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COMMENTS

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PLEA BARGAINING MISHAPS—THE POSSIBILITY OF COLLATERALLY ATTACKING THE RESULTANT PLEA OF GUILTY

This comment is aimed at the practitioner. It is a survey of the law dealing with the collateral attack of guilty pleas and is directed to those who may encounter this problem in their work. Numerous law review articles, comments and case notes have been devoted to the plea bargaining process and to federal or state collateral attack procedures. Therefore background in these areas will be minimal, hopefully serving as a reference source to other materials dealing with these subjects in more detail. The main focus will be the problem confronted by the defense attorney whose client is in jail, victim of a plea bargaining mishap.[1]

It has become *de rigeur* for articles dealing with guilty pleas to mention that 90 per cent of all felony convictions in the United States result from guilty pleas.[2] Even without knowing the exact figure as to what percentage of these are bargained for, it is evident that the defense attorney will have ample opportunity to come into contact with the defendant who entered into a plea agreement, or thought he did, only to find that the bargain was not kept. In what situations will the attorney be able to help this client? What will he have to prove? What tenor should his argument take? These are the questions this article seeks to answer.[3]

For the purposes of the following discussion four basic problems have been identified, problems inherent in most plea bargaining situations.[4] When the defendant does not receive the benefit of his bargain, he has fallen victim to a plea bargaining mishap. Mishaps may result from the promises of the prosecution, from the promises of police or investigators, from the defendant's false belief in the existence of a bargain or from judicial participation in the plea bargaining process. Whether the mishap arising from one of these instances can be the grounds for post-conviction relief will be the paramount question in the discussion to follow.[5]

This comment is intended to present the issues involved in this area, and not to serve as an encyclopedia with full jurisdictional cross references. Rather, the emphasis will be placed on federal law with an in-depth analysis of one state, Illinois, in order to illustrate the various bases of collateral attack within one jurisdiction.

GUILTY PLEAS AND THE PLEA BARGAINING PROCESS

A plea agreement most easily can be thought of as a contract. Normally it takes the form of the prosecutor's promise exchanged for a plea of

[1] This article is purposely slanted towards a defense posture. For an article dealing with the role of the prosecutor after a plea bargaining breakdown, see Bishop, *Broken Bargains*, 50 J. URBAN L. 231 (1972).

[2] D. NEWMAN, CONVICTION, THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 3 (1966) [hereinafter cited as NEWMAN].

[3] The line of cases decided on the basis of whether a guilty plea was "voluntary and knowing" will not be examined as they have been dealt with extensively in commentaries. Further, they speak to the defendant's attitude towards the plea, whereas the concern here is with the undesirable result of some plea bargaining agreements. *See, e.g.*, Brady v. United States, 397 U.S. 742 (1970); McMann v. Richardson, 397 U.S. 759 (1970); Parker v. North Carolina, 397 U.S. 790 (1970). This comment will not deal with the settled area of judicial admonishment before acceptance of a guilty plea. *See* Boykin v. Alabama, 395 U.S. 238 (1969).

For a discussion of whether plea bargaining is undesirable or *per se* unconstitutional, see North Carolina v. Alford, 400 U.S. 25 (1970).

[4] Professor Moore lists six problem areas which are all subsumed in the divisions used in this comment. 8 J. MOORE, FEDERAL PRACTICE ¶ 11.05(4) at 11-101 to 11-105 (4th ed. 1966).

[5] For discussions of the voluntariness or accuracy of pleas, see Davis, *The Guilty Plea Process: Exploring the Issues of Voluntariness and Accuracy*, 6 VAL. U. L. REV. 111 (1972); Comment, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865 (1964) [hereinafter cited as *Compromises by Prosecutors*].

guilty by the defendant. The prosecutor's consideration can be a promise to make a sentence recommendation or to dismiss related charges. The defendant bargains with his constitutional rights and his freedom. It has been held that a plea of guilty is a simultaneous waiver of the defendant's privilege against compulsory self-incrimination, of the defendant's right to a trial by jury and of the defendant's right to confront his accusers.[6]

Although the process differs from jurisdiction to jurisdiction,[7] certain elements remain the same.[8] Bargaining usually begins with informal discussions between the defense attorney and the prosecutor. At some point an agreement is reached. The defense attorney takes the bargain back to the defendant for his approval. The defendant pleads guilty and should receive what he bargained for. If he does not, he is the victim of a plea bargaining mishap, and his recourse is to seek post-conviction relief.

Avenues of Collateral Attack

Collateral attack for plea bargaining mishaps can be obtained through direct federal relief, through state post-conviction proceedings or through secondary federal action after exhausting all state remedies. The procedure for attacking a conviction based on a broken promise is similar to the attack of any constitutional infirmity in a criminal conviction. However, due to the peculiar nature of the defendant's consideration, relief from a bargained guilty plea has been given a special status. Thus Judge Friendly, who would have any collateral petition be accompanied by a colorable protestation of innocence,[9] would exempt from this rule the attack on a bargained-for guilty plea.[10]

A collateral petition, then, is not concerned with the facts of the indictment. Rather, the facts of the contract and the breach of that agreement must be emphasized.[11]

Before continuing with the discussion of the various avenues of collateral attack, it should be mentioned that one of the most important actions the defense attorney can take is not at all collateral. This is the motion to withdraw the plea of guilty.[12] This may be done most effectively prior to sentencing if the attorney is involved at that stage and if it has become clear that the bargain is going to fail. It also may be done after sentencing. In either case, granting the motion is within the sound discretion of the trial judge.[13] The American Bar Association has recommended that failure of a plea agreement be considered grounds for withdrawal of the plea,[14] and cases have held that when there was no motion to withdraw the plea, the defense is estopped from later relief.[15]

If a motion to withdraw has been made and denied, or if the attorney has entered the arena too late to use that weapon, a petition for collateral relief may be filed. There are three avenues of collateral attack: direct federal relief under 28 U.S.C. § 2255, direct state relief and secondary federal relief under 28 U.S.C. § 2254. Which one to use is a function of the court in which the conviction was obtained. Direct federal relief is available from a conviction in a federal district court. If the conviction is entered in a state court, relief may be sought under that state's collateral procedures. Where all state remedies have been exhausted, relief is available under 28 U.S.C. § 2254.

If the defendant entered his plea in a federal court, he may attack it by using 28 U.S.C. § 2255. This codified version of earlier case law allows relief for violations of constitutional rights in

[6] McCarthy v. United States, 394 U.S. 459 (1969).

[7] For a unique look at the plea bargaining process in one state, by means of an extensive survey of state prosecutors, see Klonoski, Mitchel & Gallagher, *Plea Bargaining in Oregon: An Exploratory Study*, 50 Ore. L. Rev. 114 (1971).

[8] *See generally* Newman, *supra* note 2; Bishop, *Rights and Responsibilities of the Defendant Pleading Guilty*, 49 J. Urban L. 1 (1971); Davis, *The Guilty Plea Process: Exploring the Issues of Voluntariness and Accuracy*, 6 Val. U. L. Rev. 111 (1972); Gentile, *Fair Bargains and Accurate Pleas*, 49 B. U. L. Rev. 514 (1969); Thomas, *Plea Bargaining and the Turner Case*, 1970 Crim. L. R. 559 (1970); White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. Pa. L. Rev. 439 (1971); *Compromises by Prosecutors, supra* note 5; Comment, *Plea Bargaining—Justice Off the Record*, 9 Washburn L.J. 430 (1970).

[9] Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 160 (1970) [hereinafter cited as Friendly].

[10] *Id.* at 152. *See also* People v. Gustavson, 131 Ill. App. 2d 887, 269 N.E.2d 517 (1971).

[11] In England, there is no collateral attack procedure available in plea bargaining mishap situations, and the defendant must rely on the extensive use of executive clemency. *See* Friendly, *supra* note 9, at 151 & n.35.

[12] For a discussion on withdrawals of pleas see Commonwealth v. Forbes, 450 Pa. 185, 299 A.2d 268 (1973).

[13] Fed. R. Crim. P. 32, 28 U.S.C. § 32 (1973). *See also* United States *ex rel.* Culbreath v. Rundle, 466 F.2d 730 (3d Cir. 1972).

[14] American Bar Association, Project on Minimum Standards for Criminal Justice, Standards Relating to Pleas of Guilty, Approved Draft, 53 (1968) [hereinafter cited as Minimum Standards]. *See also* Minimum Standards 57.

[15] Lambur v. Slayton, 356 F. Supp. 747, 751 (E.D. Va. 1973); People v. Hancasky, 410 Ill. 148, 101 N.E.2d 575 (1951).

Failing to withdraw a guilty plea may hurt the credibility of the defendant's claim, as well.

sentencing procedure, for convictions without proper jurisdiction, for illegal sentences and for problems otherwise subject to collateral attack.[16] Plea bargaining mishaps generally are treated as a violation of constitutional rights for the purpose of collateral attack, although there is some doubt as to whether they do reach constitutional dimension.[17]

As in all collateral proceedings of this nature, the petition under § 2255 is sent to the court from which the conviction was received. The hearing judge will either deny the petition outright, make a decision on the merits based upon the petition's allegations and the record or order an evidentiary hearing. Because the vast majority of cases are stopped at the petition stage[18] and because any summary decision on the merits is not likely to be favorable to the petitioner,[19] the defense attorney should request an evidentiary hearing. Once the hearing is granted the attorney must show that a mishap has occurred and that relief can be provided.

If the defendant has entered his plea in a state court, he must seek relief under that state's post-conviction provisions.[20] In 1963, it was held that states must provide some opportunity for post-conviction relief.[21] The Uniform Post-Conviction Procedure Act[22] has not yet been adopted by a majority of the states,[23] so relief varies from jurisdiction to jurisdiction.[24] Since a state by state procedural study is beyond the scope of this comment,[25] the Illinois procedures for collateral attack will be used to illustrate how state collateral attack can be used in plea bargaining mishap cases.

The Illinois Post-Conviction Hearing Act[26] has been cited as a model act, giving maximum relief with maximum efficiency.[27] It provides relief for violations of either the Illinois or the Federal Constitution. Upon submission of a petition verified by affidavits to the court of conviction anyone imprisoned in an Illinois prison may be granted relief. The petitioner has twenty years from the occurrence complained of in which to file.[28] As with a petition to any court, the post-conviction petition must be clear and factual,[29] and will be denied if found incomplete or conclusory.[30] The prisoner must attach any affidavits, records or depositions pertinent to his allegations or explain their absence in the petition.[31] The prisoner may submit his

[16] 28 U.S.C. § 2255 (1970). For a discussion of the history and use of § 2255 see Uelman, *Post-Conviction Relief for Federal Prisoners, A Survey and a Suggestion Under 28 U.S.C. § 2255*, 69 W. VA. L. REV. 277 (1967). In 1969 federal prisoners filed 2,817 such petitions, a 50 per cent increase over 1964. In the year 1969, petitions for mistreatment in prisons, petitions under 28 U.S.C. § 2255 and petitions under 28 U.S.C. § 2254, all combined, accounted for one-sixth of all civil filings, larger than any other single action. Friendly, *supra* note 9, at 144.

[17] *See* Santobello v. New York, 404 U.S. 257 (1971), and the discussion of that case in the text accompanying note.

[18] Federal collateral remedies yield no result in 90 per cent of the cases, a totally favorable result in only 2 per cent. Friendly, *supra* note 9, at 148 n.25.

[19] *See generally* Friendly.

[20] Some states, prior to enacting post-conviction acts, treated the mishap problem on appeal. Some states still maintain this practice. The grounds for successful collateral attack do not differ from the grounds for successful appeal, but the procedure may vary from state to state.

[21] Sanders v. United States, 373 U.S. 1 (1963); Fay v. Noia, 372 U.S. 391 (1963); Townsend v. Sain, 372 U.S. 293 (1963).

For a discussion of these cases and their impact, see *State Post-Conviction Remedies and Federal Habeas Corpus*, 12 W. & M.L. REV. 149, 157, 176–179 (1970) [hereinafter cited as *State Remedies*]; Comment, *State Post-Conviction Remedies and Federal Habeas Corpus*, 40 N.Y.U.L. REV. 154 (1965).

[22] For a discussion of the Uniform Post-Conviction Procedure Act, see *State Remedies, supra* note 21, at 179–183.

[23] *Id.*

[24] This difference may often be crucial, as in different statutes of limitation for bringing the post-conviction action: Wisconsin has a one year limitation, Wyoming has a five year limitation and Illinois has a twenty year limitation.

[25] For a state-by-state summary see *State Remedies, supra* note 21, at 170, 183–233.

For other articles concerning state post-conviction relief see Anderson, *Post-Conviction Relief in Missouri—Five Years Under Amended Rule 27.26*, 38 MO. L. REV. 1 (1973); Fairchild, *Post-Conviction Rights and Remedies in Wisconsin*, 1965 WIS. L. REV. 52 (1965); Herman, *Symposium on Post-Conviction Remedies*, 27 OHIO S.L.J. 237 (1966) (Ohio); Leighton, *Post-Conviction Remedies in Illinois Criminal Procedure*, 1966 U. ILL. L. F. 540 (1966); Raper, *Post Conviction Remedies*, 19 WYO. L. J. 213 (1965) (Wyoming); Young, *Post Conviction Belief in Pennsylvania*, 74 DICK L. REV. 703 (1970); Comment, *Post-Conviction Relief in Arkansas*, 24 ARK. L. REV. 57 (1970); Comment, *Post Conviction Remedy Procedure in Indiana*, 48 NOTRE DAME LAW. 435 (1972); Comment, *Operation of the Ohio Post Conviction Remedy Act*, 29 OHIO S.L.J. 727 (1968); Comment, *Plea-Bargaining—Justice Off the Record*, 9 WASHBURN L.J. 430 (1970) (Kansas).

[26] ILL. REV. STAT., ch. 38, § 122-1 *et seq.* (1971).

[27] Fairchild, *Post-Conviction Rights and Remedies in Wisconsin*, 1965 WIS. L. REV. 52, 65 (1965).

[28] This was amended from the original five years in 1965 and has been held to be retroactive in effect. People v. Covington, 45 Ill. 2d 105, 257 N.E.2d 106 (1970).

[29] People v. Wall, 7 Ill. App. 3d 579, 288 N.E.2d 123 (1972).

[30] People v. Pierce, 48 Ill. 2d 48, 268 N.E.2d 273 (1971).

[31] People v. Washington, 38 Ill. 2d 446, 232 N.E.2d 738 (1967) (petitioner explained in petition that he was too poor to afford affidavits). *Cf.* People v. Williams. 47

petition *pro se*, stating that he is indigent and wishes a lawyer to be appointed. Appointed counsel may then amend the petition. As in the § 2255 review, the court may deny the petition, make a finding on the merits based on the record and the allegations, or grant an evidentiary hearing. As in the case of direct federal review, the court must find that the record shows conclusively that the petitioner is entitled to no relief before denying the petition.[32] The Illinois act also provides for appellate review of a post-conviction decision.

If the defendant has sought state relief but, after exhausting all available state remedies, has failed, he may avail himself of a third avenue of collateral attack. This is the codified version of the federal writ of habeas corpus under 28 U.S.C. § 2254,[33] which is an increasingly popular remedy,[34] although not very fruitful.[35] To quality for § 2254 relief, the petitioner must show that (1) the merits of the factual dispute were not resolved at the state level, (2) any state resolution was not fairly supported by the facts, taken as a whole, (3) the state fact-finding was not adequate to give the case a full and fair hearing, (4) material facts were not adequately developed at the state level, or (5) there was no representation by counsel at the state level.[36]

Credibility and Formality Considerations

Two general precautions must precede any discussion of the various mishaps and the possibility of collaterally attacking them. First, to be granted an evidentiary hearing and, more importantly, to obtain post-conviction relief, the defendant's allegations must be credible. Second, the defense attorney must be aware of the formalities of the plea bargaining process in some states, specifically the defendant's stating for the record that his plea is not the result of any threat or promise, in order to successfully meet any argument that the defendant is bound by his recorded testimony.

A defendant may have a valid claim, but if it strikes the court as incredible, he is likely to lose.[37] Credibility may be damaged by many different causes.[38] There may be "facts in the record relating to the issue of promises which fairly contradict the defendant's claim." [39] If it is shown that a witness has refused to give a supporting affidavit[40] or if, in the case where a new attorney has been retained post-conviction, the defendant's trial attorney submits an affidavit refuting subsequent allegations,[41] the credibility of the defendant's case may be seriously damaged. If the defendant failed to complain of the broken promise at any relevant time in the past, whether at sentencing or by failing to move to withdraw the plea, the court may not believe the present claim.[42] Credibility is inversely proportionate to the amount of time between conviction and petitioning for collateral relief.[43] It is important for the lawyer to examine his case in order to compensate for any factors which might hurt his client's credibility. This may require foreseeing any credibility gaps which could raise questions in a judge's mind and presenting an explanation before they are challenged, or it may require the lawyer to shape the tenor of the petition's allegations to emphasize the peculiarity of the instant case, forestalling the judge's generalization that the particular situation is like all of the rest—incredible. Although it is not an element of proof in a plea bargaining mishap review, the innocence of the defendant is likely to be severely questioned by the judge.[44] Any argument

Ill. 2d 1, 264 N.E.2d 697 (1970) (not sufficient for state to claim no affidavits where state does not adequately refute allegations of petition); People v. Bennett, 9 Ill. App. 3d 332, 292 N.E.2d 159 (1972) (petition denied because petitioner stated no reasons for lack of affidavits). *See generally* People v. Wegner, 39 Ill. 2d 28, 237 N.E.2d 486 (1968) (affidavit of lawyer who allegedly lied to defendant held unnecessary).

[32] Cerniglia v. United States, 230 F. Supp. 932 (N.D. Ill. 1964); People v. Sigafus, 39 Ill. 2d 68, 233 N.E.2d 386 (1968).

[33] For a history of this statute and a discussion of exhausting state remedies see *State Remedies*, *supra* note 21, at 151–153.

[34] In 1969, state prisoners filed 7,359 petitions under § 2254. This was a 100 per cent increase over 1964. Friendly, *supra* note 9, at 143.

[35] *See State Remedies*, *supra* note 21, at 160–169 (table of petitions filed and action taken in Federal Circuits from 1962 to 1968).

[36] *See* Raper, *Post Conviction Remedies*, 19 Wyo. L.J. 213, 220 (1965). For a general discussion of the use of § 2254, see Mayers, *Federal Review of State Convictions: The Need for Procedural Reappraisal*, 34 Geo. Wash. L. Rev. 615 (1966).

[37] *See* Eaton v. United States, 458 F.2d 704, 707 (7th Cir. 1972).

[38] *See generally* Bishop, *Rights and Responsibilities of the Defendant Pleading Guilty*, 49 J. Urban L. 1, 23 (1971) (review of Michigan credibility cases).

[39] People v. Gaines, 48 Ill. 2d 191, 194, 268 N.E.2d 426, 428 (1971).

[40] People v. Wall, 7 Ill. App.3d 579, 288 N.E.2d 123 (1972).

[41] People v. Jewett, 4 Ill. App. 3d 738, 281 N.E.2d 693 (1972).

[42] People v. Spicer, 47 Ill. 2d 114, 264 N.E.2d 181 (1971).

[43] Petraborg v. United States, 432 F.2d 1194 (7th Cir. 1970) (5½ year lapse); People v. Gaines, 48 Ill. 2d 191, 268 N.E.2d 426 (1971) (62 month gap).

[44] Judge Friendly has said that in eleven years on the bench, he encountered only six cases where he "entertained real doubt about a defendant's guilt." Friendly, *supra* note 9, at 160.

must overcome the judge's predisposition to view the prisoner's claim as just another attempt to "beat the rap."

A petition must raise a credible issue of material fact to overcome the hurdle of the "for the record" formalities still left in the plea bargaining procedures of many jurisdictions.[45] These formalities usually take the form of a "monosyllabic negative reply" [46] to the judge's routine question, "Has your plea been coerced or induced by any threats or promises made to you by anyone?" While there are cases in which the "No" answer has been taken literally,[47] the most prevalent practice is to view the "No" answer as mere "courtroom ritual," joined in by the judge, the prosecutor, the defense attorney and the defendant, in which all the participants know the negotiation has taken place.[48] Although the "No" answer to the "threats and promises" question is usually not held to be conclusive evidence of the absence of any threats or promises,[49] or of any "controlling weight or significance," [50] it is "evidential." [51] Generally:

> [F]ormalistic recitations in the record that indicate the plea was "voluntary" cannot prevent the person convicted from complaining if the prosecutor later breaches the agreement that induced the plea.[52]

Even though the "No" answer may be given little or no weight in the judge's consideration of the petitioner's case,[53] the defense attorney may still be called on to explain why his client answered in that fashion and should be prepared to support the credibility of his client's claim, even in light of a negative response at the arraignment.

Consideration must be given to this "formality" because it is often a peg on which the judge will hang his decision. Thus, in the case where a prisoner presents an incredible claim, the reviewing judge may use the "no threats or promises" answer as a rationale for finding against the petitioner.[54] A further interrelationship between the credibility and the formality considerations is that the "no threats or promises" issue may hurt the credibility of the defendant at the evidentiary hearing.[55]

Plea Bargaining Mishaps

> Only if it is generally believed that performance on the part of the state will not disappoint a defendant's reasonable expectations will plea bargaining become and remain a truly effective device in criminal administration. Aside from this pragmatic necessity, essential fairness dictates the same result.[56]

Today plea bargaining mishap situations are often spoken of in contractual terms: negotiation, promise, inducement, expectation, consideration, reliance, promissory estoppel, benefit of the bargain and performance. Originally, however, the language was the typical lexicon of the fundamental fairness and due process decisions based on the fourteenth amendment: voluntary, knowing and waiver. The earlier attacks on guilty pleas (bargained or not) were on the basis of involuntariness, unintelligent decision and uninformed waiver.[57] The cases today have isolated the bargained-for plea and in the case of the mishap have held that a defendant should be granted relief, not because his plea was involuntary, but because it was induced by an unfulfilled promise. Newman, in the most widely cited work in this area, says that "the apparent basis of such reversal is an outraged sense of fairness. . . ." [58] He further states:

> The test most often applied to inducement by promises of leniency is whether the promises were proper and were kept. . . . [A]ppellate courts distinguish between what has been called "honorable" plea arrangements and those where the State does not fulfill its side of the bargain.[59]

The leading case in this area, and the only case in which the United States Supreme Court has

[45] *See* Walters v. Harris, 460 F.2d 988, 992 (4th Cir. 1972).

[46] Newman, *supra* note 2, at 31.

[47] Tyler v. State, 296 N.E.2d 140, 144 (Ind. App. 1973).

[48] The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 9 (1967). [hereinafter cited as Task Force].

[49] State *ex rel.* Clancy v. Coiner, 179 S.E.2d 726, 733 (W. Va. 1971).

[50] Mosher v. LaVallee, 350 F. Supp. 1101, 1107 (S.D.N.Y. 1972).

[51] United States v. Tateo, 214 F. Supp. 560, 564 (S.D.N.Y. 1963).

[52] Gallegos v. United States, 466 F.2d 740, 742 (5th Cir. 1972).

[53] Dube v. State, ___ Ind. ___, 275 N.E.2d 7, 8 (1971).

[54] People v. Spicer, 47 Ill. 2d 114, 264 N.E.2d 181 (1970).

[55] *See* People v. Gaines, 48 Ill. 2d 191, 268 N.E.2d 426 (1971); Dees v. State, 492 S.W.2d 849, 857 (Mo. App. 1973).

[56] State v. Thomas, 61 N.J. 314, 321, 294 A.2d 57, 61 (1972).

[57] *See* North Carolina v. Alford, 400 U.S. 25 (1970); Brady v. United States, 397 U.S. 742 (1970); McCarthy v. United States, 394 U.S. 459 (1969); Machibroda v. United States, 368 U.S. 487 (1962).

[58] Newman, *supra* note 2, at 56.

[59] *Id.* at 29–30.

squarely faced the issue of the broken promise, is *Santobello v. New York*.[60] Originally, Santobello pleaded not guilty to three counts of New York gambling violations. After some discussion between the defense attorney and the state prosecutor, Santobello agreed to plead to a lesser-included offense, in return for which the prosecutor promised to make no sentence recommendation. Sentencing was delayed for six months. In the interim, the prosecutor was replaced. This new prosecutor recommended the maximum sentence at the hearing in mitigation and aggravation. The maximum sentence of one year was imposed, and the defendant appealed his conviction. The New York appellate division affirmed and the court of appeals denied leave to appeal. The Supreme Court granted certiorari and held that:

> [W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.[61]

The Court held that the prosecutor's office had a duty to let the right hand know what the left was doing. They remanded the case to the appropriate state court for a determination as to whether the appellant should receive a new sentence from a new judge with no recommendation (benefit of the bargain) or whether the appellant should be allowed to plead anew to the indictment.[62]

There is some confusion as to the basis of the majority's decision. There is no discussion of the long line of cases based on involuntary and unknowing pleas,[63] and none of these cases were cited. There is no discussion of fundamental fairness or other due process cases. Furthermore, this case was not an exercise of the Supreme Court's supervisory powers over federal courts since Santobello's case arose in a state court. In fact, the Court cites no cases as controlling in this factual situation. The decision appears to rest on the "interest of justice and appropriate recognition of the duties of the prosecution in relation to promises made in the negotiation of pleas of guilty. . . ." [64] In light of this language, it is not clear whether the decision was based on fundamental fairness or whether it is a decision mandated, not by the constitution, but by the facts alone.[65]

Because this decision is generally viewed as not reaching constitutional dimensions, it has not been cited as controlling in state court opinions, only as supportive.[66] However, some states have "independently" reached the same result.[67] *Santobello* has been cited in numerous federal decisions as the law in this situation,[68] and its weight, if only by analogy, is considerable.

A. Promises by the Prosecutor

Santobello holds that if a prosecutor makes a promise and later breaks it, the defendant should be granted relief. But what sort of promises can or will the prosecutor make and when is he held to have broken them?

The most typical promise by the prosecutor is that of leniency, manifested in the form of either a sentence recommendation, or, in the case where the prosecutor could clearly influence the judge in imposing a higher sentence, no recommendation. In these situations, the prosecutor who fails to make the recommendation or breaks his promise to not do so, has not fulfilled his side of the bargain.[69] So, too, if the defendant bargains for a

[60] 404 U.S. 257 (1971). *See also* Note, *Criminal Law—Enforcement of Plea Bargaining Agreements*, 51 N.C.L. REV. 602 (1973).

[61] 404 U.S. at 262.

[62] Justices Marshall, Brennan and Stewart agreed with the decision to reverse the conviction, but felt that the petitioner should receive the relief prayed for—complete reversal. 404 U.S. at 267 (Marshall, J., concurring in part and dissenting in part.)

[63] *See* notes 3 & 8 *supra*.

[64] 404 U.S. at 262.

[65] Mr. Justice Douglas submitted a concurring opinion in which he advocated raising this decision to a constitutionally mandated decision. *Id.* at 267 (Douglas, J., concurring). This would support the conclusion that *Santobello* is not a "constitutional" decision.

[66] *See* State v. Richard, 109 Ariz. 65, 505 P. 2d 236, 239–40 (1973); People v. Stevens, 45 Mich. App. 689, 206 N.W.2d 757 (1973); People v. Craig, 41 App. Div. 2d 932, 343 N.Y.S.2d 365 (1973); Lambert v. State, — S.C. —, 198 S.E.2d 118 (1973); *In re* Bishop, 303 A.2d 154 (Vt. 1973).

[67] *See* People v. Pier, 51 Ill. 2d 96, 281 N.E.2d 289 (1972).

> [W]hen a plea of guilty rests in any significant way upon a promise or agreement of a prosecutor so that the same can be said to be a part of the inducement or consideration, the promise must be fulfilled. A plea of guilty made in reliance on an unfulfilled promise is not voluntarily made by the defendant.

Id. at 291.

[68] *See* United States v. Hallam, 472 F.2d 168 (9th Cir. 1973); Gallagos v. United States, 466 F.2d 740 (5th Cir. 1972); Walters v. Harris, 460 F.2d 988 (4th Cir. 1972).

Though not widely noted, *Santobello* has found its way into a commentary or two. *See* Erickson, *The Finality of a Plea of Guilty*, 48 NOTRE DAME LAW. 835 (1973); 8 J. MOORE, FEDERAL PRACTICE ¶ 11.05 (1) at 11–84 (4th Ed. 1966).

[69] "In dealing with guilty pleas clearly induced by

specific recommendation and receives only a general one, he will be granted relief.[70] If the prosecutor promises to recommend a specific sentence and then employs a recidivist or habitual criminal statute at sentencing which has a minimum sentence higher than the one bargained for, the prosecutor will have broken his promise.[71] The state will also be forced to abide by a promise not to introduce evidence in aggravation at sentencing.[72] Prosecutors are often willing to dismiss related counts of one indictment or drop charges arising from wholly unrelated incidents. If the state's attorney promises to do so, he will be held to it.[73]

At times, the defendant elicits what appears to be a good bargain, and then finds that he is nonetheless a victim of a mishap. In *People v. Brock*,[74] the Illinois state's attorney agreed to attempt to get charges pending in Tennessee dropped. The defendant, in return, pleaded guilty. When the defendant later claimed that the charges were not dropped, the Illinois Supreme Court held that the defendant had received what he bargained for—the state's *attempt* to get the charges dropped.

Generally, when the prosecutor makes a promise, the defendant pleads guilty and the promise is broken, a court will reach the result reached in *Santobello*.[75] Prosecutors have attempted to avoid this rule in many cases, using various arguments; few have proved successful. For example, it is considered irrelevant that the defendant had no defense or that the defense offered would have availed him nothing.[76] One prosecutor claimed that there was no *reliance* on his promise because the defendant knew that the recommendation would not be binding on the judge. The court held this to be inconsequential.[77] Many prosecutors have made an argument that goes to the *materiality* of their promise. Since the judge is not bound by statements of the prosecutor, the fact that a promise was made is *immaterial.* This argument was specifically rejected in *Santobello.*[78] In *Correale v. United States*,[79] the Court of Appeals for the First Circuit rejected this argument on the rationale that the defendant gives his plea of guilty "not in exchange for the actual sentence or impact on the judge, but for the prosecutor's statements in court." [80] If these statements are not adequate, the bargain is invalid.

B. Promises by Police

Often, a defendant will plead guilty in reliance upon the representations of a policeman or an investigator. These representations may also form the grounds for a post-conviction remedy, but the petitioner must show either actual or apparent authority on the part of the investigator to act as an agent of the prosecutor before *Santobello* would apply.[81] Therefore, broken promises made by a policeman who said he was representing the prosecutor,[82] by a sheriff who appeared to have authority[83] and by the prosecutor's chief investi-

promises of leniency, appellate courts have generally required that the prosecution honor promises made." NEWMAN, *supra* note 2, at 36.

[70] Correale v. United States, 479 F.2d 944 (1st Cir. 1973) (promise to recommend sentence to run concurrently with state sentence).

[71] Gallegos v. United States, 466 F.2d 740 (5th Cir. 1972).

[72] People v. Schleyhahn, 4 Ill. App. 3d 591, 281 N.E.2d 409 (1972) (dicta).

[73] *See* United States v. Hallam, 472 F.2d 168, 169 (9th Cir. 1973) (prosecutor may not reinstitute dismissed indictment); United States v. Paiva, 294 F. Supp. 742 (D.C. Cir. 1969) (prosecutor may not indict on non-related matter); State v. Thomas, 61 N.J. 314, 294 A.2d 57 (1972) (prosecutor may not reinstitute dismissed indictment).

[74] 45 Ill. 2d 292, 259 N.E.2d 12 (1970).

[75] However, in *People* v. *Carter*, 73 Misc. 1040, 343 N.Y.S.2d 431 (Sup. Ct. 1973), the defendant agreed to waive a preliminary hearing in return for the prosecutor's promise to press only a misdemeanor charge. When the defendant was indicted for a felony, the court said, "[T]here is no absolute right to enforce bargains entered into between the prosecution and the defense." *Id.* at 433. The court refused to extend *Santobello* to this situation. This may be indicative of a general unwillingness to extend the *Santobello* reasoning to other factual situations. There is language in the decision limiting the rationale to the specific facts. *See* 404 U.S. at 262. *See also* Martinez v. Mancusi, 409 U.S. 959 (1972), a memorandum decision denying certiorari. Mr. Justice Douglas submitted a dissenting opinion saying that where the defendant was trapped by his plea into going to trial or settling for a plea to a crime of higher degree than originally agreed upon, *Santobello* applied.

This reluctance to extend *Santobello* beyond its facts may also be the result of the lack of any definitive basis for the decision.

[76] People v. Gustavson, 131 Ill. App. 2d 887, 269 N.E.2d 517 (1971).

[77] McKeag v. People, 7 Ill. 2d 586, 131 N.E.2d 517 (1956).

[78] 404 U.S. at 262. *See also* White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439, 473 (1971).

[79] 479 F.2d 944 (1st Cir. 1973).

[80] *Id.* at 949.

[81] Manning v. State, 374 P.2d 796 (Okla. Cr. App. 1962); *see* Comment, *Criminal Law: Plea Withdrawal in Oklahoma*, 23 OKLA. L. REV. 472, 476 (1970); *cf.* United States v. Lombardozzi, 467 F.2d 160 (2d Cir. 1972), *cert. denied*, 409 U.S. 1108 (1973).

[82] McKeag v. People, 7 Ill. 2d 586, 131 N.E.2d 517 (1956).

[83] People v. Gustavson, 131 Ill. App. 2d 887, 269 N.E. 2d 517 (1971).

gator[84] have been held to be grounds for collateral attack. The defendant must also show that he relied on this authority for pleading guilty.[85] In *United States v. Lombardozzi*,[86] the defendant who had approached the federal agent was held to have had knowledge of the fact that the agent was not speaking for the prosecutor. Since the court could not find a manifestation of authority nor reliance, relief was denied.

C. Mistaken Belief in the Existence of a Deal

Even if it can be proved beyond a doubt that the defendant entered his plea on the mistaken belief that a deal existed, he is unlikely to obtain relief. The defendant may get relief if he shows a mistake in law,[87] but if he claims a mistake of fact, this will prove insufficient for collateral attack.

The earlier decisions in this area held that if the defendant could prove his mistaken belief in the existence of a deal, a belief which induced his guilty plea, the defendant would be allowed relief. This so-called "subjective" test in determining grounds for relief was first utilized in the much-cited case of *United States ex rel. Thurmond v. Mancusi*.[88] Today a few jurisdictions still hold to this view. Foremost among these is West Virginia. In *State ex rel. Clancy v. Coiner*,[89] the Supreme Court of West Virginia was confronted with two consolidated appeals. One petitioner was granted relief on the grounds of an actual broken promise. The other petitioner proved to the court's satisfaction that he had had a mistaken belief in the existence of a deal. The court upheld the subjective test and granted him relief, relying in part on *Thurmond*.

However, more recent decisions in this area clearly deny the validity of the "subjective" test. Today, in most jurisdictions, the defendant must show an actual promise was made, that he relied upon it, and that it was broken. This is the "objective" test. Although the district court judge in *Thurmond* wrote an impressive opinion, that case was overruled as to the subjective test in *United States ex rel. LaFay v. Fritz*.[90] The rationale for rejecting the subjective test was stated in *Johnson v. Beto*[91] where the court granted the petitioner relief using an "objective" test:

> Analogous to promissory estoppel, plea bargaining must have more substantiality than mere expectation and hope. It must have explicit expression and reliance and is measured by objective not subjective standards. All of the elements of the plea bargain was [sic] found here, and the law gives its sanctions to such bargains when they are real and not mere figments.[92]

Again, as noted in *United States v. Taylor*:[93]

> The fact that the defendant may have had the expectation that his plea would result in leniency is not sufficient in the absence that the expectation was induced *by the government* to justify withdrawal [or collateral attack] of the plea of guilty.[94]

There is another situation in which the defendant has a mistaken belief in the existence of a deal, a belief *not* induced by the government. This is the case where the defendant pleads guilty in reliance on misrepresentations made by his trial attorney. Sometimes this situation forms the basis of an "ineffective assistance of counsel" argument.[95] When such a claim is made, the misrepresentation must amount to "such a kind as to shock the conscience of the court and make the proceedings a farce and a mockery of justice." [96]

Representations by the defense attorney can also be grounds for a collateral attack as a plea bargaining mishap, but the defendant has a hard burden to overcome due to judicial prejudice against this claim.[97] The standard of proof in this area is formidable in many jurisdictions. For instance, even the more lenient decisions have held

[84] Dube v. State, __ Ind. __, __, 275 N.E.2d 7, 8 (1971).

[85] Manning v. State, 374 P.2d 796 (Okla. Cr. App. 1962). *See also* United States v. Lombardozzi, 467 F.2d 160 (2d Cir. 1970), *cert. denied*, 409. US. 1108 (1973); Comment, *Criminal Law: Plea Withdrawal in Oklahoma*, 23 OKLA. L. REV. 472 (1970).

[86] 467 F.2d 160 (2d Cir. 1970), *cert. denied*, 409 U.S. 1108 (1973).

[87] Cross v. State, 248 Ark. 553, 452 S.W.2d 854 (1970).

[88] 275 F. Supp. 508 (1967).

[89] 179 S.E.2d 726 (W. Va. 1971). *See also* Note, *Criminal Law—Plea Bargaining—Withdrawal of Guilty Plea*. 74 W. VA. L. REV. 196 (1972).

[90] 455 F.2d 297 (2d Cir.), *cert. denied*, 407 U.S. 923 (1972).

[91] 466 F.2d 478 (5th Cir. 1972).

[92] *Id.* at 480. *See* Mosher v. LaVallee 351 F. Supp. 1101, 1108 (S.D.N.Y. 1972).

[93] 303 F.2d 165 (4th Cir. 1962).

[94] *Id.* at 168.

[95] State v. Tunender, 182 Neb. 701, 157 N.W. 2d 165 (1968).

[96] United States v. Horton, 334 F.2d 153, 155 (2d Cir. 1964).

[97] For example, the court in *United States v. Horton* concluded that to allow the claim of a defense attorney's misrepresentation to vitiate a plea "would afford an all too easy avenue for the invalidating of convictions on pleas of guilty." *Id.* at 154.

that a defense attorney's wrong prediction of the judge's action is not sufficient to vitiate the induced plea of guilty,[98] that an erroneous estimate by the attorney[99] or mistaken impression on the part of the attorney[100] are not sufficient grounds for attacking a conviction, even if they have induced the plea. According to one commentator:

> A lawyer may be mistaken.... His advice may be open to question.... Nevertheless, a conviction will not be upset merely for those reasons. As long as there is no misrepresentation clothing an opinon in the guise of a guarantee... the defendant has received that to which he is entitled. The sixth amendment guarantees that a defendant will have the benefit of sound, professional judgment. It does not guarantee infallibility.[101]

Plea bargaining mishaps arising from the misrepresentations of the defense attorney may form the basis of a collateral attack if the misrepresentations amount to a fraud upon the defendant.[102] Courts speak of such inducements with language such as "bald" and "conclusive." [103] Where counsel represented that he was authorized to make a promise on behalf of the prosecutor and this was corroborated by statements by the prosecutor assuring the judge's cooperation, the defendant was able to successfully attack his conviction.[104] In *People v. Williams*,[105] the defendant was given an evidentiary hearing when he claimed that his attorney told him that the state had agreed to a lenient sentence, that further, when he was given a harsh sentence, the attorney whispered to him that the judge would call him back later and give him the "bargained for" term, even though there was no state corroboration.

Many courts require a petitioner to show some corroborating representation by the prosecutor or the judge supporting the petitioner's claim of reliance on the defense attorney's misrepresentation. In one such case, *People v. Gilbert*,[106] the court went so far as to say that "unwarranted or even willfully false statements of factual matters by his [the defendant's] attorney" will not suffice to vitiate the plea, absent corroboration by the state.[107] Other courts have held that defense counsel's assurance is sufficient without corroboration.[108] In *Brown v. State*,[109] the Missouri supreme court said that a guilty plea induced by a mistaken belief in the existence of a binding agreement was invalid merely upon the defendant's showing that he had been misled by the judge, the prosecutor or by his own attorney.[110]

There is no hard line that can be drawn in these cases as to what actions will be deemed "sufficient misrepresentations," "frauds on the defendant," "assurances" or "guarantees." When the defendant's mistaken belief is the result of a misrepresentation by trial counsel, the success of a collateral attack will depend on how blatant the lawyer's conduct was and what the law of the jurisdiction is.

D. Judicial Participation in the Plea Bargaining Process

Several questions arise in connection with the judge's role in the plea bargaining process. First, is judicial participation, *per se*, a mishap which should give rise to collateral relief? Second, is the judge bound by promises of the prosecutor and if not, can a defendant collaterally attack a sentence imposed that is higher than the one bargained for?

Much has been written about judicial participation in the plea bargaining process. Some authorities say that the judge should have absolutely nothing to do with the process,[111] that any participation is undesirable *per se*.[112] Other authorities

[98] *See* Masciola v. United States, 469 F.2d 1057 (3d Cir. 1972).

[99] Mosher v. LaVallee, 351 F. Supp. 1101 (S.D.N.Y. 1972) (dicta).

[100] Holt v. United States, 329 F.2d 368 (7th Cir.) *cert. denied*, 379 U.S. 992 (1964); Mosher v. LaVallee, 351 F. Supp. 1101 (S.D.N.Y. 1972) (dicta); Dees v. State, 492 S.W. 2d 849, 857 (Mo. App. 1973).

[101] Gentile, *Fair Bargains and Accurate Pleas*, 49 B.U.L. REV. 514, 540 (1969).

[102] Long v. State, 231 Ind. 59, 106 N.E.2d 692 (1952).

[103] People v. Shneer, 194 F.2d 598, 601 (3rd Cir. 1952) (dicta).

[104] Petraborg v. United States, 432 F.2d 1194, 1197 (7th Cir. 1970).

[105] 47 Ill. 2d 1, 264 N.E.2d 697 (1970).

[106] 25 Cal. 2d 422, 154 P.2d 657 (1944). *See* People v. Rodriguez, __ Cal. 2d __, __, 299 P.2d 1057, 1058 (1956); *cf.* Gallegos v. United States, 466 F.2d 740 (5th Cir. 1972).

[107] 25 Cal. 2d at 423, 154 P.2d at 668.

[108] People v. Wegner, 39 Ill. 2d 28, 237 N.E.2d 486 (1968). *Cf.* Mosher v. LaVallee, 351 F. Supp. 1101, 1110 (S.D.N.Y. 1972).

[109] 485 S.W.2d 424 (Mo. 1972).

[110] *Id.* at 429. *See* State v. Rose, 440 S.W.2d 441 (Mo. 1969) (defense attorney); State v. Edmondson, 438 S.W.2d 237 (Mo. 1969) (judge); State v. Cochran, 332 Mo. 742, 60 S.W.2d 1 (1933) (prosecuting attorney). *See generally* Note, *A New Ground for Withdrawal of Plea of Guilty: Plea Involuntarily Induced by Defendant's Attorney. State v. Rose*, 36 Mo. L. REV. 139 (1971).

[111] *See* United States *ex rel.* Elksnis v. Gilligan, 256 F. Supp. 244, 254, 255 (S.D.N.Y. 1966); Commonwealth v. Evans, 434 Pa. 52, 55–56, 252 A.2d 689, 690 (1969).

[112] The 1973 proposed amendments to the Federal

state that it is not.[113] Still others have drawn a distinction between the judge's *participation* during negotiations and the judge's *ratification* after a tentative settlement has been reached.[114] The conclusion to be drawn is that the law is in a state of flux, and no accurate predictions can be made without studying the law of the jurisdiction in question.

The mishap more easily analyzed in this area is that of the broken judicial promise. Statements by the judge, in the form of plea negotiations, have been said to fall under the same scrutiny as any influence which might make a guilty plea involuntary.[115] Those cases which have extended *Santobello* to cover judicial promises are more properly concerned with plea bargaining mishaps, rather than with a voluntariness test. An example of the first type of case, decided on voluntariness grounds, is *People v. Stephens*,[116] in which the judge participated in the plea discussions with the defense attorney and the prosecutor. Although the judge never actually issued a promise, his statements of his inclinations in the matter were held to be improper inducement in light of the fact that he gave a higher sentence than expected.[117] *People v. Riebe*[118] is an example of the *Santobello* "fairness" test. In *Riebe* the Illinois supreme court held that judicial statements during plea discussion were tantamount to promises which must be fulfilled. In the case of an express promise, courts have held that "the imposition by the judge of a sentence contrary to his express promise is wholly irreconcilable with constitutional safeguards and due process of law." [119] Where the judge makes a promise and reneges, courts are likely to extend the rationale of *Santobello*.[120]

One final mishap occurs where the prosecutor issues a promise and the defendant pleads guilty, but the sentence is twice that bargained for because the judge refused to go along with the agreement. This is certainly an injurious mishap, but it cannot be collaterally attacked if the judge has given no prior indication of accepting the agreement. A Presidential Commission felt that this problem would seldom arise,[121] but in fact, it frequently does. As noted in *People v. Hancasky*,[122] "It is elementary that a court is not bound by the recommendation of a State's Attorney. . . ." [123] In *People v. Baldridge*[124] an agreement was reached, but prior to sentencing the trial judge informed the defendant that he was in no way bound by any recommendations or promises. On appeal, the Illinois supreme court held that the prosecutor had fulfilled his promise by recommending the agreed upon sentence. The fact that the trial judge refused to go along was held to give the defendant no grounds for relief. The plea was held not to have been made in reliance upon the judge's consent since the defendant had notice of the judge's sentiments.

Rules of Criminal Procedure flatly bar the trial court from participating in plea discussions. 8 J. MOORE, FEDERAL PRACTICE ¶ 11.05(5), at 11-109 (4th ed. 1966).

[113] Brown v. Peyton, 435 F.2d 1352 (4th Cir. 1970); Blackman v. State, 265 So. 2d 734, 735 (Fla. App. 1972); Commonwealth v. Rothman, 294 A.2d 783 (Pa. Super. 1972); *see generally* Note, *Criminal Procedure—Plea Bargaining—Trial Judge's Participation Does Not Render Plea Involuntary*, 24 VAND. L. REV. 836 (1971) (note on *Brown*).

In England, the judge *must* participate in the plea discussion and agreement, if any. Thomas, *Plea Bargaining and the Turner Case*, 1970 CRIM. L. R.; 559, 563 (1970).

[114] The American Bar Association recognized this distinction in their recommendations, allowing for judicial participation after the parties have reached a tentative settlement, MINIMUM STANDARDS, *supra* note 14, at 71–72, 74–76. Illinois has also recognized the distinction, and although the "trial judge shall not initiate plea discussions," ILL. REV. STAT., ch. 110, § 402 (d)(1) (1971), he may play an important part if the parties come to him with a tentative agreement. ILL. REV. STAT., ch. 110a, § 402 (d)(2) (1971).

Case law has also drawn the line between participation and ratification. *See, e.g.*, United States *ex rel.* Rosa v. Follette, 395 F.2d 721, 725 n.5 (2d Cir. 1968); Commonwealth v. Evans, 434 Pa. 52, 252 A.2d 689, 691 n.* (1969); *see also* 8 DUQUESNE L. REV. 461, 465–466 (1970) (note on *Evans*); *see generally* Comment, *Judicial Participation in Guilty Pleas—A Search for Standards*, 33 U. PITT. L. REV. 151 (1971). *But see* Brown v. Peyton, 435 F.2d 1352, 1356 (4th Cir. 1970) (court rejects ABA distinction); *cf.* United States *ex rel.* Elksnis v. Gilligan, 256 F. Supp. 244 (S.D.N.Y. 1966); United States v. Tateo, 214 F. Supp. 560 (S.D.N.Y. 1963).

[115] Brown v. Peyton, 435 F.2d 1352, 1356 (4th Cir. 1970) (applying the *Brady* tests of involuntariness).

[116] 45 Mich. App. 689, 206 N.W.2d 757 (1973).

[117] *Id.* at 760.

[118] 40 Ill. 2d 565, 241 N.E.2d 313 (1968).

[119] United States *ex rel.* Elksnis v. Gilligan, 256 F. Supp. 244, 249 (S.D.N.Y. 1966).

[120] People v. Craig, 41 App. Div. 2d 932, 343 N.Y.S. 2d 365 (1973).

[121] TASK FORCE, *supra* note 48, at 11.

[122] 410 Ill. 148, 101 N.E.2d 575 (1951).

[123] *Id.* at 155, 101 N.E.2d at 579. *See* Gallegos v. United States, 466 F.2d 740, 741 (5th Cir. 1972); People v. Williams, 10 Ill. App. 3d 456, 458, 294 N.E.2d 98, 100 (1973); People v. Cheshier, 3 Ill. App. 3d 523, 525, 278 N.E.2d 93, 94 (1972); Lambert v. State, — S.C. —, —, 198 S.E.2d 118, 119–120 (1973). *See generally* TASK FORCE, *supra* note 48, at 10; Davis, *The Guilty Plea Process: Exploring the Issues of Voluntariness and Accuracy*, 6 VAL. U. L. REV. 111, 116 (1972); Comment, *Plea Bargaining—Justice Off the Record*, 9 WASHBURN L. J. 430, 431 (1970).

[124] 19 Ill. 2d 616, 169 N.E.2d 353 (1960).

The American Bar Association has recommended that the judge, prior to sentencing, and at the request of the parties, determine the terms of any agreement and then state his predisposition to them.[125] He should also inform the defendant that he is not bound by the deal.[126] This procedure would eliminate what one commentator has called the "ritualistic, minstrel dance" [127] of hiding the agreement.

Illinois has adopted this procedure in Supreme Court Rule 402.[128] Any agreement must be stated in open court and the judge must confirm the terms of the agreement.[129] Upon request of either party, a tentative agreement may be presented to the judge at the pre-arraignment stage. He may then give his predisposition. If he agrees, he may not change his mind without allowing the defendant the opportunity to withdraw the guilty plea. If the defendant does withdraw his plea, the judge is to recuse himself.[130] Many of these procedures have been developed by case law in other jurisdictions.[131]

[125] MINIMUM STANDARDS, *supra* note 14, at 29. In West Virginia, it is *mandatory* that any plea agreement be made part of the record. State *ex rel.* Clancy v. Coiner, 179 S.E.2d 726 (W. Va. 1971). *Cf.* Note, *Criminal Law—Plea Bargaining—Withdrawal of Guilty Plea*, 74 W. VA. L. REV. 196, 199–200 (1972).

[126] MINIMUM STANDARDS, *supra* note 14, at 29.

[127] Davis, *The Guilty Plea Process: Exploring the Issues of Voluntariness and Accuracy*, 6 VAL. U. L. REV. 111, 119 (1972). The author continues, explaining the process which works to keep secret the bargain. *Id.* at 119–120.

The then Attorney General of Wyoming expressed the opinion that more extensive, more open pretrial procedures (like discovery and pretrial conferences) would help the criminal justice system by making convictions harder to attack. Raper, *Post Conviction Remedies*, 19 WYO. L.J. 213 (1965).

[128] ILL. REV. STAT., ch. 110a, § 402 (1971).

[129] ILL. REV. STAT., ch. 110a, § 402(b) (1971).

[130] ILL. REV. STAT., ch. 110a, § 402(d)(2) (1971).

[131] *See* Enos v. State, 272 So. 2d 847, 850 (Fla. App. 1973); Dube v. State, — Ind. —, 275 N.E.2d 7, 11 (1971); Dodson v. Page, 461 P.2d 957 (Okla. Cr. App. 1969). *Cf.* Comment, *Criminal Law: Plea Withdrawal in Oklahoma*, 23 OKLA. L. REV. 472, 475 (1970) (citing and discussing *Dobson*).

The Illinois Rule further requires that if the parties do not request such a hearing, the judge shall inform the defendant in open court that he is not bound by any agreement and that the disposition of the case may differ from any promise made to the defendant.[132] If the defendant persists in his plea he is said to have pleaded independently of the promise of the prosecutor.[133] If at any juncture the judge does not follow the Supreme Court Rule and the defendant finds himself the victim of a mishap, he may seek and obtain collateral relief.

These procedures will eliminate much of the post-conviction filing in plea bargaining mishap situations if scrupulously followed. One problem may arise, however, as this rule is put into effect. Its practice may become more and more routine, and someday in the future, it may also resemble a "minstrel dance." Just as today, a negative reply to the "threats and promise" question has become a formality, the rule-dictated judicial warning that the judge is not bound may soon be merely *pro forma*. If this does occur, it should not be considered conclusive and courts should be urged to look beyond it, to see if the defendant is a hopeless victim of an undue plea bargaining mishap.

CONCLUSION

It has been the goal of this comment to catalogue the law concerning the possibility of collaterally attacking plea bargaining mishaps. Some of the mishaps give rise to remedies; others do not. This survey is by no means exhaustive, but was intended to raise the major issues which arise in this confusing, "pseudo-contractual" area of criminal law.

[132] ILL. REV. STAT., ch. 110a, § 402(d)(2) (1971).

[133] *See* People v. Baron, 130 Ill. App. 2d 588, 264 N.E.2d 423 (1970); People v. Baldridge, 19 Ill. 2d 616, 169 N.E.2d 353 (1960). *Cf.* Cross v. State, 248 Ark. 553, 452 S.W.2d 854 (1970).

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DISCOVERY IN CRIMINAL CASES: DENIAL TO MISDEMEANANTS AS A VIOLATION OF DUE PROCESS AND EQUAL PROTECTION

On October 1, 1971, Illinois Supreme Court Rules 411, 412 and 415[1] became effective. These liberal discovery[2] rules superceded previous Illinois statutes regarding discovery and granted extensive discovery rights to criminal defendants.[3] The applicability of these rules, however, was limited to "criminal cases wherein the accused is charged with an offense for which, upon conviction, he might be imprisoned in the penitentiary." [4]

Prior to the enactment of the new Illinois discovery rules the Supreme Court of Illinois had held that a defendant, charged with a misdemeanor, was entitled to the discovery of a police report prepared by the sole prosecution witness.[5] Subsequent to the enactment of the new discovery rules, however, an Illinois appellate court, in *People v. Schmidt*,[6] held that Supreme Court Rule 411 limited the applicability of the discovery rules to felonies and therefore denied the defendant who was charged with driving while intoxicated, a misdemeanor, discovery of a police report.[7] Liberalization of the law had resulted in loss of rights for the class of criminals known as misdemeanants, whose cases comprise the vast majority of criminal cases presently before state courts.[8]

The explicit denial of discovery in misdemeanor cases is unique to Illinois, but the potential for similar adjudications based on statutory interpretation exists in other jurisdictions. Arizona, for example, provides for automatic discovery "no later than 10 days after arraignment in Superior Court. . . ." [9] Since an accused misdemeanant by statute, may not be arraigned in the superior court the statute could be interpreted as denying discovery in misdemeanor cases.[10]

This comment is concerned with the constitutionality of the denial of discovery in misdemeanor cases and, more generally, the constitutionality of the misdemeanor/felony dichotomy as a standard for the allocation of rights and privileges to criminal defendants. In order to deal more fully with the specific question of misdemeanant's discovery rights, the first section of this comment will analyze

[1] ILL. REV. STAT. ch. 110A, §§ 411, 412 & 415 (1971). ILL. REV. STAT. ch. 110A, §§ 413 & 414 (1971) deal with prosecutorial discovery and evidence depositions, respectively.

[2] Discovery and pre-trial discovery are used interchangeably in this comment. Disclosure, when used, refers to disclosure at time of trial.

[3] The superceded Illinois statutes were ILL. REV. STAT. ch. 38, §§ 114-9, 114-10 & 114-13 (1968). These sections were vague and primarily gave authority to the Illinois Supreme Court to promulgate rules of discovery. To this effect, § 114-13 read that "[D]iscovery procedures in criminal cases shall be in accordance with Supreme Court Rules." §§ 114-9 and 114-10 dealt with motions for a list of witnesses and to produce a confession, respectively.

[4] ILL. REV. STAT. ch. 110A, § 411 (1971). In Illinois, felony is defined as "an offense punishable with death or by imprisonment in the penitentiary. . . ." ILL. REV. STAT. ch. 38, § 2-7 (1971). A misdemeanor is "any offense other than a felony, and includes conduct prohibited by a statute which provides no penalty for its violation." ILL. REV. STAT. ch. 38, § 2-11 (1971).

[5] People v. Allen, 47 Ill. 2d 57, 264 N.E.2d 184 (1970). The defendant based his claim on an asserted denial of due process of law in that he was deprived of his full right to cross examine the witness and his right to possibly impeach the witness. The court, however, sidestepped the issue and relied on "a right sense of justice" as the basis for this rule of production. *Id.* at 59, 264 N.E.2d at 185. *Accord*, People v. Cole, 30 Ill. 2d 375, 196 N.E.2d 691 (1964); People v. Moses, 11 Ill. 2d 84, 142 N.E.2d 1 (1957).

More recent decisions in Illinois rely more directly on due process as a basis for requiring discovery. People v. Flowers, 51 Ill. 2d 25, 281 N.E.2d 299 (1972); People v. Cagle, 41 Ill. 2d 528, 244 N.E.2d 200 (1969); People v. Crawford, 114 Ill. App. 2d 230, 252 N.E.2d 483 (1969).

[6] 8 Ill. App. 3d 1024, 291 N.E.2d 225 (1972).

[7] The factual situations in *Allen* and *Schmidt* are very similar, with the sole difference being that Allen was charged with resisting arrest in addition to the common charge of driving while intoxicated. Resisting arrest is also a misdemeanor in Illinois. ILL. REV. STAT. ch. 38, § 31-1 (1971).

[8] Hellerstein, *The Importance of the Misdemeanor Case on Trial and Appeal*, 38 THE LEGAL AID BRIEFCASE 151 (1970).

[9] ARIZ. R. CRIM. P. 15.1 (1973).

[10] ARIZ. R. CRIM. P. 14.1(c) (1973), provides that an arraignment need not be held in cases involving offenses triable in a non-record court. Misdemeanors are triable in non-record courts. ARIZ. R. CRIM. P. 2.1(b) (1973). It should be noted that misdemeanor actions *may* also be commenced in Superior Court. ARIZ. R. CRIM. P. 2.1(a) (1973).

Montana's discovery statute also has limited applicability. MONT. REV. CODES ANN. § 95-1803 (1959), provides that discovery is available "[I]n all criminal cases originally triable in District Court. . . ." However, in Montana, justice's courts have jurisdiction of all misdemeanors punishable by a fine not exceeding $500.00 or imprisonment not exceeding six months or both. MONT. REV. CODES ANN. § 95-302 (1959). The district court has jurisdiction of all public offenses not otherwise provided for. MONT. REV. CODES ANN. § 95-301 (1959).

arguments that the sixth and fourteenth amendments incorporate the right to discovery.

The second section will discuss the denial of discovery in terms of the due process clause of the fourteenth amendment. The position that such a denial constitutes a violation of fundamental fairness as required by the due process clause is based on the premise that the constitution incorporates a right to discovery. Although the arguments that discovery is constitutionally required are compelling, no court has ever held that such a constitutional right exists.

Regardless of whether a constitutional basis for discovery exists, many states have recognized the importance of discovery by enacting statutory provisions for discovery.[11] The third section posits the argument that where such statutes exist, the denial of discovery solely on the ground that an accused is charged with a misdemeanor is a violation of the Equal Protection Clause of the Fourteenth Amendment.

I

Discovery had its origins in the English Courts of Chancery.[12] *Rex v. Holland*,[13] in 1792, first dealt with the issue of criminal discovery and flatly refused to allow it, holding that there was no principle or precedent to warrant it and that the court was without discretionary power to grant it. Lord Kenyon, Chief Justice, thought that discovery would subvert the whole system of criminal law.[14]

In America, the issue of criminal discovery was presented early in the trial of former Vice President Aaron Burr on conspiracy and treason charges.[15] In holding that a letter from Thomas Jefferson, which was relevant to the defense could not be withheld, Chief Justice Marshall set an important precedent for criminal discovery that was ignored for over one hundred years.

The English rule prohibiting discovery in criminal cases was adhered to in most American jurisdictions.[16] Judge Learned Hand's well known observation in *United States v. Garsson*[17] is indicative of the judicial attitude toward pre-trial discovery in criminal cases:

> It [discovery] is said to lie in discretion, and perhaps it does, but no judge of this court has granted it, and I hope none ever will. Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see.[18]

Four years later, in 1927, Mr. Justice Cardozo, while sitting on the Court of Appeals of New York, professed to see the "beginnings or at least the glimmerings of"[19] a doctrine of inherent power in the criminal courts to compel discovery.

Since 1927, discovery has gained more and more support. Numerous jurisdictions have passed discovery statutes.[20] Many states without statutory discovery rely on judicially created discovery rights.[21] Although there is still disagreement over the extent to which discovery should be afforded to criminal defendants, the general trend in American jurisdictions has been toward the granting,

[11] ARK. STAT. ANN. § 43-2011.2 (SUPP. 1973); MONT. REV. CODES ANN. § 95-1803 (1959); N. C. GEN. STAT. § 15.155.4 (SUPP. 1971); OHIO REV. CODE § 2945.50 (1971); TENN. CODE ANN. § 40-2441 (SUPP. 1970); TEX. CODE CRIM. P. § 39.14 (1966); W. VA. CODE § 62-1B-1 to 62-1B-4 (1970); WIS. ANN. STAT. § 971.23 (1957).

ARIZ. R. CRIM. P. 15.1 (1973); COLO. R. CRIM. P. 16 (1963); DEL. SUPER. CT. (CRIM.) R. 16 (1953); FLA. R. CRIM. P. 1.220 (1968); KY. R. CRIM. P. 7.24 (1971); MD. R. P. 728 (1957); PA. R. CRIM. P. 310 (SUPP. 1973).

Judicial decisions form the basis for discovery in California, New Hampshire and Washington. *E.g.*, Jones v. Superior Court, 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962); State v. Superior Court, 106 N.H. 228, 208 A.2d 832 (1965); State v. Johnson, 28 N.J. 133, 145 A.2d 313 (1958); State v. Thompson, 54 Wash. 2d 100, 338 P.2d 319 (1959).

[12] 9 HOLDSWORTH, HISTORY OF ENGLISH LAW 330-408 (3d ed. 1944); Gaynor, *Defendant's Right of Discovery in Criminal Cases*, 20 CLEV. ST. L. REV. 3 (1971).

[13] 100 Eng. Rep. 1248 (K. B. 1792).

[14] *Id.* at 1249.

[15] 25 Fed. Cas. 30 (C.C.D. Va. 1807).

[16] *See e.g.*, United States v. Garsson, 291 F. 646 (S.D.N.Y. 1923); Wendling v. Commonwealth, 143 Ky. 587, 137 S.W. 205 (1911); Robertson v. Steele, 117 Minn. 384, 135 N.W. 1128 (1912); State v. Tune, 13 N.J. 203, 98 A.2d 881 (1953); Territory v. McFarlane, 7 N.M. 421, 37 P. 1111 (1894); Santry v. State, 67 Wis. 65, 30 N.W. 226 (1886).

[17] 291 F. 646 (S.D.N.Y. 1923).

[18] *Id.* at 649.

[19] People ex rel. Lemon v. Supreme Court, 245 N.Y. 24, 32, 156 N.E. 84, 86 (1927). Although Justice Cardozo professed to see the glimmerings of a doctrine of criminal discovery, he denied such a request in the case at bar. The decision is based on the theory that if the evidence is not admissible in court, it is not subject to inspection. Since the items, documents and memoranda in the possession of the district attorney were held inadmissible, discovery was denied.

[20] *See* note 10 *supra*.

[21] *See* cases cited in note 10 *supra*.

either legislatively or judicially, of liberal discovery rights.[22] The rationale for granting broad discovery rights is important in determining the constitutional validity of the misdemeanor/felony distinction. Although the misdemeanor/felony dichotomy may be constitutionally invalid, whether discovery is constitutionally mandated or state created, the constitutional arguments for attacking this dichotomy will vary depending on the basis for pretrial discovery.

With the trend toward more liberalized criminal discovery there has been greater recognition of a constitutional basis for discovery.[23] The Supreme Court has not spoken directly to the issue of a constitutional basis for discovery but the Court has implied several approaches. *Mooney v. Holohan*[24] marked the beginning of a line of cases that can be seen to be laying the framework for the argument that discovery is incorporated into the fourteenth amendment. The use of the due process rationale focuses on the concept that due process,

> in safeguarding the liberty of the citizen against deprivation through the action of the State, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions.[25]

In *Mooney*, the Court held that the state's knowing use of perjured testimony was "inconsistent with the rudimentary demands of justice. . . ." [26] The Court, in *Pyle v. Kansas*,[27] affirmed and slightly extended *Mooney*. In *Pyle*, the defendant alleged that the prosecutor knowingly used perjured testimony and suppressed evidence favorable to the defendant. Such allegations were held to be sufficient to allege a deprivation of due process and the lower court could not deny a petition for a writ of habeas corpus without determining the truth of the allegations.

In *Alcorta v. Texas*[28] and *Napue v. Illinois*,[29] the Court extended the concepts of fundamental fairness inherent in the due process clause to situations where the state did not solicit false evidence, but allowed it to go uncorrected with the knowledge that it was false. Moreover, the Court held, in *Napue*, that suppression of evidence favorable to the defense was a denial of due process.[30]

The preceding cases led to the holding in *Brady v. Maryland*[31] that:

> the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.[32]

Mooney, *Pyle*, *Alcorta*, *Napue* and *Brady* were all variations on the same theme: that suppression of evidence by the prosecution was, under certain circumstances, a violation of due process. The corollary, in those situations where suppression is violative of due process rights, is that disclosure, in those situations, is required.[33] However, disclosure, referring to disclosure at the time of trial, does not alleviate the problems inherent in the adequate and proper preparation of a defense.[34] Nonetheless, the above mentioned cases did not purport to require pre-trial discovery, and only prohibited suppression of evidence by the prosecution at the time of trial.

[22] *See* note 10 *supra*. Traditional arguments against pre-trial discovery have been that pre-trial discovery would increase the dangers of intimidation of witnesses, elimination or alteration of documentary evidence, perjury and subornation of perjury. *See* United States v. Gleason, 265 F. Supp. 880 (S.D.N.Y. 1967); State v. Tune, 13 N.J. 203, 98 A.2d 881 (1953). *See also* Krantz, *Pre-Trial Discovery in Criminal Cases: A Necessity for Fair and Impartial Justice*, 42 NEB. L. REV. 127 (1962) [hereinafter Krantz]; Nakell, *Criminal Discovery for the Defense and the Prosecution—The Developing Constitutional Considerations*, 50 N.C. L. REV. 437 (1972) [hereinafter Nakell].

[23] An excellent analysis of the constitutional considerations for discovery is presented in Nakell, *supra* note 22. *See also*, Fahringer, *Has Anyone Here Seen Brady?: Discovery in Criminal Cases*, 9 CRIM. L. BULL. 325 (1973) [hereinafter Faringer]; Symposium, Criminal Discovery, 7 U.S.F.L. REV. 203 (1973). General overviews of discovery, illustrative of the liberalizing trend in criminal discovery can be seen in Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth*, 1963 WASH. U.L.Q. 279 (1963); Fletcher, *Pre-Trial Discovery in State Criminal Cases*, 12 STAN. L.R. 293 (1960); Gaynor, *The Defendant's Right to Discovery in Criminal Cases*, 20 CLEV. ST. L. REV. 3 (1971); Goldstein, *The State and the Accused: Balance of Advantage in Criminal Prosecutions*, 69 YALE L.J. 1149 (1960); Katz, *Pre-Trial Discovery in Criminal Cases*, 5 CRIM L. BULL. 441 (1969); Krantz, note 23 *supra;* Rezneck, *Justice Brennan and Discovery in Criminal Cases*, 4 RUT. CAM. L.J. 85 (1972); Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. REV. 228 (1964).

[24] 294 U.S. 103 (1935).

[25] *Id.* at 112.

[26] *Id.* at 112.

[27] 317 U.S. 213 (1942).

[28] 355 U.S. 28 (1957).

[29] 360 U.S. 264 (1959).

[30] *Id.* at 269.

[31] 373 U.S. 83 (1963).

[32] *Id.* at 87.

[33] Nakell at 452.

[34] Gaining the evidence at the time of trial does not afford defense counsel the same opportunity to assimilate and utilize the evidence gained as would pre-trial discovery.

Brady and its precursors are predicated on the concept that the due process clause requires fundamental fairness in the judicial process. This concept is, in turn, predicated on the growing realization that the average criminal defendant is at a serious disadvantage, as compared to the state, in the ability to gather evidence due to a lack of manpower and resources. In addition, the police, in the usual course of investigating the crime, will have removed, and in some cases obliterated, evidence before the defendant is actually charged with the crime, making the defendant dependent on the prosecutor for needed evidence.[35]

The impact of this weakness in the adversary system of justice is made clearer by viewing it in terms of the purposes of the adversary process. In the American system of criminal justice, "[t]he purpose of a trial is as much the acquittal of an innocent person as it is the conviction of a guilty one." [36] A basic tenet of the criminal justice system is that a person is innocent until he has had a fair opportunity to prepare a defense and is then proven guilty beyond a reasonable doubt.

The police, in their position as impartial enforcers of the law, should conduct an investigation that is impartial with a goal toward ascertaining the truth.[37] Ascertainment of the truth is also the goal of the prosecutor, not the compilation of "a record of indiscriminate convictions by concealment and surprise." [38] Furthermore, it has been noted that:

> [T]he State has no interest in interposing any obstacle to the disclosure of the facts, unless it is interested in convicting accused parties on the testimony of untrustworthy persons.[39]

Since in practice the prosecution is likely to be in possession of the evidence that is essential for the adequate and proper preparation of a defense, and no prosecutorial or state interest in withholding such evidence exists, there appears to be no reason for denying discovery. In fact, the Supreme Court has observed,

> that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of justice.[40]

Although the thrust of *Brady* is directed toward maintaining the fundamental fairness in the judicial process and rights guaranteed by the Federal Constitution, *Brady* left important questions unanswered and imposed a limitation on what evidence had to be disclosed to the defense. The Court had an opportunity to propound a doctrine of constitutionally required pre-trial discovery under the fourteenth amendment but stopped short of this result. Since the Court, in *Brady*, made no explicit reference to pre-trial discovery, various courts have subsequently held that *Brady* "did not deal in any way with pre-trial discovery by the defendant," [41] but, rather, dealt only with fairness at trial and not before. Second, the *Brady* Court limited the holding to evidence that was material and favorable. Recently, the Supreme Court has reiterated this portion of the holding.[42] Third, *Brady* did not indicate who was to make the determination as to the favorability of the evidence. In subsequent cases, courts have held that the determination is for the trial court subject to appellate review.[43] Additionally, *Brady* was limited by its facts to felony cases.

[35] Fahringer, note 23 *supra;* Nakell, note 22 *supra.*

[36] Application of Kapatos, 208 F. Supp. 883, 888 (S.D.N.Y. 1962).

[37] According to Fahringer, note 23 *supra*, at 326, "investigation of crime should be designed not only to convict the guilty but to free the innocent."

[38] Krantz, note 22 *supra*, at 130. *See also* Giles v. Maryland, 386 U.S. 66, 98 (1967)(Fortas, J., dissenting); Jackson v. Wainwright, 390 F.2d 288 (5th Cir. 1968). In *Jackson*, Judge Wisdom cites Canon 5 of the American Bar Association Code of Professional Ethics for the proposition that:

> The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done.

Id. at 294.

[39] People v. Moses, 11 Ill. 2d 84, 89, 142 N.E.2d 1, 3 (1957), quoting from People v. Davis, 52 Mich. 569, 573, 18 N.W. 362, 363 (1884). *See also* Jones v. Superior Court, 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962).

[40] Dennis v. United States, 384 U.S. 855, 870 (1966).

[41] United States v. Armantrout, 278 F. Supp. 517, 518 (S.D.N.Y. 1968). In United States v. Manhattan Brush Co., 38 F.R.D. 4 (S.D.N.Y. 1965), the court held that *Brady* applies tests of fairness to the prosecution at trial and not before. The court said further that there was no intention in *Brady*, of creating pre-trial discovery rights. *Id.* at 6-7. *See also* United States v. Gleason, 265 F. Supp. 880 (S.D.N.Y. 1967). Judge Frankel argued that there should not be a blanket denial of pre-trial discovery although in the case at bar discovery was denied. The reason for the denial was that the evidence sought was not novel or unexpected and there was no compelling reason to allow pre-trial discovery.

[42] Moore v. Illinois, 408 U.S. 786 (1972).

[43] In United States v. Jordan, 399 F.2d 610, 615 (2d Cir. 1968), the Court, responding to defendant's contention that defense counsel should determine what evidence is favorable to the defendant, concluded that the trial court is to make the decision, subject to appellate review. *Compare Jordan with* United States v.

The implication in *Brady*, that the defense is not entitled to unfavorable evidence, ignores the fact that such evidence is necessary towards the adequate preparation of a defense. In attempting to ascertain the truth about a given incident it seems anomalous to withhold evidence obtained in investigations conducted pursuant to the goal of ascertaining the truth. The denial of pre-trial discovery and rejection of the contention that such discovery is essential to obtain full protection of the due process clause leads to the illogical conclusion that the trier of fact can fairly determine what actually happened without knowledge of all the pertinent facts. The prosecutor should not be required to make the defendant's case, but fundamental fairness and the concept of the adversary system require that defendant's counsel have the pertinent information with which to build his own case.

Denying the defense the opportunity to determine the favorability or materiality of the evidence is also inconsistent with fundamental fairness and the precepts of an adversary system. Neither the prosecutor nor the trial court have the same motive, personal interest or drive in presenting a defense as does defense counsel and, consequently, are ill-suited to make the necessary evidentiary determinations. The public demand for high conviction rates puts pressure on the prosecutors to strive for convictions and encourages the suppression of evidence. Although public pressure is unlikely to affect the trial court, the court lacks the sensitivity and familiarity with a case necessary for a full appreciation of the evidence possessed by the prosecutor, so is no substitute for defense participation in making the determination.

Although there are compelling arguments against the direct and indirect limitations of *Brady* and for constitutionally required discovery, subsequent case law has left little doubt as to the attitude of the courts.[44] Cases after *Brady* reject the theory that *Brady* is a constitutional discovery case and have reaffirmed the limitations of *Brady*. Most recently, the United States Supreme Court, in *Moore v. Illinois*,[45] strictly reinforced the limitation of defense discovery to favorable evidence. The Court held that the state's failure to disclose favorable evidence that would have seriously impeached a prosecution witness' identification of the defendant was not sufficient to support a claim of a violation of a *Brady* right. The Court's reasoning was that since the misidentification was by only one witness and was not material to the issue of guilt or innocence in light of all the evidence, it did not meet the *Brady* standards.

The cases after *Brady* have scrutinized the *Brady* decision and have carefully refrained from reading anything into the holding that is not apparent on its face. Such strict scrutiny has restricted the holding to a prosecutorial admonition against suppression of evidence. Although subject to reinterpretation, *Brady* presently does not support the position that discovery is required by the due process clause of the fourteenth amendment.

Additional constitutional implications for pretrial discovery can be drawn from other applications of the due process clause and the sixth amendment. In *Roviaro v. United States*,[46] the Supreme Court applied fundamental due process analysis in holding that the government's privilege to withhold the identity of an informer must fall when,

> disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause. . . .[47]

Although *Roviaro* deals with a testimonial privilege and the limitations placed on its use by the due process clause, and the holding is primarily directed toward disclosure during the trial, the Court deemed it necessary to add that the trial court also erred in denying defendant's pre-trial motion for a bill of particulars requesting the identity and address of the informer.[48] *Roviaro*

Manhattan Brush Co., 38 F.R.D. 4 (S.D.N.Y. 1965) (government obligations must be examined and tested after trial). *Contra*, Fahringer, note 22 *supra*, at 330:

> This difficult judgment process should properly be left to the singlemindedness of defense counsel. . . . No one but defense counsel should be trusted with this decision.

[44] *See* notes 39, 40 & 41 *supra*. *See also* Wardius v. Oregon, 412 U.S. 470 (1973) (without deciding whether discovery in itself is required by due process, the Supreme Court held that where there is prosecutorial discovery there must be defense discovery). *See also* Jones v. Superior Court, 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962). Other courts seem to support a theory that denial of discovery can result in violation of due process rights. In such situations due process would require pre-trial discovery. People v. Flowers, 51 Ill. 2d 25, 281 N.E.2d 299 (1972); People v. Cagle, 41 Ill. 2d 528, 244 N.E.2d 200 (1969).

[45] 408 U.S. 786 (1972).

[46] 353 U.S. 53 (1957).

[47] *Id.* at 60–61. *See also* Honore v. Superior Court, 70 Cal. 2d 162, 449 P.2d 169, 74 Cal. Rptr. 233 (1969).

[48] 353 U.S. 53, 65 n.15.

thus implies a constitutional basis for at least one specific area of pre-trial discovery—the identity and address of an informer.[49] *Roviaro* also is significant because it adopted the standard that the evidence in question be relevant and helpful, a less strict standard than the material and favorable standard of *Brady*. Furthermore, *Roviaro* involved the disclosure of inculpatory evidence which presumably would not now be discoverable under the *Brady* standard.[50]

The sixth amendment right to counsel has also provided sustenance to the theory of the constitutional incorporation of discovery. In *United States v. Wade*,[51] the Court held that the sixth and fourteenth amendments require counsel to be present at a pre-trial lineup since such a lineup is a critical stage in the proceedings. The importance of the holding to pre-trial discovery lies in the fact that the Court recognized that a pre-trial lineup is an important vehicle for discovery. Defense counsel's presence will enable him to obtain evidence with which to attack the fairness of the lineup and the validity of both in-court and out-of-court identifications plus information with which to attack the credibility of the government's witnesses without "having to probe in the dark in an attempt to discover and reveal unfairness. . . ." [52]

More recently, the Court, in *Coleman v. Alabama*,[53] held that the preliminary hearing was a critical stage of Alabama's criminal procedure and therefore the sixth amendment right to counsel was applicable to such a situation. The Court's determination that a preliminary hearing was a critical stage partially rests on the recognition that it is extremely important for the purpose of pre-trial discovery.[54]

The impact of *Coleman* is severely limited by the fact that there is no guarantee of a preliminary hearing since a grand jury proceeding may be held instead.[55] Since the defense attorney would not be present, he would lose an important discovery tool. Furthermore, the concept that discovery is an important purpose of a preliminary hearing has been diluted by decisions holding that the judge may terminate a preliminary hearing as soon as there is a showing of probable cause, thus limiting discovery to whatever evidence the prosecutor has obtained up to that point in time.[56]

The presumption of innocence and proof of guilt beyond a reasonable doubt have also been relied on as authority for the existence of a constitutional right of discovery. Mr. Justice Brennan twice has said, in favor of discovery,

> To shackle counsel so that they cannot effectively seek out the truth and afford the accused the representation which is not his privilege but his absolute right, seriously imperils our bedrock presumption of innocence.[57]

Mr. Justice Brennan first argues that discovery is necessary to make the right to counsel more than a meaningless gesture. The deprivation of discovery relates to the very foundation of our legal system—the presumption of innocence. Discovery is the vehicle for enforcing proof beyond a reasonable doubt and making the presumption of innocence meaningful.

Presently, the overwhelming weight of authority forces the conclusion that despite compelling arguments for constitutionally required discovery, such a position has not been judicially accepted.[58] There are still echoes of Judge Learned Hand's opinion in *Garsson* lingering in the background.[59]

[49] There is also the obvious relationship with the sixth amendment in Roviaro—the right to be confronted with the witnesses against you. *See* James v. State, 493 S.W.2d 201 (Tex. Crim. App. 1973). Taking a somewhat contrary view is Hewitt & Bell, *Beyond Rule 16: The Inherent Power of the Federal Court to Order Pre-Trial Discovery in Criminal Cases*, 7 U.S.F. L. REV. 233 (1973).

[50] The identity of the informer and his testimony are clearly inculpatory. Illinois courts, even prior to the adoption of the new discovery rules, allowed discovery of inculpatory evidence. *E.g.*, People v. Allen, 47 Ill. 2d 57, 264 N.E.2d 184 (1970); People v. Tribbett, 90 Ill. App. 2d 296, 232 N.E.2d 523 (1967).

[51] 388 U.S. 218 (1967).

[52] *Id.* at 240–41.

[53] 399 U.S. 1 (1970).

[54] *Id.* at 9. The Court recognized that the preliminary hearing would enable the defense to obtain evidence with which to impeach the state's witnesses and would also afford an opportunity for discovering the state's case.

[55] *E.g.*, Sciortino v. Zampano, 385 F.2d 132 (2d Cir. 1967); Crump v. Anderson, 352 F.2d 649 (D.C. Cir. 1965). The preliminary hearing is for the purpose of finding probable cause. If an indictment is returned, probable cause is established and the need for a preliminary hearing is eliminated. Grand jury proceedings are secret, held without counsel present and merely involve the presentation of prosecution evidence. Some states provide for mandatory preliminary hearings. *E.g.*, ILL. REV. STAT. ch. 38 §§ 109-1 & 109-3 (1971).

[56] Coleman v. Burnett, 477 F.2d 1187 (D.C. Cir. 1973). In *Coleman*, the court held that discovery was not the purpose of a preliminary hearing.

[57] State v. Tune, 13 N.J. 203, 234, 98 A.2d 881, 897 (1953) [Brennan, J., dissenting opinion]; Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U.L.Q. 279, 287 (1963).

[58] *See* notes 39, 40 & 41 *supra*.

[59] *See* text accompanying note 18 *supra*.

Proponents of discovery still have to fend off attacks alleging that discovery will lead to perjury, subornation of witnesses, fabrications, suppression of evidence and will give the defendant too great an advantage in the adversary system.[60] At the same time, prosecutorial discovery is overcoming fifth amendment self incrimination objections.[61] Since the fifth amendment does not bar prosecutorial discovery and many states provide for such discovery by statute, complete discovery for the defense becomes essential to maintain a fair balance between the state and the defendant in the adversarial process.

II

Whether or not discovery is constitutionally required, discovery rights, in varying degrees, are accorded to defendants either by statute or by judge-made law.[62] Some statutes preclude discovery in misdemeanor cases.[63] Irrespective of whether discovery is incorporated within the sixth or fourteenth amendment, or whether it remains as a constitutionally unprotected doctrine based on equitable principles and concepts of a "right sense of justice," [64] a strong case can be made that the denial of discovery in misdemeanor cases, at least where discovery is permitted in felony cases, violates the due process and equal protection clauses of the fourteenth amendment.

If discovery is viewed as being constitutionally mandated, a strong argument can be made for the position that the denial of discovery would be a violation of due process of law and fundamental fairness. In the past, certain constitutional rights have been perfunctorily denied on the basis of the misdemeanor/felony dichotomy. In *Gideon v. Wainwright*,[65] the Supreme Court held that an indigent defendant is entitled to the appointment of counsel to insure a fair trial. Although the decision was not limited in application to felonies, subsequent decisions upheld the denial of appointed counsel in misdemeanor cases.[66] These cases and analogous ones dealing with the right to trial by jury developed the misdemeanor/felony dichotomy and sought to formulate what was hoped to be a more acceptable dichotomy—petty/serious.[67]

After *Gideon*, there were several judicial attempts at defining petty and serious crimes for the purpose of using the definition as a demarcation line for the realization of constitutional rights. In *Duncan v. Louisiana*,[68] the Supreme Court held that the sixth and fourteenth amendments guaranteed a right to a jury trial *in all serious offenses*. Without defining the boundary between petty and serious offenses, the Court held that a possible two year sentence in the case at bar made the offense a serious one.

In *Baldwin v. New York*[69] the Court made a more specific delineation of the petty/serious dichotomy by holding that with respect to the right of trial by jury, serious offenses are those which authorize more than six months imprisonment. While recognizing that imprisonment for any length of time can result in serious repercussions, the Court determined that the disadvantages to the individual who is denied a jury trial in non-serious cases were "outweighed by the benefits that result from speedy and inexpensive non-jury adjudications." [70] Although the Court specifically refused to adopt the state's contention that the petty/serious dichotomy should correspond to the misdemeanor/felony dichotomy, the two concepts are merely variations on the same theme—that some constitutional rights do not attach to all who are criminally accused.

After *Baldwin*, some courts adopted the serious/petty distinction in cases concerning the right to counsel. Of particular interest is Judge Kerner's opinion in *United States ex rel. Singleton v. Woods*[71] in which he held that failure to advise a defendant

[60] *See* note 22 *supra*. These objections are by no means relics of a by-gone era. These objections were raised in United States v. Manhattan Brush Co., 38 F.R.D. 4, 7 (S.D.N.Y. 1965).

[61] Wardius v. Oregon, 412 U.S. 470 (1973); Williams v. Florida, 399 U.S. 78 (1970). For the position that prosecutorial discovery does violate fifth amendment protections see Judge Peter's dissenting opinion in Jones v. Superior Court, 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962).

[62] *See* note 10 *supra*.

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

[64] People v. Allen, 47 Ill. 2d 57, 264 N.E.2d 184 (1970); People v. Cole, 30 Ill. 2d 375, 196 N.E.2d 691 (1964); People v. Moses, 11 Ill. 2d 84, 142 N.E.2d 1 (1957).

[65] 372 U.S. 335 (1963).

[66] *See e.g.*, United States *ex rel.* Singleton v. Woods, 440 F.2d 835 (7th Cir. 1971); Goslin v. Thomas, 400 F.2d 594 (5th Cir. 1968).

[67] The petty/serious dichotomy varies little from the misdemeanor/felony dichotomy. Both use possible punishment as a criteria. Generally, the petty/serious dichotomy has cut into the misdemeanor/felony dichotomy by lowering the length of imprisonment necessary for the attachment of constitutional rights from one year to six months.

[68] 391 U.S. 145 (1968).

[69] 399 U.S. 66 (1970).

[70] *Id.* at 73.

[71] 440 F.2d 835 (7th Cir. 1971).

of his right to appeal and right to court-appointed counsel if indigent violated his right to equal protection under the fourteenth amendment and his right to counsel under the sixth amendment as incorporated through the due process clause of the fourteenth amendment. Judge Kerner recognized that basic constitutional protections should not "entirely depend on the distinction between misdemeanors and felonies," [72] and held that the right to counsel applies to all serious offenses regardless of whether they are felonies or misdemeanors.

Justices Black and Douglas, in their concurring opinion in *Baldwin*,[73] attacked the petty/serious distinction. Their position was that the Constitution makes no such distinctions; the constitutional guarantees are applicable to all criminal prosecutions and for all crimes. The Supreme Court took a long stride toward adopting the Black and Douglas view in *Argersinger v. Hamlin*.[74] Mr. Justice Douglas, writing for the majority, held that no person may be imprisoned for any offense without representation by counsel at trial unless he has knowingly and intelligently waived the right to counsel regardless of whether the offense is classified as petty, serious, misdemeanor or felony. The Court specifically rejected the contention that since prosecutions for crimes punishable by less than six months imprisonment were triable without a jury they were also triable without counsel.[75]

The decision in *Argersinger*, on its face, leaves the misdemeanor/felony dichotomy intact with respect to trial by jury, but the validity of the dichotomy for defining when constitutional rights attach is necessarily undermined by the rejection of this position in *Argersinger*. Even with the distinction still intact for determining the right to a jury trial, *Argersinger* can be seen to have a strong impact on the right to pre-trial discovery, particularly if discovery is viewed as constitutionally required. *Argersinger* suggests that an individual is entitled to his constitutional rights regardless of the classification of the crime, and as so interpreted, would require the same treatment for discovery if discovery is constitutionally required. It may be argued that *Argersinger* does not eradicate the misdemeanor/felony dichotomy for all constitutional rights, but is limited to the facts present in the case. The Court is likely to adjudicate the validity of the misdemeanor/felony distinction on a case by case basis with respect to specific constitutional rights. Thus, the Court might find the policies with respect to discovery justify the application of the dichotomy as is presently the situation with respect to the right of trial by jury. However, if discovery is viewed as essential to the full realization of the sixth amendment right to counsel, the analogy to *Argersinger* would be more compelling than the analogy to the right to jury trial. And, if the Court were to elevate discovery to a constitutional right on the basis of the right to counsel, *Argersinger* would presumably require pre-trial discovery in state misdemeanor cases regardless of the existence or absence of state laws on the subject.

Cases dealing with other constitutionally protected rights have also repudiated the misdemeanor/felony dichotomy. In *Camara v. Municipal Court*[76] and *See v. City of Seattle*,[77] the defendants were charged with misdemeanors for refusal to allow a warrantless inspection of their premises in violation of a municipal ordinance. Mr. Justice White, delivering the majority opinion in both cases, held that the fourth amendment protections against warrantless searches extends to administrative searches because such searches are "significant intrusions upon the interests protected by the Fourth Amendment." [78]

Further erosion of the misdemeanor/felony classification is seen in *Groppi v. Wisconsin*.[79] In *Groppi*, the Court struck down a Wisconsin state law that denied a change of venue in a criminal case, regardless of prejudice, solely on the ground that the crime charged was a misdemeanor. The Court held that the law violated the accused's right to trial by an impartial jury under the sixth amendment.

Very recently the California supreme court, in *Mills v. Municipal Court*,[80] announced what could be the death knell for discrimination against misdemeanants by holding that misdemeanor guilty pleas must conform to the standards previously set for felony guilty pleas.[81] The holding was predicated on the observation that a misdemeanant, in

[72] *Id.* at 837.
[73] Baldwin v. New York, 399 U.S. 66, 73 (1970).
[74] 407 U.S. 25 (1972).
[75] *Id.* at 29.
[76] 387 U.S. 523 (1967).
[77] 387 U.S. 541 (1967).
[78] 387 U.S. 523, 534.
[79] 400 U.S. 505 (1971).
[80] 10 Cal. 3d 383, 515 P.2d 273, 110 Cal. Rptr. 329 (1973); *contra*, Johnson v. Texas, 503 S.W.2d 280 (Tex. Crim. App. 1973).
[81] The standards for guilty pleas in felony cases was set out in Boykin v. Alabama, 395 U.S. 238 (1969).

pleading guilty, waives the *same fundamental rights* as a felon—the privilege against self-incrimination, the right to trial by jury, and the right to confrontation with the witnesses against him. Were the Supreme Court to adopt such a position, it would create serious doubts about the viability of the *Duncan* and *Baldwin* position that the right to trial by jury could be denied to misdemeanants.

To the extent that discovery is determined to be constitutionally mandated, the clear import of the preceding cases would compel the view that discovery is required in misdemeanor cases. Such a view would necessitate modification of the blanket denial of misdemeanor discovery in *People v. Schmidt*.[82] For example, the Illinois discovery rules, held inapplicable to misdemeanants, encompasses *Brady* rights. If *Brady* requires pre-trial discovery of the specified information on due process grounds then *Schmidt* encompasses too much. However, under the prevailing doctrine that *Brady* applies only to disclosure of evidence at trial, *Schmidt* could be reconciled by interpreting it as only denying pre-trial discovery.

III

At the present time, discovery, with the limited exceptions previously discussed, is at best a state created right. There has not been an explicit holding, apart from scholarly deductive reasoning, to the effect that states *must* grant broad discovery as exemplified by the Illinois discovery rules. Nonetheless, many states have statutes regarding criminal discovery, the vast majority of which do not limit their applicability to felonies.[83] Where discovery is denied to all criminal defendants alike, it is difficult to see what strong constitutional argument a misdemeanant could make for discovery unless discovery itself was constitutionally protected.

The situation where discovery is granted to felons and denied to misdemeanants is a "horse of a different color." In *Griffin v. Illinois*,[84] a statute that provided free transcripts only to indigent defendants sentenced to death resulted in violations of the due process and equal protection clauses of the fourteenth amendment. As Mr. Justice Black said:

> [O]ur own constitutional guarantees of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons. Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American Court.[85]

Griffin involved a state-granted, as opposed to a constitutional, right—the right of appellate review. The state is not required by the Federal Constitution to provide avenues of appellate review. But, the Court held that appellate review was now an integral part of the Illinois trial system and that the due process and equal protection clauses protect persons from invidious discrimination at all stages of the proceedings.

Mr. Justice Frankfurter noted that equal protection "does not deny a state the right to make classifications in law when such classifications are *rooted in reason*." [86] *Griffin* thus leaves open the question of whether a misdemeanor/felony classification is invidious or unreasonable. Several cases indicate that such a classification is unreasonable.

In *Williams v. Oklahoma City*,[87] the Court, again dealing with the issue of free transcripts and appellate review, held that once appellate review is established it "must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." [88] Although the issue of an indigent's rights was again paramount, the state sought to deny the right to a free transcript since the defendant was charged with a misdemeanor. Nonetheless, the Court held that such denial was a violation of equal protection.

In the same vein, Judge Kerner, while sitting on the Seventh Circuit Court of Appeals,[89] held that the failure of the trial judge to advise an indigent misdemeanant of his right to appeal and his right to court-appointed counsel violates his equal protection rights. Although this case deals with the constitutional right to counsel, it is also worthy of note for the point made by Judge Mayor that once Illinois created the avenues to appellate review they must be kept open to all defendants whether they be felons or misdemeanants.[90]

[82] *See* note 5 *supra*.
[83] *See* notes 9 & 10 *supra*.
[84] 351 U.S. 12 (1956).
[85] *Id.* at 17.
[86] *Id.* at 21 [concurring opinion].
[87] 395 U.S. 458 (1969).
[88] *Id.* at 459.
[89] United States *ex rel.* Singleton v. Woods, 440 F.2d 835 (7th Cir. 1971).
[90] *Id.* at 839 [concurring opinion].

Mayer v. City of Chicago[91] involved an indigent defendant who was denied a free transcript solely because his was a misdemeanor case. The Court held that the distinction drawn by the Illinois Supreme Court Rule[92] which provided for free trial transcripts only in felony cases was an unreasoned distinction proscribed by the fourteenth amendment, noting that:

> The distinction between felony and non felony offenses drawn by Rule 607(b) can no more satisfy the requirements of the Fourteenth Amendment than could the like distinction . . . held invalid in *Groppi v. Wisconsin*. . . .[93]

Although *Mayer* involves indigency, there are very compelling analogies to the situation involving pre-trial discovery. Both the right to appellate review and to pre-trial discovery were state created and both were limited by statute to felonies. The fact that *Mayer* deals with an indigent defendant is of no consequence since it would be inconsistent and illogical to hold that the state has to treat indigent felons and misdemeanants alike but can discriminate between felons and misdemeanants who are financially more fortunate.

The misdemeanor/felony dichotomy is largely the result of balancing the state's and the individual's interests. The rationale used by the state to justify the dichotomy is important in determining whether it is sufficient to out-weigh the need for discovery.

One possible rationale is that to grant sweeping discovery rights in misdemeanor cases would clog beyond imagination courts already severely burdened by over-crowded dockets. This rationale necessarily rests on the premise that the grant of discovery rights retards the operation of the criminal justice system. However, the growth of discovery, contrary to slowing up the judicial process, has speeded it up. Judge Earl Strayhorn, of the Circuit Court of Cook County, Illinois, observed significant practical benefits to the speedy and efficient operation of the criminal justice system after only one year of operating under Illinois' liberalized discovery rules.[94] Judge Strayhorn noted a very significant decrease in the amount of time used in pre-trial preparation and a marked shortening of the trial itself by the elimination of frequent recesses to chambers after the testimony of each prosecution witness. Additionally, there was an increase in the effectiveness of plea bargaining, increases in the number of guilty pleas, and more cases were dismissed and/or stricken from the docket with leave to reinstate or nolle prosequi.[95] The premise that pre-trial discovery will slow the adjudicative process is thus not supported in reality. Moreover, further improvement in the speed and efficiency of criminal adjudication is possible under automatic discovery rules which eliminate the need for pre-trial motions and time for compliance.[96]

A second possible rationale for denying discovery to misdemeanants is that the increased cost that would result would be too great a financial burden for a state's adjudicatory system to absorb. Again, this rationale rests on a faulty premise. If there is any increased cost to the state, it should be more than outweighed by the increase in speed and efficiency. Furthermore, there is some doubt as to whether the state's fiscal interest can justify the deprivation of certain rights. The state's fiscal interest was raised in *Mayer* as a justification for denying free transcripts to indigent misdemeanants. The Court, however, held the state's fiscal interest to be irrelevant.[97] In a different context the Supreme Court recognized that the state has a legitimate interest in preserving its fiscal integrity and the fiscal integrity of its programs, but it may not protect that interest by invidious distinctions between classes of its citizens.[98] If the misdemeanor/felony dichotomy is unreasonable or invidious then the state's rationale falls.

Conclusion

Since Justice Cardozo first saw the glimmerings of discovery in *People ex rel. Lemon v. Superior Court*,[99] the judicial, legislative and scholarly trend has been toward greater recognition of the importance of discovery. The most far reaching views concerning discovery treat it as a constitu-

[91] 404 U.S. 189 (1971).
[92] Ill. Rev. Stat. ch. 110A, § 607(b) (1971).
[93] 404 U.S. at 195–96.
[94] Strayhorn, *Full Criminal Discovery in Illinois: A Judge's Experience*, 56 Judicature 279 (1973).
[95] *Id.* at 280.
[96] Ariz. R. Crim. P. 15.1 (1973).
[97] Mayer v. City of Chicago, 404 U.S. 189, 197 (1971): The indiviousness of the discrimination that exists when criminal procedures are made available only to those who can pay is not eased by any differences in the sentences that may be imposed.
[98] The Supreme Court has recognized that the state has a legitimate interest in its fiscal integrity but it can not satisfy that interest by creating invidious discriminations. *Cf.* Goldberg v. Kelly, 397 U.S. 254 (1970); Shapiro v. Thompson, 394 U.S. 618 (1969).
[99] 245 N.Y. 24, 156 N.E. 84 (1927).

tional right. Although this doctrine is still in the budding stage, it is an excellent illustration of the progress that has been achieved with respect to the liberalization of pre-trial discovery in crminial cases.

With respect to Illinois discovery rules and *People v. Schmidt*,[100] the following observations can be made. First, the Illinois discovery rules, as far as they have been interpreted to deny rights set down in *Brady v. Maryland*, are unconstitutional under the due process and equal protection clauses of the fourteenth amendment. This position, of course, is disputable, but the recent trend in criminal cases in affording constitutional rights to all criminally accused alike argues strongly in favor of it. Secondly, the position taken in recent cases concerning the denial of a state created right to misdemeanants would compel a similar conclusion with respect to pre-trial discovery. Since discovery is becoming an integral part of Illinois' criminal justice system, the *Mayer* decision should be controlling.

In jurisdictions with statutes that imply a misdemeanor/felony dichotomy the problem has not yet been litigated. The statutes in those jurisdictions are not as explicit as that in Illinois and are susceptible to an interpretation that would permit discovery in misdemeanor cases.

As yet, the Supreme Court has not held that discovery is a constitutionally protected right. Nevertheless, a great many states, both judicially and legislatively, have adopted sweeping discovery procedures. Where these rights have been granted to felons but denied to misdemeanants the evidence points to the conclusion that such statutes or rules would be unconstitutional if applied to deny a misdemeanant the right to discovery since they would then violate the proscriptions of the fourteenth amendment. The need for discovery, the effect of discovery on certain constitutional rights regardless of whether discovery itself is constitutionally required, the general repudiation of the misdemeanor/felony dichotomy and the lack of valid reasons for denying misdemeanor discovery lead to the conclusion that discovery, if permitted at all by the state, must be granted to all persons accused of crime regardless of the classification of the charge.

[100] 8 Ill. App. 3d 1024, 291 N.E.2d 225 (1972).

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THE FIRST AMENDMENT OVERBREADTH DOCTRINE: A COMPARISON OF DELLINGER AND BARANSKI

In *United States v. Dellinger*[1] and *United States v. Baranski*[2] the Seventh Circuit Court of Appeals considered defendants' first amendment rights in the context of the first amendment overbreadth doctrine. Within a period of a year, the court, in applying the same concepts to factually similar situations, arrived at differing constructions of this doctrine. Judge Pell, who had written the dissenting opinion in *Dellinger*,[3] wrote the opinion of the court in *Baranski*. In *Baranski* he presented a set of threshold standards which differed from those presented in *Dellinger* although both controlled the application of the overbreadth doctrine. While in both cases the court premised its decision on the same legal rules, the *Baranski* decision differed in its more rigid adherence to the primacy of the first amendment rights which form the basis of the first amendment overbreadth doctrine.

In *Baranski* the defendants were arrested and tried for acts committed in protest of the Viet Nam war. On the afternoon of April 29, 1971, John Baranski, Thomas Clark, Eileen Marie Kruetz and Mary Elizabeth Lubbers went to the offices of three draft boards housed in the same building in Evanston, Illinois. Once in the offices, they opened drawers and filing cabinets, removed some records, and poured animal blood over them. They waited quietly for the police whom the board secretary had telephoned. When the police arrived, the defendants said that they would non-violently submit to arrest. Upon receiving permission, they prayed and read aloud from the New Testament. They also distributed a signed letter in explanation and justification of their acts. The defendants were arrested and charged in a four count indictment with 1) wilful damage to mliitary property;[4] 2) removal, mutilation and destruction of records;[5] 3) interference with the administration of the Military Selective Service Act;[6] and 4) conspiracy to commit the above offenses.[7] The jury acquitted the defendants of the three substantive counts, but convicted them on the conspiracy count. On appeal, the defendants contended that the statute prohibiting interference with the Military Selective Service Act unconstitutionally abridged the freedom of speech guaranteed by the first amendment. The court of appeals found the language of the statute overbroad and held the provision void on its face.[8]

United States v. Dellinger also involved acts of political protest. During the last week of August, 1968, the Democratic party held its national convention in Chicago. During this time several violent encounters occurred between city police and individuals in the streets and parks of Chicago. As leaders of the National Mobilization Committee to End the War in Viet Nam, David Dellinger, Rennie Davis and Tom Hayden were arrested and charged with conspiracy to travel in and use the facilities of interstate commerce with intent to incite, organize, promote and encourage a riot.[9] They were also charged with conspiracy to participate in and carry on a riot, to commit acts of violence in furtherance of a riot, and to aid and abet persons in inciting and carrying on a riot.[10] The indictment also included charges of conspiracy to teach or demonstrate the use of incendiary devices with knowledge that they would be used in a civil disorder which might obstruct commerce, or to interfere with a fireman or law enforcement officer engaged in his duties during such a civil disorder.[11]

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[1] 472 F.2d 340 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973).
[2] 484 F.2d 556 (7th Cir. 1973).
[3] 472 F.2d at 409.
[4] 18 U.S.C. § 1361 (1970).
[5] 18 U.S.C. § 2071 (1970).
[6] Military Selective Service Act of 1967 § 1(11), 50 U.S.C. § 462(a) (1970).
[7] 18 U.S.C. § 371 (1970).

The specific language which the court found objectionable read as follows:

> ... any person or persons who shall knowingly hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of this title or the rules or regulations made pursuant thereto, or who conspires to commit any one or more of such offenses, shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years....

[8] Military Selective Service Act of 1967 § 1(11), 50 U.S.C. App. § 462(a) (1970).
[9] 18 U.S.C. § 371 (1970) (the conspiracy charge); Anti-Riot Act § 1(a), (b), 18 U.S.C. § 2101(a), (b) (1970) (the substantive provision).
[10] 18 U.S.C. § 371 (1970) (the conspiracy charge); Anti-Riot Act § 1(b)–(d), 18 U.S.C. § 2101(b)–(d) (1970) (the substantive provision).
[11] 18 U.S.C. § 371 (1970) (the conspiracy charge);

As leaders of Youth International Party, Y.I.P., Abbie Hoffman and Jerry Rubin were also charged in the conspiracy count. In addition each of these defendants was charged in a separate count with travelling in interstate commerce to Chicago with the intent to incite, organize, promote and encourage a riot[12] and, thereafter, on specified dates and at specified locations, speaking to an assemblage of persons for the purpose of inciting, organizing and encouraging a riot.[13]

A jury acquitted the defendants on the conspiracy count, but convicted each of them on the individual counts. On appeal, the defendants argued that the Anti-Riot Act[14] unconstitutionally abridged their first amendment right to freedom of speech. The court of appeals, however, held that the statute, when properly interpreted, prohibited only conduct which was not constitutionally protected.[15]

The first amendment introduces the concept of freedom of expression into the American legal system.[16] In resolving a conflict, however, courts do not simply refer to the concept of freedom of expression as a basis for decision. The legal system imposes an intermediary system of rules ordering the determination of conflicts. Through these rules, abstract concepts such as freedom of expression influence conduct in a society. At the same time, the factual situations to which a court applies these rules shape the content of the rules, thereby shaping the content of the abstract concept.[17]

As part of its decision in *Dellinger*, the court formulated general rules concerning the first amendment overbreadth doctrine. Applying these rules, the court in *Dellinger* found the questioned statute to be constitutionally valid. In *Baranski* the court accepted the general rules as stated in *Dellinger*. Yet in applying these rules to a similar factual situation, the court in *Baranski* reached an opposite conclusion which invalidated the questioned clause. Because of this difference in application, the decision of the Seventh Circuit in *Baranski* presents an alternative statement of the first amendment overbreadth doctrine. The general concept of freedom of expression forms the basis of this doctrine; thus, in differing in their interpretation of the overbreadth doctrine, the decisions of *Dellinger* and *Baranski* also differed in their definition of the concept of freedom of expression.[18]

The court in *Dellinger* formulated the following statement of the first amendment overbreadth doctrine:[19]

> The doctrine of overbreadth applies when a statute lends itself to a substantial number of impermissible applications, such that it is capable of deterring protected conduct, when the area affected by the challenged law involves first amendment interests, and when there is not a valid construction which avoids abridgment of first amendment interests.[20]

This statement of the overbreadth doctrine presents three criteria which the court must consider in determining whether the doctrine applies. First, the court must determine if the challenged law affects first amendment interests. If the area affected by the law does not involve such interests, then the court need not deal with the remaining criteria since they relate only to first amendment considerations. The second criterion requires that the court determine whether the challenged statute lends itself to a substantial number of impermissible applications and, therefore, is capable of de-

18 U.S.C. § 231(a)(1), (3) (1970) (the substantive provision).

[12] Anti-Riot Act § 1, 18 U.S.C. § 2101 (1970).

[13] 472 F.2d at 349.

[14] Anti-Riot Act § 1, 18 U.S.C. § 2101 (1970).

[15] 472 F.2d at 355.

[16] U.S. CONST. amend. I. As Judge Pell noted in his dissent in *United States v. Dellinger:*

> Sometimes people are prone to speak offhandedly and perhaps slightly inaccurately of well-established or cherished concepts without resort to the exact text of the source. The plain language of the First Amendment to the Constitution of the United States of America is 'Congress shall make no law . . . abridging the freedom of speech.' United States v. Dellinger, 472 F.2d 340, 414 (7th Cir. 1972) (dissenting opinion), *cert. denied*, 410 U.S. 970 (1973).

Cf. McKay, *The Preference for Freedom*, 34 N.Y.U.L. REV. 1182, 1188 (1959). For a brief discussion of the historical background of the first amendment, see Cahn, *The Firstness of the First Amendment*, 65 YALE L.J. 464 (1956).

[17] *See* E. LEVI, AN INTRODUCTION TO LEGAL REASONING 3 (1949).

[18] E. LEVI, *supra* note 17, at 4. Concepts such as freedom of expression do not represent fixed absolutes. The ambiguity inherent in legal rules permits the shaping of these rules to reflect the values of the society in which they function. As Levi points out:

> Legal reasoning has a logic of its own. Its structure fits it to give meaning to ambiguity and to test constantly whether the society has come to see new differences or similarities. Social theories and other changes in society will be relevant when the ambiguity has to be resolved for a particular case.

Thus a difference in interpretation of the first amendment overbreadth doctrine reflects a more basic difference within society.

[19] For an extensive analysis of the first amendment overbreadth doctrine see, Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

[20] 472 F.2d at 357.

terring protected conduct. A statute may regulate or even prohibit expression, and yet be so narrowly drawn that it abridges only expression which falls outside the protection of the first amendment. A statute meets this second criterion only if it is so broadly worded that by its terms it applies to expression which is constitutionally protected as well as expression outside the protection of the first amendment. If the statute meets the first and second criteria, the court reaches the third criterion. This criterion requires that the court seek a construction of the statute which does not abridge first amendment rights. If the court cannot achieve a valid construction, the overbreadth doctrine requires that the court hold the challenged provision void on its face. Only if the challenged statute meets all three of these requirements, will the overbreadth doctrine apply.

In evaluating the three criteria of the doctrine the court in *Dellinger* formulated two specific questions to be answered.[21] The first question was the "threshold question," that is,

> whether the statute relates to expression and is therefore governed by first amendment considerations.[22]

The answer to this question determines whether the statute meets the first criteria for the application of the overbreadth doctrine, the question of whether the area affected by the challenged statute involves first amendment interests.

If, under the threshold question, the court concludes that the statute relates to expression, it reaches the "removal question," that is,

> whether the expressive conduct is so related to action that the expression is therefore carved away from the protection of the first amendment.[23]

In evaluating the removal question, the court also evaluates the remaining two criteria of the overbreadth doctrine: 1) whether the statute lends itself to a substantial number of impermissible applications and 2) whether a valid construction is possible. Thus, there are two possible ways in which the court may determine that the expressive conduct is removed from the protection of the first amendment. First, although the challenged statute may deter expression, it may still be so narrowly drawn that it affects only expression which the first amendment does not protect. If the legislature in effecting its goal limited the application of the statute to conduct which it had authority to prohibit, expression inextricably related to such conduct is removed from the protection of the first amendment. Such a statute would not meet the second requirement of the overbreadth doctrine, that is, it would not lend itself to a substantial number of impermissible applications.

Second, if the court construes the statute in language which avoids abridgment of first amendment interests, it has accomplished what the legislature failed to do; it has narrowed the application of the statute to expression outside the protection of the first amendment. If such a valid construction is possible, the statute does not meet the third requirement for the application of the overbreadth doctrine since the court has found a construction of the statute which does not abridge first amendment rights. Thus, the court may find, either through a reading of the statute or through its own construction, that the expressive conduct in question is so related to action that the first amendment does not protect the conduct.

Having acknowledged the general principles of the overbreadth doctrine and having accepted the specific questions embodying these principles, it remains for the court to evaluate the facts before it. Turning to an evaluation, the court first considers whether the challenged statute relates to first amendment interests. In considering this threshold question, the court has two alternative bases for evaluation, the defendant's particular conduct or the general impact of the statute. Traditionally, a court exercises limited review confined to the evaluation of facts arising from a particular application of the statute.[24] In the adjudication of a case involving first amendment rights, the court's concern extends beyond the vindication of the defendant's own rights. In first amendment cases, the courts recognize the inhibitory effect which an overbroad statute may have on constitutionally protected conduct.[25] This con-

[21] *Id.* at 358. The court also applied these two specific questions in considering the challenged provision in *Baranski*.

[22] 472 F.2d at 358.

[23] *Id.*

[24] *See* United States v. Raines, 362 U.S. 17, 20 (1960); Yazzo & M.V.R.R. v. Jackson Vinegar Co., 226 U.S. 217, 219 (1912).

[25] *See* Dombrowski v. Pfister, 380 U.S. 479 (1965) (an overbroad or vague statute may lead to a "chilling effect" on first amendment rights); Baggett v. Bullit, 377 U.S. 360 (1964) (the vagueness of a statute may inhibit the exercise of first amendment freedoms and cause an individual to steer far wider of the unlawful zone than if the boundaries of the forbidden area were clear). *See also*, Barenblatt v. United States, 360 U.S. 109, 137 (1959) (Black, J., dissenting):

sideration has led the courts to reject a method of adjudication which requires the appearance of a privileged complainant before eliminating statutory overbreadth.[26] The importance of first amendment considerations requires that any question of their infringement be resolved with alacrity.[27] A possibility that a statute may inhibit the exercise of first amendment rights requires prompt judicial review of the challenged provision. The court, therefore, considers the general impact of the statute, making any evaluation of defendant's own conduct irrelevant.

In considering the threshold question the court in both *Dellinger* and *Baranski* concluded that the statute in question related to expression. In each case, the court based its conclusion on a consideration of the general impact of the statute. The federal Anti-Riot Act which the court considered in *Dellinger* did not specifically refer to expression, but prohibited travelling in interstate commerce with intent to incite a riot.[28] It is not, however, the specific terms of a statute but its impact which is crucial in determining whether the statute relates to expression.[29] As the court observed in *Dellinger*, rioting has historically occurred as an expression of political, economic and social reaction.[30] The Anti-Riot Act made the individual liable for causing a riot. Congress may validly seek to prevent riots; it may not, however, abridge freedom of speech. Because of the possibility that some form of expression may cause a riot, first amendment considerations require that the statute draw a careful distinction between expression which the constitution protects and expression which the legislature may validly prohibit.

In concluding that the statute in question related to expression, the court in *Baranski* relied on the words of the statute itself which prohibited interference with the Military Selective Service Act "by force or violence or otherwise." [31] This statute literally prohibited interference by any means including expression. In support of its conclusion the court in *Baranski* cited *United States v. Eberhardt*[32] in which the court held that this phrase relieved the prosecution of any obligation to show force or violence.

Because the court considered the general impact of the statutes rather than defendants' particular conduct, it did need to consider whether defendants' conduct was "speech" in the context of the first amendment.[33] In *Dellinger* the court offered the generalized definition of speech as "conduct which makes an offer in the market place of ideas." [34] Although the charge of incitement to riot rested wholly on the defendants' speeches, the court in *Dellinger* did not consider whether the speeches themselves represented expression protected by the first amendment. The court referred to the defendants' particular conduct only as a relevant example supporting its conclusion that the statute related to expression.[35] In *Baranski*, the court condemned the defendants' conduct as intolerable and inexcusable, noting specifically that it was not per se privileged under the first amendment.[36] Again, however, the court did not go farther and consider whether the defendants' conduct qualified as "speech" protected by the first amendment.

> A statute broad enough to support infringement of speech, writings, thoughts, and public assemblies . . . necessarily leaves all persons to guess just what the law really means to cover, and fear of a wrong guess inevitably leads people to forego the very rights the Constitution sought to protect above all others.

[26] *See* NAACP v. Button, 371 U.S. 415 (1963); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

[27] To some extent, the costs of delay are inherent in a system of constitutional adjudication including the requirements of article III. The need to dispose of overbreadth problems with dispatch, however, does not offend article III if the complainant is viewed as asserting his own right not to be burdened by an unconstitutional statute. *See* text accompanying note 36 *infra*.

[28] Anti-Riot Act § 1, 18 U.S.C. § 2101 (1970) provides:

> Whoever travels in interstate or foreign commerce or uses any facility of interstate or foreign commerce, including, but not limited to, the mail, telegraph, telephone, radio, or television, with intent—
> (A) to incite a riot; or
> (B) to organize, promote, encourage, participate in, or carry on a riot; or
> (C) to commit any act of violence in furtherance of a riot; or
> (D) to aid or abet any person in inciting or participating in or carrying on a riot or committing any act of violence in furtherance of a riot;
>
> and who either during the course of any such travel or use or thereafter performs or attempts to perform any other overt act for any purpose specified in subparagraph (A), (B), (C), or (D) of this paragraph—
>
> Shall be fined not more than $10,000, or imprisoned not more than five years, or both.

[29] 472 F.2d at 458.

[30] *Id.* at 359.

[31] Military Selective Service Act of 1967 § 1(11), 50 U.S.C. App. § 462(a) (1970).

[32] 417 F.2d 1009, 1013 (4th Cir. 1969), *cert. denied*, 397 U.S. 909 (1970).

[33] *Cf.* United States v. O'Brien, 391 U.S. 367 (1968). *But see* Bradenburg v. Ohio, 395 U.S. 444 (1969) (Douglas, J., concurring).

[34] 472 F.2d at 358.

[35] *Id.* at 359.

[36] 484 F.2d at 565.

Since the court considers the general impact of the statute, consideration of whether defendant's speech is privileged conduct is irrelevant in determining whether the statute infringes protected conduct. Determination of whether the defendant's conduct is "speech" within the meaning of the first amendment is similarly irrelevant in considering the first amendment overbreadth doctrine. The analysis of the threshold question involves consideration of the general impact of the statute which the court evaluates in terms of hypotheticals and general conclusions. The requirements of "justiciability" and "case or controversy" give rise to the concept of standing in constitutional law, and it is the concept of standing which prohibits the court from considering the rights of third parties not before the court.[37] In using hypotheticals and general conclusions to evaluate the general impact of the statute, however, the court does not violate the requirement of standing by considering the rights of parties not before the court. As a theoretical matter, the court considers only the defendant's assertion of his own right not to be burdened by an unconstitutional rule of law.[38] An evaluation of the threshold question in terms of the general impact of the statute enables the court promptly to consider the validity of any statute which possibly infringes first amendment rights.

As the next step in evaluating the facts, the court determines whether the expression is so related to action that the expression is removed from the protection of the first amendment. The removal question raises the problem of the test to be used to determine if the expression is so closely related to conduct that the legislature may prohibit the expression.[39] In promulgating the test to determine when expression is removed from the protection of the first amendment, the court in *Dellinger* observed that constitutional protection is not limited to mild or innocuous presentation. The value of unfettered speech implicit in the first amendment precludes any formula punishing advocacy of violence in terms of fervor or vigor.[40] The court then concluded that "the real question is whether particular speech is intended to and has such capacity to propel action that it is reasonable to treat such speech as action." [41]

Accepting this statement of the test, the legislature may prohibit only those forms of expression which have a substantial relation to action. Because of the peculiar vulnerability of first amendment rights, the Supreme Court has required that legislation in this area be narrowly specific in its

[37] As examples showing that the canon against *jus tertii* claims is relaxed when fundamental rights are at stake and third parties are unable to effectively protect themselves, see NAACP v. Button, 371 U.S. 415 (1963); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958). *See also* Note, *The First Amendment Overbreadth Doctrine*, *supra* note 19, at 848.

[38] The test defining a sufficient relationship of expression to action has posed a continuing problem in the adjudication of first amendment rights. Mr. Justice Holmes first formulated the "clear and present danger" test in Schenck v. United States, 249 U.S. 47, 52 (1919). The precise meaning of the phrase has been a source of continuing debate. Professor Freund points out that:

> The test is pretty clearly drawn from the criminal law, and in particular from Holmes' analysis of the criminal law as a scholar and state judge; for the criminal law is necessarily concerned with the line at which innocent preparation ends and a guilty conspiracy attempt begins.

P. FREUND, ON UNDERSTANDING THE SUPREME COURT 25 (1949).

In Abrams v. United States, 250 U.S. 616 (1919), Frohwerk v. United States, 249 U.S. 204 (1919), and Debs v. United States, 249 U.S. 211 (1919) the Court applied the *Schenk* doctrine to affirm the convictions of dissidents during World War I. These World War I cases introduced the concept of "clear and present danger" into first amendment considerations.

In Bridges v. California, 314 U.S. 252 (1941), the Court approved the "clear and present danger" test, confining it, however, to a narrow category. In Dennis v. United States, 341 U.S. 494 (1951), the Court introduced the "not improbable test" of Judge Learned Hand. This test required a determination of "whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." United States v. Dennis, 183 F.2d 201, 212 (1950), *aff'd*, 341 U.S. 494 (1951). In Yates v. United States, 354 U.S. 298 (1957), the Court drew a distinction between advocacy to do something and advocacy to believe in something. The Court in Bradenburg v. Ohio, 395 U.S. 444 (1969), refined this distinction. Before advocacy of the use of force may be prohibited, it must be shown 1) that "such advocacy is directed to inciting or producing imminent lawless action" and 2) that such advocacy "is likely to produce such action." 395 U.S. at 447.

The test has thus evolved towards a separation of "conduct" into "expression" which is always protected and "action" which is not. Even under this test, the dichotomy between action and expression is not always clear. Expression may be so closely linked to action that they have equivalent impact. In such mixed cases, a test separating conduct into "action" and "expression" would require that the court then determine whether the harm is immediate and instantaneous, and whether it is remediable only by punishing and thereby preventing the conduct. T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 59 (1966). *Cf.* Bradenburg v. Ohio, 395 U.S. 444 (1969) (Douglas, J., concurring); Speiser v. Randal, 357 U.S. 513, 536 (1958) (Douglas, J., concurring: "[A]dvocacy which is in no way brigaded to action should always be protected by the First Amendment."); A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

[39] 472 F.2d at 360.

[40] *Id.* at 360.

[41] *Id.*

terms and effect.[42] A determination that the statute relates to expression imposes the further requirement that the statute be sufficiently specific to prohibit only constitutionally unprotected conduct.

While advocacy of violence may have the capacity to propel action in certain circumstances, the Supreme Court has held a statutory prohibition of advocacy of violence overbroad.[43] Although recognizing that the legislature may validly seek to prevent acts of violence, the Court found that mere advocacy of violence did not have a sufficient probability of provoking violence to allow the legislature to prohibit the expression in order to prevent the action.[44]

In applying the removal test to the language of the federal Anti-Riot Act, the court in *Dellinger* distinguished incitement to riot from advocacy of violence.[45] The court first considered the statute as a whole in order to determine the meaning of incitement. Analyzing the provisions of the statute, the court concluded that Congress had described a "disorder of a type which is enough of an assault on the property and personal safety interests of the community so that participation in a riot or *intentionally and successfully causing* a riot can be made a criminal offense." [46] The court in *Dellinger* found that the terms of the statute embodied a relation to action by construing them to require that a riot occur.[47] The court held that the term incitement was so closely related to propulsion to action that it was removed from the protection of the first amendment.[48] The court thus distinguished "incitement" from the broader term "advocacy of violence."

As part of the statutory review, the court in *Dellinger* also construed the definition of incitement included in the Act. The Act specifically provided that the term "to incite a riot ... shall not be deemed to mean the mere oral or written ... expression of belief, not involving advocacy of any act or acts of violence or assertion of the rightness of, or the right to commit any such act or acts." [49] The court itself characterized the language of this provision as "obtuse and obscure." [50] The court nevertheless concluded that the provision excluded advocacy of violence from the definition of incitement.[51]

In considering the statute, the court in *Dellinger* relied on the principle of statutory construction which requires a court to construe statutes so as to avoid constitutional questions.[52] This principle of saving construction, however, is not an absolute rule. In considering first amendment rights, the Supreme Court has rejected statutory constructions which would have resulted in judicial rewriting of the statute.[53] The legislature may have a legitimate interest in regulating the conduct; the validity of the legislative judgment is not the issue. If a statute inhibits first amendment activities, the

[42] *See* NAACP v. Button, 371 U.S. 415, 433 (1963) ("Because First Amendment freedoms need breathing space to survive, government may regulate in the area of first amendment rights only with narrow specificity."); Cantwell v. Conn., 310 U.S. 296 (1940).

[43] *See* Bradenburg v. Ohio, 395 U.S. 444 (1969) (overruling Whitney v. California, 274 U.S. 357 (1927)); Yates v. United States, 354 U.S. 298 (1957).

[44] *See* Bradenburg v. Ohio, 395 U.S. 444, 447 (1969).

[45] 472 F.2d at 360.

[46] *Id.* at 361.

[47] *Id.*

[48] *Id.* at 362.

[49] Anti-Riot Act § 1(a)(1)(A),(B), 18 U.S.C. § 2101(a)(1)(A),(B) (1970).

[50] 472 F.2d at 364.

[51] *Id.* at 363. By construing the language of the statute on its face, the court in *Dellinger* avoided consideration of any limiting rule:

> In those instances of overbreadth where no readily apparent construction suggests itself as a vehicle for rehabilitating the statute in a single prosecution ... the whole statute must be declared a violation of the first amendment, and void for all applications.

472 U.S. at 356.

The court in *Baranski* considered the *ejusdem generis* rule as a means of attaining a sufficiently limited construction. Rejecting this rule, the court found it unlikely that any single opinion resolving a case or controversy could clearly delineate the line between constitutional and unconstitutional conduct. *Cf.* Dombrowski v. Pfister, 380 U.S. 479, 491 (1965) in which the court stated:

> As we observed this [authoritative construction] cannot be satisfactorily done through a series of criminal prosecutions.... We believe that those affected by a statute are entitled to be free of the burdens of defending prosecutions however expeditiously aimed at hammering out the structure of the statute piecemeal, with no likelihood of obviating similar uncertainty for others.

See also Baggett v. Bullitt, 377 U.S. 360 (1964).

[52] *See* Garner v. Board of Pub. Works, 341 U.S. 716, 727 (1951) (dissenting opinion); *cf.* Gregory v. City of Chicago, 394 U.S. 111, 118 (1969) (Black, J., concurring); United States v. Reese, 92 U.S. 214 (1874) (interpreting a federal statute).

[53] *See* United States v. Robel, 389 U.S. 258, 267 (1967):

> The task of writing legislation which will stay within these bounds has been committed to Congress. Our decision today simply recognizes that, when legitimate legislative concerns are expressed in a statute which imposes a substantial burden on protected First Amendment activities, Congress must achieve its goals by means which have a 'less drastic' impact on the continued vitality of First Amendment activities.

See also Apetheker v. Secretary of State, 378 U.S. 500 (1964).

legislature must achieve its goals through means which have a less drastic effect.[54] The importance of first amendment rights limits judicial revision in the form of extensive construction and interpretation of the statutory language.

The traditional distinction between the functions of the legislature and the judiciary is particularly relevant in first amendment questions. Freedom of expression may be vital to minority interests.[55] A decision to limit freedom of expression therefore should be the function of the legislature as the body more capable of representing diverse elements in a society. Any ambiguity in the extent of such a limitation should similarly be reserved for legislative, rather than judicial, resolution.

The principle of saving construction presumes a legislative intent to act only within constitutional bounds.[56] As the court itself observed in *Dellinger*, first amendment considerations greatly weaken this presumption.[57] A court will not presume that the statute curtails constitutionally protected conduct as little as possible.[58] Nor will a court accept a showing of a mere rational basis for the legislation where it impinges on first amendment rights.[59] An examination of the statute must show that it applies only to forms of expression which the legislature may validly prohibit in society's interest.

In contrast to the extensive judicial construction in *Dellinger*, the court in *Baranski* refused to excise the doubtful statutory language in order to achieve a constitutional construction. Because of the first amendment interests involved, the court in *Baranski* left the statutory ambiguity to legislative rather than judicial resolution. The court in *Dellinger* avoided consideration of any constitutional question through extensive construction and interpretation of the challenged provisions. In refusing similarly to rewrite the statute, the court in *Baranski* adhered to the particular requirements imposed by the special nature of first amendment rights.

These same considerations apply to judicial use of legislative history as evidence of legislative intent. The court in *Dellinger* obliquely employed legislative history to support its construction of the statute.[60] During consideration of the Anti-Riot Act,[61] Congress was warned that the inclusion of advocacy of violence in the definition of riot would invalidate the statute.[62] The court in *Dellinger* assumed that Congress heeded these warnings. Judge Pell in his dissent, also discussed the legislative history,[63] but found an equally clear intent to include advocacy of violence in the definition.

Read together, the majority and dissenting opinions show that the legislative intent was at best ambiguous. Since legislation represents the product of group action where much of the group may be ignorant or misinformed, such ambiguity is understandable. Passage of a bill does not require that each legislator agree on its effect; each may well have a different interpretation of a law's application. Thus, legislative intent, as inferred from legislative history, inevitably remains ambiguous.[64]

[54] *See* United States v. Robel, 389 U.S. 258, 267 (1967).

[55] *See* Emerson, *The Right to Protest*, in THE RIGHTS OF AMERICANS WHAT THEY ARE—WHAT THEY SHOULD BE 209 (N. Dorsen ed. 1970).

[56] *See* United States v. CIO, 335 U.S. 106, 120 (1948); Shapiro v. United States, 335 U.S. 1, 70 (1948) (Jackson, J., dissenting). *Cf.* Note, *Supreme Court Interpretation of Statutes to Avoid Constitutional Decisions*, 53 COLUM. L. REV. 633 (1953).

[57] 472 F.2d at 356:

> Within this range in non-first amendment cases there might additionally be said to be a presumption that the statute was meant to operate only within the limits of legislative power, ... In first amendment cases that presumption is either greatly weakened or dropped. (citation omitted)

cf. McKay, *supra* note 16, at 1213:

> In such instances [where legislation impinges on the freedom of expression] to say that there is no presumption of constitutionality is simply to recognize in one way the preferred position of these freedoms.

[58] *See* McKay, *supra* note 16, at 1213:

> In such instances [where legislation impinges on freedom of thought] to say that there is no presumption of constitutionality is simply to recognize in one way the preferred position of these freedoms. This is not to say . . . that there is a presumption that such legislation is unconstitutional. It is rather no more than a way of signaling the special importance to society of these rights and noting that they may not be regulated by showing a mere 'rational basis' for legislation.

[59] *See* NAACP v. Button, 371 U.S. 415, 432 (1963):

> If the line drawn by the decree between the permitted and prohibited activities . . . is an ambiguous one, we will not presume that the statute curtails constitutionally protected conduct as little as possible.

[60] The context of language and the legislative history may be the best guides to congressional purpose and the extent to which Congress enacted a policy. Welsh v. United States, 398 U.S. 333, 347 (1970) (Harlan, J., concurring). The ambiguity of legislative intent, as implied from legislation, limits its use as support for a determination of the constitutional validity of a statute. *See* note 65 *infra*.

[61] H.R. 2516, 90th Cong., 2d Sess. (1968).

[62] *See, e.g.*, letter from Attorney General, accompanying proposed bill, 114 CONG. REC. 5213 (March 5, 1968).

[63] 472 F.2d at 410.

[64] *See* E. LEVI, *supra* note 17, at 30:

> In a significant sense there is only a general intent which preserves as much ambiguity in the concept used as though it had been created by case law. . . . [F]or a legislature perhaps the pressures are such that a bill has to be passed dealing with a

In *Baranski* the court also referred to legislative history to support its position that Congress intended to give the term otherwise in the phrase "by force or violence or otherwise," a meaning beyond "force or violence." [65] In *Baranski* the legislative history seemed to imply support for the court's position. Yet, if the importance of the first amendment prohibits judicial rewriting of ambiguous statutory language, it would also seem to limit reliance upon ambiguous legislative history to support a finding of constitutional validity.

Overbroad statutory language presents other problems beyond those concerning interpretation and construction of ambiguous provisions. An overbroad statute affecting first amendment rights results in both an absence of fair notice and an unchannelled delegation of legislative authority. A statute capable of sweeping and improper application may also result in the prosecution of protected conduct.[66] Although it has been argued that the court will point out any errors in application of the statute, the Supreme Court has refused to assume that even subsequent litigation will resolve any ambiguities in favor of first amendment rights.[67] Furthermore, even if litigation resulted in the ultimate vindication of constitutional rights, the chilling effect of prosecutions for protected conduct would still remain.[68] As the Supreme Court has pointed out, well-intentioned prosecutors cannot obviate the vices of an overbroad statute.[69]

While improper prosecutions may result from a well-intentioned excess of zeal, zeal is not the only source of danger to first amendment rights. Improper prosecutions also present a means of suppression of minority views.[70] The Supreme Court has refused to rely on either the ability or the desire of prosecutors and law enforcement officials to distinguish constitutionally protected conduct.

In *Baranski* the court rejected the government's argument that the questioned clause posed no threat to first amendment rights since no prosecutor had yet misused it. The government argued that the absence of misuse showed that the statute was sufficiently specific to insure its application only to conduct falling outside the protection of the first amendment. The government contended that even if such misuse were to occur, the courts would point out the error.[71] In rejecting these arguments, the court in *Baranski* found the statutory language objectionable not only because it failed to give adequate guidance to potential actors by permitting them clearly to distinguish between prohibited and permissible conduct, but also because it failed to guide law enforcement officials in making this distinction.[72]

In *Dellinger*, the court admitted that the constitutionality of the statute was a close question.[73] In resolving this question in favor of the statute's validity, the court acknowledged that parts of the statutory language were obtuse and obscure.[74] Nevertheless, the court found the statutory language sufficiently specific to preclude the possibility of prosecution for protected conduct. Employing the argument which it had rejected in *Baranski*, the court supported its position by referring to the fact that no prosecutor had yet misused the statute, implying that such misuse was therefore unlikely.

In admitting that the validity of the statute was a close question, the court in *Dellinger* implicitly recognized a degree of ambiguity at least sufficient to support arguments on both sides of the issue. If the degree of ambiguity were as great as the court implied in *Dellinger*, and if the court

certain subject. But the precise effect of the bill is not something upon which the members have to reach agreement.... The members of the legislative body will be talking about different things; .... It cannot be forgotten that to speak of legislative intent is to talk of group action, where much of the group may be ignorant or misinformed.

[65] 484 F.2d at 568.

[66] *See* NAACP v. Button, 371 U.S. 415, 432 (1963); Thornhill v. Alabama, 310 U.S. 88, 97 (1940):

The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview.

[67] *See* NAACP v. Button, 371 U.S. 415, 438 (1963): If there is an internal tension between proscription and protection in the statute, we cannot assume that in its subsequent enforcement, ambiguities will be resolved in favor of First Amendment rights.

[68] *See* Dombrowski v. Pfister, 380 U.S. 479, 494 (1965).

[69] *See* Baggett v. Bullitt, 377 U.S. 360, 373 (1964).

[70] *See* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 9 (1970) ("[I]t is necessary to recognize the powerful forces that impel men towards the elimination of unorthodox expression.") *Cf.* NAACP v. Button, 371 U.S. 415, 445 (1963) (Douglas, J., concurring). In *Button*, Mr. Justice Douglas specifically noted the use of the statute to penalize defendants for promoting desegregation. He viewed the statute as infringing defendants' civil rights as well as their first amendment rights.

[71] *But see* Baggett v. Bullitt, 377 U.S. 360, 373 (1964): "Well intentioned prosecutors... do not neutralize the vice of a vague law."; Thornhill v. Alabama, 311 U.S. 88 (1940).

[72] 484 F.2d at 568.

[73] 472 F.2d at 362.

[74] *Id.* at 364.

were applying the standards set by the Supreme Court, it would seem difficult for the court to have reached a conclusion that the possibility of prosecution was so minimal that it posed no threat to first amendment rights.

In both *Dellinger* and *Baranski* the court began with the same theoretical statement of the first amendment overbreadth doctrine. Each case concluded, however, by presenting a different functional statement of the doctrine. In both cases the court agreed that the nature of first amendment rights created certain legal rules. It employed the same general statement of these rules. The rules, however, have meaning in a legal system only in relation to specific conduct. If courts differ in their evaluation of this relationship, they have in effect differed on the actual meaning of the rules themselves.

In *Dellinger* and *Baranski* the court in effect set different factual requirements for the application of the first amendment overbreadth doctrine. In *Dellinger*, the court required a greater possibility of improper prosecution than it did in *Baranski*. In *Dellinger*, the court accepted a greater degree of ambiguity in the legislative history and in the statutory language itself. The court in *Dellinger* effectively held that the challenged language did not pose a threat to first amendment rights which was sufficiently great to require the court to invalidate the statute. In *Baranski* the court gave greater weight to first amendment rights and, therefore, found that in essentially similar circumstances the same rules would require the court to invalidate the statute in question.

The first amendment protects the individual's right to freedom of expression.[75] Thus, in a limited sense, the resolution of a conflict involving first amendment rights involves the balancing of the interests of the individual against those of society.[76] Yet, as the Supreme Court stated in *Dombrowski v. Pfister*, "Freedom of expression is of transcendental value to all society and not merely those exercising their rights." [77] To frame a question is, in a sense, to determine its answer. Properly framed, the resolution of the conflict involves a balancing of equally important interests within a society, rather than a simple balancing of interests of the individual against those of the community.[78]

In *Dellinger* and *Baranski* the court considered the concept of freedom of expression in its relation to other conflicting values within society. These decisions arrived at different conclusions in balancing the valid need for a suppression of violence against society's interest in freedom of expression. The difference in conclusion did not arise from any factual difference, but rather from the evaluation and application of first amendment principles. Both decisions are acceptable interpretations of the Supreme Court decisions concerning first amendment rights. They are not identical interpretations, but positions at either end of a continuum. While both decisions refer to the primacy of first amendment rights, the *Baranski* decision gives greater importance to these rights in determining to invalidate the challenged statute.

The *Dellinger* and *Baranski* decisions represent a division within the Seventh Circuit, a division as yet unresolved. The breadth with which a legislature may act in suppressing violence remains undefined. In his dissenting opinion in *Dellinger*, Judge Pell ably summarized the considerations implicit in the resolution of this problem:

> An ideal state of civilization should find no person in any jeopardy of loss of life or wellbeing from violence irrespective of its motivation. To attain that state, however, by suppression of ideas and beliefs would be a pyrrhic sacrifice of a precious freedom for an illusory safety.[79]

[75] For a discussion of the concept of natural or individual rights, see Cahn, *supra* note 16, at 471.

[76] As stated in United States v. Baranski, 484 F.2d 556, 569 (1973):

> The determination whether a given law is unconstitutional requires a subtle analysis that takes into account a variety of factors, including a balancing of competing interests and goals, those of the Government and those of the individual.

[77] 380 U.S. 479, 486 (1965).

[78] *See* Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1, 2 (1943):

> When it comes to weighing or valuing claims or demands, we must be careful to compare them on the same plane. If we put one as an individual interest and the other as a social interest we may decide the question in our way of putting it.

Cf. McKay, *supra* note 16, at 1200.

[79] 472 F.2d at 416.