuntary nonpayment of a fine in *Tate v. Short* __U.S.__ (3/2/71).

APPLICATION OF COLEMAN V. ALABAMA

In *Coleman v. Alabama*, 399 U.S. 1 (1970), the Supreme Court applied the test of *Powell v. Alabama*, 287 U.S. 451 (1932) and *United States v. Wade*, 388 U.S. 218 (1967) to determine whether the preliminary hearing in Alabama was a "critical stage" in the State criminal process. The *Powell* and *Wade* test required the Court to examine "whether potential prejudice to defendant's rights inhere[d] in the . . . confrontation", and whether the presence of counsel would help to avoid that prejudice in the preliminary hearing. The Court in *Coleman* held that the preliminary hearing was a "critical stage" in the Alabama criminal process and that the accused was entitled to have counsel present.[1]

[1] The court in *Coleman* found the preliminary hearing to be a critical stage because:

> First, the lawyer's skilled examination and cross-examination of the witness may expose fatal weaknesses in the state's case that may lead the magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the state's witnesses at the trial. Third, trained counsel can more effectively discover the case the state has against his client and make possible the preparation of a proper defense to meet the case at trial. Fourth,

The doctrine of *Coleman* was considered in five recent cases.[2] Each court compared the preliminary hearing in the Alabama criminal process with the preliminary hearing in its own jurisdiction and found the hearings procedurally similar. Each court reversed former holdings to the effect that a preliminary hearing was not a "critical stage" of the criminal process. Therefore, the accused in each of these jurisdictions now has a constitutional right to counsel at the preliminary hearing stage.

However, in applying the retroactivity test of *Stovall v. Denno*, 388 U.S. 293 (1967),[3] to the constitutional requirements of *Coleman* in each case, the courts held that *Coleman* would be applied prospectively.

Search And Seizure

In *Lockridge v. Sup. Ct. of L.A.*, 89Cal. Rptr. 731, 3Cal.3d 166, 474 P.2d 683 (1970), a police search of the defendants pursuant to a legally insufficient search warrant, produced a gun which through subsequent investigation linked them with a two year old robbery. The search itself was part of an investigation of unrelated crimes. The police then contacted witnesses to the two year old robbery who identified the defendants and testified at their trial. The *Lockridge* court faced the question whether the identification of the defendants by those witnesses to the robbery and their subsequent testimony at trial should be excluded as fruits of the unlawful search and seizure. The California Supreme Court held that such evidence should not be excluded because the witnesses' testimony had been acquired independent of the illegal search. Furthermore, suppression of the gun as the product of an illegal search, it was said, alone adequately served the purpose of the exclusionary rule in deterring unlawful police conduct. However, in *United States* v. *Edmons*, 39 U.S.L.W. 2251 (2d Cir. Oct. 5, 1970), the court excluded identification evidence and dismissed the indictment of four defendants who were taken into custody by the police pursuant to an arrest unrelated to the identification. Judge Friendly, writing for the majority, contended that "flagrantly illegal arrests made for the precise purpose of securing identifications that would not otherwise have been obtained" could be discouraged only if such identifications were subject to the exclusionary rule.

In *People v. Flowers*, 23Mich.App.523, 179 N.W.2d 56, (1970), the court ordered a new trial and granted defendant's motion to suppress evidence obtained by searching the accused's room without a search warrant. Although the defendant's father gave valid consent for the search of his teenage son's room, the court held that, because the son is the real defendant to the action, only he can waive his own fourth amendment right to be free from unreasonable search and seizure. The court reasoned that "a person who has no personal and punishable involvement in the crime suspected or charged" cannot waive another's right not to be subject to unreasonable search. Therefore, in this case of first impression, the Michigan court has carved out a personal fourth amendment right for the juvenile which cannot be waived by another person who has no personal and punishable involvement in the minor's crime.

Right To Free Transcript

In *Magezia v. Municipal Court of City and County of San Francisco*, 3Cal.3d54, 473 P.2d 353, 88 Cal. Rptr.713 (1970), the Supreme Court of California held that the United States Supreme Court did not require a free trial transcript to indigents in all cases, and reasserted that a statement of facts provides an adequate basis from which to bring an appeal. In *Magezia*, the majority found that the petitioner had not attempted to obtain a settled statement of facts, nor had he shown by a "reasonably particularized presentation" why such a statement would have failed to inform the reviewing court of the alleged grounds for petitioner's appeal. The dissent argued that the burden of demonstrating the adequacy of anything other than a transcript as a basis for preparing an appeal should rest with the state, particularly since in the instant case, the defendant claimed that he could not reconstruct crucial portions of the trial proceedings from memory.

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counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail.
Coleman v. Alabama, 399 U.S. 1, 9 (1970).

[2] Vance v. North Carolina, 432 F.2d 985 (4th Cir. 1970). Konvalin v. Sigler, 431 F.2d 1156 (8th Cir. 1970); People v. Adams, 46 Ill.2d 198, 263 N.E.2d 490 (1970); Billings v. State, 267 A.2d 808, 10 Md.App. 31 (1970); Commonwealth v. Brown, 214 Pa. Super. 709, 269 A.2d 383 (1970).

[3] The *Stovall* test considered,
a) the purpose to be served by the new standards; b) the extent of reliance by law enforcement authorities on the old standards; c) the effect on the administration of justice of a retroactive application of the standard. 388 U.S. at 297.

MIRANDA PROBLEMS

In *United States v. Jackson*, 429 F.2d 1368, (7th Cir. 1970), the court indicated that seventh circuit courts "... may reconsider the application of the harmless error doctrine" to *Miranda* warning cases. It held that in the *Jackson* case, although the trial court erred in admitting statements which defendant gave to police without receiving a prior *Miranda* warning, the trial court's error was harmless beyond a reasonable doubt because there existed uncontradicted evidence of defendant's guilt independent of his statements to police.

The seventh circuit had previously applied the harmless error doctrine in three similiar cases, *United States v. Stutt* 415 F.2d 1305 (7th Cir.1969); *United States v. Wick*, 416 F.2d 61, (7th Cir. 1969); *United States v. Frank*, 409 F.2d 958 (7th Cir. 1969). The *Jackson* court noted that cases involving harmless error were "swarming around the seventh circuit like bees," and warned that continued disregard of the *Miranda* decision by law enforcement officials may require the court to reconsider the application of the harmless error doctrine to these cases.

The seventh circuit in *United States v. Dickerson*, 413 F.2d 1111 (7th Cir. 1969), held that *Miranda* warnings must be given to a taxpayer by either a revenue or special agent at first contact with the suspect after his case has been transferred to the Intelligence Division of the Internal Revenue Service. Recently, the first and third circuits rejected the seventh circuit's holding in *Dickerson*. The first circuit, in *United States v. Mitchell*, 432F.2d354, 8 Crim.L.Rptr. 2077 (1st Cir. Oct. 7, 1970), found no plain error in admitting incriminating statements given by the defendant to the IRS special agents without a *Miranda* warning. The third circuit, in *Jaskiewicz v. United States*, 433F.2d415, 8 Crim.L.Rptr. 2021 (3rd Cir. Sept. 28, 1970), specifically rejected the reasoning of *Dickerson*, holding that the sole test for the admissibility of a taxpayer's statements to agents of the Treasury Department is the voluntariness of such statements. The *Jaskiewicz* court relied on its pre-*Miranda* rule, and rejected the reasoning that *Miranda* rights arise when the taxpayer becomes the focus of a potential indictment by the Intelligence Division of the IRS. Instead, the court declared that *Miranda* rights arise only when the government has restrained the taxpayer's freedom of action in some meaningful way during his questioning. The court felt that meaningful restraint did not include the psychological effect which questioning may have on a taxpayer who is made aware of the possibility of criminal sanction under the Internal Revenue Code.

Addressing itself to the question of who has standing to object to the admission of evidence obtained in violation of *Miranda*, the Supreme Court of Alaska in *Dimmick v. State*, 473 P.2d 616 (1970), held that a robbery defendant cannot defeat the admission of an accomplice's incriminating testimony at trial by asserting that the accomplice's original confession was obtained in violation of *Miranda*. The police in *Dimmick* admitted to securing the accomplice's confession after disregarding his request for legal counsel, and further conceded that their sole purpose in eliciting the accomplice's confession was for its value in convicting the defendant. Relying on an interpretation of the constitutional roots of the *Miranda* decision, *i.e.* the fifth amendment self-incrimination clause, and opinions in *People v. Varnum*, 66 Cal.2d 808, 59 Cal.Rptr. 108, 427 P.2d 772 (1967) and *People v. Denham*, 41 Ill.2d 1, 241 N.E.2d 415, (1968), an equally divided court in *Dimmick* affirmed the conviction, noting that the *Miranda* protections adhere tc each individual personally, and therefore provoke judicial censure only when personally violated.