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Osmond K. Fraenkel

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ONE HUNDRED AND FIFTY YEARS OF THE BILL OF RIGHTS

By OSMOND K. FRAENKEL*

As soon as the American colonies threw off the English yoke, they began formalizing their experience into written constitutions.[1] Many of these contained "bills of rights,"[2] provisions restricting governmental power for the protection of individual liberty. The failure of the drafters of the constitution of 1787 to include similar provisions nearly blocked ratification,[3] and, as is well known, the first eight amendments were adopted to meet this deficiency.

These amendments affected only federal power.[4] Presumably the early advocates of civil liberties believed that the provisions of the state constitutions would be adequate to protect individual liberty against state interference. And they seem to have been correct over a long period. It is curious, nevertheless, that no suggestion originally was made to have the proposed bill of rights restrict state as well as national power. For in the drafting of the constitution itself it had been recognized that action by the states might result in curtailment of liberties.

The original constitution thus provided against state action with regard to ex post facto laws and bills of attainder, for the provisions concerning these, though placed in separate sections,[5] are binding on both state and federal governments in identical

*Associated with the firm of Goldsmith, Jackson & Brock, New York City.

[1]All the original colonies, except Connecticut and Rhode Island adopted constitutions before 1789. See Dealey, Growth of American State Constitutions (1915).

[2]Massachusetts (1780); Pennsylvania (1776); Virginia (1776).

[3]See 1 Elliot, Debates in the Several State Conventions (1866) 323-337; 1 Cooley, Constitutional Limitations (8th ed. 1927) 533-6; 3 Story, Commentaries on the Constitution (1st ed. 1833) 713-720.

[4]See notes 26-28, infra.

[5]United States, Constitution, art. I, sec. 9, cl. 3; sec. 10, cl. 1 (cf. also prohibition against titles of nobility, sec. 9, cl. 8, sec. 10, cl. 1). See notes 34, 35, infra.

language. However, the other civil liberties provisions of the Constitution, those dealing with habeas corpus[6] and trial by jury,[7] affect only federal power. There is no explanation extant of this divergent treatment of various liberties.

The rights specified in these provisions of the Constitution, and the early amendments alike, continue, with a few minor exceptions, to have vitality. They derive from essential needs of the human spirit in its effort to develop. We need not at this point concern ourselves with the extent to which they are relative to each other, or to some conception of the necessities of public order. But it is mischievous to give any of the rights of individuals an a priori precedence over any other. The recent statement of Vice Chancellor Berry of New Jersey, for example, that the right of free speech must yield to rights of property because the latter are basic and the former only granted,[8] runs counter to the spirit of our institutions. That property rights transcend personal rights may too frequently have been the view of judges graduated into their calling from careers of advocacy for powerful business interests. This has not been the view of our great legal thinkers. And many foreign commentators on the institution of judicial review have praised it to the extent that personal rights have received protection thereby.[9] That is a fundamentally sound position. For, while property rights remain essential to the existing order of capitalist society, personal rights inhere in any free government.

Moreover, it is with personal rights that the guaranties chiefly dealt. Except in so far as the condemnation of bills of attainder might be such, property received its sole protection against federal action in the requirements of due process and of compensation for public taking contained in the fifth amendment; against state action it was protected by the contract clause of the original constitution only. No change in this respect occurred until after the Civil War. Then, for the purpose of protecting the Negro in his newly won freedom, there came the first federal interference with state power over business. Primarily, it resulted from the due

[6]United States, Constitution, art. I, sec. 9, cl. 2. See notes 31-43, infra.

[7]United States, Constitution, art. III, sec. 2, cl. 3. See notes 110-114, infra.

[8]Mitnick v. Furniture Workers, (1938) 124 N. J. Eq. 147, 200 Atl. 553; see (1938) 48 Yale L. J. 67.

[9]See Haines, Some Phases of the Theory and Practice of Judicial Review of Legislation in Foreign Countries, (1930) 24 Am. Pol. Sci. Rev. 583, 598, 605.

process and equal protection clauses of the fourteenth amendment. The latter clause is remarkable in that it imposes on the states a restriction nowhere imposed upon the federal government.[10] Yet, while it has been used extensively to protect property against taxation and regulation,[11] as we shall see, it has not had so profound an influence on civil liberties as might have been supposed.

Property received its greatest protection from the extended meaning which the courts began to give the due process clause in the last decade of the nineteenth century.[12] But in recent times it has also come to have great importance in the field of civil liberties. Not only, in accordance with its original, procedural, meaning, has it ensured fair trials,[13] but it has also become a bulwark against state interference with fundamental rights such as freedom of speech and of the press, of religion and of assembly.[14] Yet there are other rights guaranteed against federal curtailment which have not been thus siphoned into the fourteenth amendment. For protection against unreasonable searches and seizures[15] and against self-incrimination,[16] for assurance of prosecution only after indictment,[17] even for the safeguard of jury trial in criminal cases,[18]

[10]See LaBelle Iron Works v. United States, (1921) 256 U. S. 377, 392, 41 Sup. Ct. 528, 65 L. Ed. 998. But in a number of recent cases the Supreme Court has considered—and rejected—arguments of counsel that a classification under an Act of Congress was so arbitrary as to be a denial of due process. See Isbrandtsen-Moller Co. v. United States, (1937) 300 U. S. 139, 57 Sup. Ct. 407, 81 L. Ed. 562; Steward Machine Co. v. Davis, (1937) 301 U. S. 548, 57 Sup. Ct. 883, 81 L. Ed. 1279; Helvering v. Davis, (1937) 301 U. S. 619, 57 Sup. Ct. 904, 81 L. Ed. 1307.

[11]For a discussion of recent cases under the equal protection clause see Fraenkel, Constitutional Issues in the Supreme Court, 1934 Term, (1936) 84 U. Pa. L. Rev. 345, id. 1935 Term, (1936) 85 U. Pa. L. Rev. 27; id. 1936 Term, (1937) 86 U. Pa. L. Rev. 38; id. 1937 Term (1938) 87 U. Pa. L. Rev. 50.

[12]For a discussion of recent cases under the due process clause see Fraenkel, note 11 supra.

[13]See notes 138-149 infra.

[14]The subject has been considered at length by Wilkinson, The Federal Bill of Rights and the 14th Amendment, (1938) 26 Geo. L. J. 439, and in Note (1938) 7 Brooklyn L. Rev. 490. See notes 15-19, 173-221 infra.

[15]Adams v. New York, (1904) 192 U. S. 585, 594, 24 Sup. Ct. 372, 48 L. Ed. 575. Cf. refusal to review People v. Defore, (1926) 242 N. Y. 13, 150 N. E. 585, in (1926) 270 U. S. 657, 46 Sup. Ct. 354, 70 L. Ed. 784. But see contra Hague v. C. I. O. (C.C.A. 3rd Cir. 1939) 101 F. (2d) 774 on the ground that this was both a violation of the due process clause and the privileges and immunities clause. (Now awaiting decision from the United States Supreme Court.)

[16]Twining v. New Jersey, (1908) 211 U. S. 78, 29 Sup. Ct. 14, 53 L. Ed. 97.

[17]Hurtado v. California, (1884) 110 U. S. 516, 4 Sup. Ct. 111, 292, 28 L. Ed. 232.

[18]Walker v. Sauvinet, (1876) 92 U. S. 90, 23 L. Ed. 678; Jordan v. Massachusetts, (1912) 225 U. S. 167, 32 Sup. Ct. 651, 56 L. Ed. 1038.

recourse must still be had to state constitutions and state courts. In such situations as these the federal court will not interfere. An explanation of these differences may not be readily apparent. Mr. Justice Cardozo recently attempted a formulation of the guiding principle:

"The line of division may seem to be wavering and broken if there is a hasty catalogue of the cases on the one side and the other. Reflection and analysis will induce a different view. There emerges the perception of a rationalizing principle which gives to discrete instances a proper order and coherence. The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them. What is true of jury trials and indictments is true also, as the cases show, of the immunity from compulsory self-incrimination. This too might be lost, and justice still be done. Indeed, today as in the past there are students of our penal system who look upon the immunity as a mischief rather than a benefit, and who would limit its scope or destroy it altogether. No doubt there would remain the need to give protection against torture, physical or mental. Justice, however, would not perish if the accused were subject to a duty to respond to orderly inquiry. The exclusion of these immunities and privileges from the privileges and immunities protected against the action of the states has not been arbitrary or casual. It has been dictated by a study and appreciation of the meaning, the essential implications of liberty itself."[19]

These Civil War amendments created additional rights. For the first time, by the fifteenth amendment, the federal government was permitted to review state restrictions on the franchise; to be sure, in case of discrimination due to race, color or previous servitude only. And the first clause of the fourteenth added a guaranty of "privileges and immunities," which has been of little value to the negro for whom it was supposedly enacted. Finally, in the thirteenth amendment, involuntary servitude was forbidden. This provision is unique in that it binds at once the federal government, the states and individuals.

For the protection afforded by these amendments, other than the thirteenth, is against state action, not action by individuals.

[19]Palko v. Connecticut, (1937) 302 U. S. 319, 325, 58 Sup. Ct. 149, 82 L. Ed. 288. See also note 14 supra.

Nor have the courts always protected persons even against state action. Judges who stretched the constitution in order to protect property rights were frequently content to stick to the literal meaning of the amendments when personal rights were involved.[20] And it is only in the last few years, when the dreaded example of Fascism may be serving as a warning, that a truly liberal approach to the subject of civil liberties has become the rule rather than the exception.

I. Before the Civil War

In the early period of our history the courts were little concerned with federal encroachments on liberty. Except for the Alien and Sedition Acts of 1798, Congress had attempted no restrictions on individual freedom. While opinion differed concerning the constitutionality of these hated laws,[21] no authoritative decision was ever rendered on the subject.

During the half century or so following the adoption of the constitution, however, an increasing concern with state encroachment appears. At first this showed itself in the field of property rights. When restrospective laws were attacked as a violation of the prohibition against "ex post facto" legislation, Mr. Justice Story pointed out that this guaranty related only to criminal prosecutions, and that nothing in the federal constitution then prohibited a state from divesting vested property interests.[22] On the other hand, not only was the contract clause used whenever possible; often, in the using, it was stretched unbelievably to accomplish the same end.[23] And in matters of taxation the Supreme Court interfered with state action on grounds of "natural

[20]Borchard, The Supreme Court and Private Rights, (1938) 47 Yale L. J. 1051; Boudin, The Supreme Court and Civil Rights, (1937) 1 Sci. & Soc. 273; Edgerton, The Incidence of Judicial Control over Congress, (1937) 22 Corn. L. J. 299; Fraenkel, What Can be Done About the Constitution and the Supreme Court?, (1937) 37 Col. L. Rev. 212; Jacobson, Federalism and Property Rights, (1938) 15 N. Y. Univ. L. Q. Rev. 319; Curbing the Courts, (1937) Int. Jurid. Ass'n pamphlet.

[21]Jefferson, of course, believed the laws to be unconstitutional. Cooley was of the same opinion. Cooley, Constitutional Limitations (1st ed. 1868) 421. Story, however, while believing them unwise, had no doubt about their constitutionality: 3 Story, Commentaries (1st ed. 1833) 743-5. See Chafee, Freedom of Speech in War Time (1920) 30.

[22]Watson v. Mercer, (1834) 8 Pet. (U.S.) 88, 110, 8 L. Ed. 876. The general principle had been laid down in Calder v. Bull, (1798) 3 Dall. (U.S.) 386, 1 L. Ed. 648.

[23]For a discussion of recent cases see Fraenkel, Note 11 supra, at 353, 63, 70 and 79 respectively.

law."[24] In the main, however, federal judicial protection of property and business interests against state action occurred only with the adoption, in the last decade of the nineteenth century, of the expanded meaning of the due process clause.[25]

It was in the course of early, but abortive, efforts on the part of property to obtain protection from federal courts against state action, that the Supreme Court reached the conclusion that the Bill of Rights constituted no protection of this sort. The conclusion, sometimes criticized, is natural enough in view of the language of the early amendments. The issue arose first in *Brown v. Mayor, etc. of Baltimore,*[26] under that clause of the fifth amendment which prohibits the taking of private property for public use without the payment of just compensation. Chief Justice Marshall said:

"Had the people of the several states, or any of them, required changes in their constitutions; had they required additional safeguards to liberty from the apprehended encroachments of their particular governments, the remedy was in their own hands, and would have been applied by themselves. A convention would have been assembled by the discontented State, and the required improvements would have been made by itself. The unwieldy and cumbrous machinery of procuring a recommendation from two-thirds of Congress and the assent of three-fourths of their sister states, could never have occurred to any human being as a mode of doing that which might be effected by the state itself. Had the framers of these amendments intended them to be limitations on the powers of the state governments they would have imitated the framers of the original constitution and have expressed that intention. Had Congress engaged in the extraordinary occupation of improving the constitutions of the several states by affording the people additional protection from the exercise of power by their own governments in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language.

But it is universally understood, it is a part of the history of the day, that the great revolution which established the constitution of the United States was not effected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statesmen who then watched over the interests of our country, deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the Constitution was adopted,

[24]See Fraenkel, the Supreme Court and the Taxing Power of the States, (1934) 28 Ill. L. Rev. 612.

[25]See notes 160-165 infra.

[26](1833) 7 Pet. (U.S.) 243, 8 L. Ed. 672.

amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government—not against those of the local governments."[27]

When shortly after this opinion, therefore, complaints arose of state interference with various personal rights guaranteed in the first eight amendments, the door had been closed to their consideration by the federal judiciary.[28] The burden of these complaints has, however, been a recurrent one. Right down to the present, defeat seems not to have deterred counsel for those accused of crime. First, and unsuccessfully, they urged that these rights were protected by the privileges and immunities clause.[29] Later, and, as we have noted, with partial success, the due process clause of the Fourteenth Amendment became the instrument for the protection of those rights which were so fundamental that their absence was inconsistent with any system of "ordered justice."[30]

II. Civil War Problems—Martial Law and Habeas Corpus

The Civil War created problems of civil liberties out of which arose the first legal landmarks in the subject. Curiously, they rested on provisions of the original constitution, not on any of the amendments. They related to habeas corpus, ex post facto laws and bills of attainder.

While the war was going on the Supreme Court neglected an opportunity of condemning the acts of President Lincoln and the military authorities in ignoring writs of habeas corpus.[31] But after the war was safely won, the Court, by a five-to-four decision, in *Ex parte Milligan*[32] condemned trials by military com-

[27](1833) 7 Pet. (U.S.) 243, 249, 8 L. Ed. 672.

[28]Livingston v. Moore, (1833) 7 Pet. (U.S.) 469, 551, 8 L. Ed. 751, (the right to trial by jury in civil cases); Permoli v. New Orleans, (1845) 3 How. (U.S.) 589, 609, 11 L. Ed. 739 (religious liberty); Fox v. Ohio, (1847) 5 How. (U.S.) 410, 434, 12 L. Ed. 213 (freedom from double jeopardy); Smith v. Maryland, (1855) 18 How. (U.S.) 71, 15 L. Ed. 269 (searches and seizures). For cases decided after the adoption of the fourteenth amendment see notes 15-19 supra.

[29]As in Presser v. Illinois, (1886) 116 U. S. 252, 6 Sup. Ct. 580, 29 L. Ed. 615.

[30]Palko v. Connecticut, (1937) 302 U. S. 319, 325, 58 Sup. Ct. 149, 82 L. Ed. 288.

[31]See Klaus, The Milligan Case (1929) 4 ff. Judge Taney condemned the executive in an opinion written while on circuit, Ex parte Merryman. (C.C. Md. 1861) Fed. Cas. 9487, but the Court refused to act in another instance, on technical grounds, Ex parte Vallandigham, (1864) 1 Wall. (U.S.) 243, 17 L. Ed. 589.

[32](1866) 4 Wall. (U.S.) 2, 18 L. Ed. 281.

manders outside the areas of actual warfare. The words of Mr. Justice Davis on this subject have been oftener quoted than heeded. He said:

"Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world has taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government."[33]

At the same time, the Court set itself against attempts of both national and state governments to disqualify lawyers, preachers and doctors from continuing to practice their professions unless they were willing to take an oath that they had not participated in the rebellion. In two five-to-four decisions[34] the Court held these laws unconstitutional as both bills of attainder and ex post facto laws. The decisions, however, had no influence on the future; for bills of attainder had lost significance and the prohibition against ex post facto laws has really nothing to do with legislation of this kind.[35]

Even the decision in the *Milligan Case* has been less fruitful than might have been expected. Almost immediately, the Supreme Court meekly permitted itself to be temporarily deprived of appellate jurisdiction in habeas corpus cases, when Congress wanted to prevent review of its reconstruction legislation.[36]

While the constitutional prohibition against suspension of the right of habeas corpus is, of course, not directed against state action,[37] the writ may be available in a federal court to challenge

[33](1866) 4 Wall. (U.S.) 2, 120, 17 L. Ed. 589.

[34]Cummings v. Missouri, (1867) 4 Wall. (U.S.) 277, 18 L. Ed. 356; Ex parte Garland, (1867) 4 Wall. (U.S.) 333, 18 L. Ed. 366.

[35]See Dent v. West Virginia, (1889) 129 U. S. 114, 9 Sup. Ct. 231, 32 L. Ed. 623; Hawker v. New York, (1898) 170 U. S. 189, 18 Sup. Ct. 583, 42 L. Ed. 1002, (laws changing the qualifications of the practice of professions are not ex post facto laws).

[36]Ex parte McCardle, (1869) 6 Wall. (U.S.) 318, 18 L. Ed. 816; (1869) 7 Wall. (U.S.) 506, 19 L. Ed. 264. See 3 Warren, History of the United States Supreme Court (1922) 185-202.

[37]Gasquet v. Lapeyre, (1917) 242 U. S. 367, 37 Sup. Ct. 165, 61 L. Ed. 367.

state action, executive and judicial, in extreme cases, when a constitutional issue is raised and no other remedy is available.[38]

Due to the growing use of troops and martial law in labor controversies,[39] the extent to which federal courts will interfere with detentions under martial law has become of great importance. The early cases seemed to imply that the decision of a governor that it was necessary to declare martial law could not be reviewed by the courts.[40] However, in the recent case of *Sterling v. Constantin*,[41] Chief Justice Hughes reached a different conclusion. He held that the action of the governor of Texas was not necessary to preserve order and issued an injunction to restrain the regulation of oil production under compulsion of troops. This decision declares it the duty of the federal courts to determine whether any basis exists in the facts for a challenged declaration of martial law. Habeas corpus should, therefore, be available to challenge detention of labor organizers in situations such as these. A lower federal court had already so ruled, even before the decision in the *Sterling Case*.[42] Unfortunately, the courts sheer off from questioning executive action when it is taken to prevent a labor situation getting out of hand.[43]

[38]See Mooney v. Holohan, (1935) 294 U. S. 103, 55 Sup. Ct. 340, 79 L. Ed. 791. But in Pettibone v. Nichols, (1906) 203 U. S. 192, 27 Sup. Ct. 111, 51 L. Ed. 148, the Court, over the sole dissent of Mr. Justice McKenna, refused to review by habeas corpus a detention on a charge of murder, although the accused claimed that they had been extradited under circumstances that denied them any opportunity to test the lawfulness of the proceedings.

For recent instances in which writs of habeas corpus have been granted to review state convictions see Jones v. Kentucky, (C.C.A. 6th Cir. 1938) 97 F. (2d) 335; Howard v. Dodd, (D. Ind. 1938) 25 F. Supp. 844. Compare Shields v. Shields, (D. Mo. 1939) 26 F. Supp. 210—this was in review of an order in a lunacy proceeding. But see contra: McLeod v. Majors, (C.C.A. 5th Cir. 1939) 102 F. (2d) 129, and United States v. Ragen, (C.C.A. 7th Cir. 1939) 102 F. (2d) 184, on the ground that all remedies had not been exhausted under the state law.

[39]Comment, Use of Military Force in Domestic Disturbances (1936) 45 Yale L. J. 879; Call Out the Militia (1938), Am. Civil Liberties Union pamphlet. A recent instance was at Newton, Iowa. The governor used troops to close the plant of the Maytag Washing Machine Co. during a strike and in effect ordered a settlement and reopening by armed forces. He even threatened to use troops to stop a hearing of the National Labor Relations Board. See N. Y. Times (1938) Aug. 1 at 1:3; 3 at 1:4, 4 at 1:3, 5 at 1:2, 13 at 2:4.

[40]See Luther v. Borden, (1849) 7 How. (U.S.) 1, 12 L. Ed. 581 and Moyer v. Peabody, (1908) 212 U. S. 78, 29 Sup. Ct. 235, 53 L. Ed. 410. Both these cases, however, were actions to recover damages for detention.

[41](1932) 287 U. S. 378, 53 Sup. Ct. 190, 77 L. Ed. 375, and see Strutwear Knitting Co. v. Olson, (D. Minn. 1936) 13 F. Supp. 384.

[42]United States v. Adams, (D. Colo. 1927) 26 F. (2d) 141.

[43]See particularly the Moyer Case, (1908) 212 U. S. 78, 29 Sup. Ct. 235, 53 L. Ed. 410.

III. In Aid of the Unpopular and Underprivileged

Just as we have discussed provisions of the original constitution which affect civil liberties, so it becomes pertinent to consider also the post-Civil War amendments. These greatly increased the field in which state action came under federal scrutiny. They were all, although not simultaneously so,[44] adopted to protect the negro,[45] and, of course, to benefit other minority groups or individuals as well. We shall at this point discuss the thirteenth and fifteenth amendments and those portions of the fourteenth designed to prevent discrimination, leaving for later consideration under various heads the due process clause of the latter.[46] Congress endeavored to implement these provisions by punitive laws. But most of the attempts, as we shall see, were held unconstitutional.[47]

Peonage

The thirteenth amendment achieved its ostensible purpose of preventing slavery; and it continues to have vitality when confronted by modern devices for circumventing that purpose. Today in many states, individuals fined for petty offenses agree to work for a fixed time for the person who pays the fine; and failure to live up to such a contract is made a criminal offense.[48] Under these conditions it is easy to procure labor forced to work under fear of punishment, since local courts tend not to be over scrupulous in some situations. For many years such practices have flourished in the deep South, even though the Supreme Court of the United States has declared contracts of this nature to be in violation of the amendment and has upheld the right of Congress to punish persons who take part in their enforcement.[49] The Supreme Court has also struck down state laws which punish as a fraud the failure to work for the time agreed on in return for an advance payment, when the law permits the jury to find a presumption of fraud from the mere refusal to work.[50] The battle

[44]Amd. XIII proposed Jan. 31, 1865, ratified Dec. 9, 1865. Amd. XIV proposed June 13, 1866, ratified July 9, 1868. Amd. XV proposed Feb. 26, 1869, ratified Feb. 3, 1870.

[45]See Slaughterhouse Cases, (1893) 16 Wall. (U.S.) 36, 21 L. Ed. 465.

[46]See infra, notes 139-152, 154-168.

[47]The Enforcement Act of 1870; the Civil Rights Act of 1875. See 2 Boudin, Government by Judiciary (1932) 126 ff. and notes 69, 75 infra.

[48]See (1937) 5 I.J.A. Bulletin 71.

[49]United States v. Reynolds, (1914) 235 U. S. 133, 35 Sup. Ct. 86, 59 L. Ed. 162.

[50]Bailey v. Alabama, (1919) 219 U. S. 219, 31 Sup. Ct. 145, 55 L. Ed. 191.

against peonage, however, is one which must be fought constantly, over and over again. Recent convictions in Arkansas point the fact strongly.[51]

Peonage, as a matter of fact, is in effect accomplished by making it difficult for workers to change their employment. Many states forbid "enticement" of workers,[52] thus preventing offers to them of better conditions. None of these laws has yet been tested. Sometimes force is used to prevent workers from responding to the lure of improved wages. This happened recently in Georgia; cotton pickers were scarce and the market price was falling in the face of a large crop, so that it became important to get the cotton picked quickly.[53] Presumably conduct such as this is punishable under existing federal statutes.

Not all forced labor, however, is forbidden. For traditional reasons seamen, for example, have been subject to punishment for breaking their articles.[54] Fortunately, Congress has recently removed this particular anachronism from the law.[55] A state, too, may exact necessary labor, such as road building, from its citizens and may punish them, if they fail to perform it.[56]

Suffrage

Freeing the negro soon came to be recognized as insufficient. Obviously, it was advisable to protect him also against discrimination in his most important civic right, the vote. But, while the fifteenth amendment accomplished this on paper, in actual practice the negro has remained widely disfranchised.[57] At first disfranchisement was accomplished by severe property and educational qualifications from which all persons were exempted whose grandfathers had voted before 1868. After a long period, the Supreme Court finally held these so-called "grandfather clauses" void, as intentional evasions of the thirteenth amendment.[58]

[51]See N. Y. Times (1936) Nov. 23, 42:3; Nov. 25, 46:2; Nov. 26, 1:5; Dec. 11, 3:1.

[52]See note 48 supra.

[53]See N. Y. Times, Sept. 16, 1937 at 1:6.

[54]Robertson v. Baldwin, (1897) 165 U. S. 275, 17 Sup. Ct. 326, 41 L. Ed. 715.

[55]R. S. Sec. 4598, 4599 were repealed by Act of Dec. 21, 1898, ch. 28 sec. 25, 30 Stat. at L. 764.

[56]Butler v. Perry, (1916) 240 U. S. 328, 36 Sup. Ct. 258, 60 L. Ed. 672.

[57]See Fraenkel, Restrictions on Voting in the United States, (1938) 1 Nat. L. G. Q. 135.

[58]Guinn v. United States, (1915) 238 U. S. 347, 35 Sup. Ct. 926, 59 L. Ed. 1340; Myers v. Anderson, (1915) 238 U. S. 368, 35 Sup. Ct. 932, 59 L. Ed. 1349. But see Lane v. Wilson, (C.C.A. 10th Cir. 1938) 98 F. (2d)

Certain laws imposing educational[59] or property[60] qualifications have been upheld, however, though their purpose and effect is to restrict the number of negro voters, since they operate in theoretical equality on white and black alike. The commonest device adopted to this end is the poll tax. While usually very small in amount, this is frequently cumulative, so that the poor have great difficulty in paying it. The validity of the method was upheld last year by a unanimous Supreme Court in *Breedlove v. Suttles.*[61]

Still another method of disfranchisement, used especially in the South, is that of preventing negroes from voting in the primaries of the Democratic party. In most Southern communities the election is, of course, decided in that primary. Yet, as the fifteenth amendment, unlike the thirteenth, contains no restrictions on individual action, in *Grovey v. Townsend*[62] the Supreme Court recently refused to interfere with this practice, on the ground that since political parties are purely private organizations the state had in no way caused the discrimination.

It should be remembered that this amendment prohibits discrimination based on race, color or previous condition of servitude only. (The nineteenth amendment, of course, has added sex to these categories). It therefore remains uncertain whether the constitution forbids discrimination in voting which is based on political or religious opinion. It is possible that the courts might rule such discrimination void as being a denial of equal protection or due process. Yet the Supreme Court unanimously upheld restrictions on voting which disqualified any one cohabiting with more than one wife, on the broad ground that the legislature might "prescribe any qualifications for voters calculated to secure obedience to its laws."[63]

980, certiorari granted Dec. 12, 1938 upholding Oklahoma law, passed just after these decisions, which restricted the franchise to those who had voted in 1914 or registered between May 10 and June 30, 1916.

[59]See Trudeau v. Barnes, (C.C.A. 5th Cir. 1933) 65 F. 2d 563 cert. denied (1933) 290 U. S. 659, 54 Sup. Ct. 74, 78 L. Ed. 571—but in that case remedies afforded by the state law had not been exhausted.

[60]See United States v. Reese, (1876) 92 U. S. 214, 23 L. Ed. 563—concurring opinion of Clifford, J.

[61](1938) 302 U. S. 277, 58 Sup. Ct. 205, 82 L. Ed. 252.

[62](1935) 295 U. S. 45, 55 Sup. Ct. 622, 79 L. Ed. 1292. Earlier decisions to different effect were distinguished because in those cases the state had participated in the discrimination: Nixon v. Herndon, (1927) 273 U. S. 536, 47 Sup. Ct. 446, 71 L. Ed. 759; Nixon v. Condon, (1932) 286 U. S. 73, 52 Sup. Ct. 484, 76 L. Ed. 984.

[63]Davis v. Beason, (1890) 133 U. S. 333, 10 Sup. Ct. 299, 33 L. Ed. 637. Cf. Murphy v. Ramsay, (1885) 114 U. S. 15, 5 Sup. Ct. 747, 29 L. Ed. 47; Pope v. Williams, (1904) 193 U. S. 621, 24 Sup. Ct. 573, 48 L. Ed. 817.

But even if the individual may not be deprived of his vote on account of his opinions, the effectiveness of that vote may be destroyed by its being made difficult or impossible for minority parties to place their candidates on the ballot.[64] Whether state legislation of this character can be reviewed in the federal courts is doubtful.[65]

Privileges and Immunities

The first clause of the fourteenth amendment prohibits state legislation abridging the "privileges or immunities of citizens of the United States." This is an extension of the provision of the original constitution, which guaranteed to a citizen of each state all the privileges and immunities of citizenship in the other states.[66] Since the original provision had been interpreted as not protecting a person against action by the state of his residence,[67] the new provision presumably was intended to accomplish at least so much; and the Supreme Court has now reached that conclusion.[68]

However, the amendment has not served its basic purpose of protecting the negro in the exercise of fundamental rights. For, almost immediately after the adoption of the amendment, the Court ruled that the rights to vote, to assemble and to be safe from assault were rights of state citizenship, not of national citizenship, and therefore beyond the power of Congress to protect.[69] These decisions have been constantly adhered to.[70]

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[64]All states have laws which impose some restriction; a few states bar parties charged with the advocacy of the overthrow of the government by force. See (1936) 5 I.J.A. Bull. 57, 58.

[65]In Blackman v. Stone, (C.C.A. 7th Cir. 1939) 101 F. (2d) 500 an attempt to recover damages for denying the Communist Party a place on the ballot in the 1936 election was upheld. The Court overruled numerous attacks on the Illinois Election Law and on the proceedings of the electoral board. Previous attempts to obtain relief by injunction failed because the question had become moot. Blackman v. Stone, (1937) 300 U. S. 641, 57 Sup. Ct. 512, 81 L. Ed. 856, cf. Johnson v. Hughes, (1936) 299 U. S. 601, 57 Sup. Ct. 193, 81 L. Ed. 443. See Note (1937) 37 Col. L. Rev. 86.

[66]United States Constitution art. IV sec. 2.

[67]Bradwell v. Illinois, (1873) 16 Wall. (U.S.) 130, 21 L. Ed. 442.

[68]Colgate v. Harvey, (1935) 296 U. S. 404, 56 Sup. Ct. 252, 80 L. Ed. 299.

[69]United States v. Cruikshank, (1875) 92 U. S. 542, 23 L. Ed. 588. See also United States v. Harris, (1883) 106 U. S. 629, 1 Sup. Ct. 601, 27 L. Ed. 290. The foundation for these cases had been laid in the Slaughter-house Cases, (1873) 16 Wall. (U.S.) 36, 21 L. Ed. 394. In United States v. Reese, (1875) 92 U. S. 214, 23 L. Ed. 563, the Court, by a strained construction of the indictment, concluded that an attempt was made to punish for interference with all voting, not only voting for federal officers. See also James v. Bowman, (1903) 190 U. S. 127, 23 Sup. Ct. 678, 47 L. Ed. 979.

[70]See Hamilton v. Regents, (1934) 293 U. S. 245, 55 Sup. Ct. 197, 79 L. Ed. 343. But in Colgate v. Harvey, (1935) 296 U. S. 404, 56 Sup. Ct.

The Court has nevertheless upheld legislation punishing interference with voting, when that was restricted to voting for federal offices.[71]

Although it has been said that the right to travel freely from one state to another is protected by this clause of the fourteenth amendment,[72] the Supreme Court, in the *Wheeler Case*,[73] further restricted its effectiveness by ruling that Congress could not punish persons who forcibly transported a citizen out of his home state and threatened him with injury if he returned. This ruling rested in part on the fact that the right to remain at peace in one's own home is not a right created by national citizenship; in part on the fact that it was private action, not state action, which was responsible for the wrong. It remains undecided whether Congress could punish if the person threatened were a visitor to the state, although an attempt was made to obtain a ruling on this subject by the now abortive prosecution in Harlan County, Kentucky. This rested on the theory that the right of collective bargaining granted by the National Labor Relations Act had been interfered with. The serious question in the case was the right to prosecute private persons. Similar considerations, of course, affect the validity of the anti-lynching legislation so often blocked by filibusters.

No such complication, however, existed in the recent action by the American Civil Liberties Union and the C. I. O. against Mayor Hague. There one of the issues was the right of the Jersey City police to escort persons out of the state.

252, 80 L. Ed. 299, the majority of the Court held that the right to invest money in a state other than that of one's residence was an attribute of national citizenship, protected by the fourteenth amendment against infringement by the state of residence—Justices Brandeis, Stone and Cardozo dissented.

But it has been argued that recent rulings under the due process clause (see note 14 supra) have included freedom of speech and other basic rights among the privileges and immunities of national citizenship. See Deutsch, Federal Equity Jurisdiction of Cases Involving Freedom of Press, (1939) 25 Va. L. Rev. 507. Mr. Deutsch has stressed Mr. Justice Cardozo's references in the Palko case, (1937) 302 U. S. 319, 58 Sup. Ct. 149, 82 L. Ed. 288, to these rights as "privileges and immunities." It is doubtful, however, whether the Supreme Court will reverse its consistent attitude which is nearly 100 years old.

[71]Ex parte Siebold, (1879) 100 U. S. 371, 25 L. Ed. 717; Ex parte Yarborough, (1884) 110 U. S. 651, 4 Sup. Ct. 152, 28 L. Ed. 274; United States v. Mosley, (1915) 238 U. S. 383, 35 Sup. Ct. 904, 59 L. Ed. 1355.

[72]Crandall v. Nevada, (1868) 6 Wall. (U.S.) 35, 18 L. Ed. 745; Colgate v. Harvey, (1935) 296 U. S. 404, 56 Sup. Ct. 252, 80 L. Ed. 299; Williams v. Fears, (1900) 179 U. S. 270, 21 Sup. Ct. 128, 45 L. Ed. 186.

[73](1920) 254 U. S. 281, 41 Sup. Ct. 133, 65 L. Ed. 270.

An injunction against such deportations was upheld by the court of appeals for the third circuit with the statement:[74]

"There is no doubt that the right of an individual to pass with freedom of movement and without molestation between the states of the union is one of the privileges of federal citizens which is protected by this clause."

EQUAL PROTECTION

The same doctrine, that private action is not included in the prohibitions of the fourteenth amendment, has greatly restricted the application of the amendment's equal protection clause. In the *Civil Rights Cases*[75] the Supreme Court struck down Congressional legislation which forbade discrimination against negroes in places of public entertainment and transportation, such as inns and railroads. And the doctrine there announced has been followed in more recent decisions also.[76] The Court expected that the rights of persons aggrieved "may presumably be vindicated by resort to the laws of the state for redress;"[77] an expectation which has not been fulfilled.

Notwithstanding these facts, the equal protection clause has been of some slight benefit to the negro. The Court has persistently struck down attempts to prevent negroes from serving on juries, although without much practical result. At first the states passed laws expressly excluding negroes; they were promptly held void.[78] Then more subtle attempts at exclusion were practiced. But when it appeared that jury commissioners had discriminated against negroes, even though the laws were free from criticism, the Supreme Court reversed convictions of negroes so obtained, whether the discrimination had been practiced with regard to grand or petit juries, or both.[79] But the Court made it very clear that the Constitution did not require that any negro must actually sit on a jury trying another negro; it required only that persons

[74](C.C.A. 3rd Cir. 1939) 101 F. 2d 774 affirming (D. N.J. 1938) 25 F. Supp. 127 now awaiting decision by the United States Supreme Court.

[75](1883) 109 U. S. 3, 3 Sup. Ct. 18, 27 L. Ed. 835.

[76]See Hodges v. United States, (1906) 203 U. S. 1, 27 Sup. Ct. 6, 51 L. Ed. 65; Butts v. Merchants Co., (1913) 230 U. S. 126, 33 Sup. Ct. 964, 57 L. Ed. 1422 and cases cited in notes 62, 73 supra.

[77](1883) 109 U. S. 3, 17, 3 Sup. Ct. 18, 27 L. Ed. 835.

[78]Strauder v. West Virginia, (1880) 100 U. S. 303, 25 L. Ed. 664; Bush v. Kentucky, (1883) 107 U. S. 110, 1 Sup. Ct. 625, 27 L. Ed. 354.

[79]Neal v. Delaware, (1881) 103 U. S. 370, 26 L. Ed. 567; Carter v. Texas, (1900) 177 U. S. 442, 20 Sup. Ct. 687, 44 L. Ed. 839; Rogers v. Alabama, (1904) 192 U. S. 226, 24 Sup. Ct. 257, 48 L. Ed. 417; Martin v. Texas, (1906) 200 U. S. 316, 26 Sup. Ct. 338, 50 L. Ed. 497.

not be excluded from service on account of their race.[80] Consequently, when the state denied that there had been such discrimination, and no evidence was introduced by the defendant to establish it, the Court refused to interfere.[81] However, where the proof of discrimination is strong, the Supreme Court will not feel precluded by a finding by the state courts negativing discrimination. In the second Scottsboro case, *Norris v. Alabama,*[82] the Supreme Court analyzed the evidence for itself and concluded that the mere denial by jury commissioners of any intent to discriminate could not be accepted in the face of a long history of exclusion of negroes.

These successive rulings make it harder for the state to practice discrimination. But the custom which prevails in many states of striking the names of prospective talesmen, makes it very easy for the prosecution to eliminate all negroes. Actual discrimination, in short, has not yet been stopped.

There are other fields in which discrimination has been attempted. They are those of housing, railroad accommodations and schools. Sometimes the laws themselves discriminate; more often the wrong is done by prejudiced administrators.[83] The Supreme Court has disapproved both sorts, but declared segregation to be no discrimination, when the facilities offered both races are substantially the same. Thus the Court voided laws which created negro districts in cities,[84] but has upheld those compelling separate railroad accommodations for negroes and whites,[85] and those requiring separate public schools.[86] The question of what constitutes

[80]See Virginia v. Rives, (1879) 100 U. S. 313, 323, 25 L. Ed. 667; Shibuya Jugiro v. Brush, (1891) 140 U. S. 291, 11 Sup. Ct. 770, 35 L. Ed. 510.

[81]Smith v. Mississippi, (1896) 162 U. S. 592, 16 Sup. Ct. 900, 40 L. Ed. 1082; Tarrance v. Florida, (1903) 188 U. S. 519, 23 Sup. Ct. 402, 47 L. Ed. 572; Brownfield v. South Carolina, (1903) 189 U. S. 426, 23 Sup. Ct. 513, 47 L. Ed. 882; Martin v. Texas, (1906) 200 U. S. 316, 26 Sup. Ct. 338, 50 L. Ed. 497.

[82](1935) 294 U. S. 587, 55 Sup. Ct. 579, 79 L. Ed. 1074; to the same effect are Hollis v. Oklahoma, (1935) 295 U. S. 394, 55 Sup. Ct. 784, 79 L. Ed. 1500; Hale v. Kentucky, (1938) 303 U. S. 613, 58 Sup. Ct. 753, 82 L. Ed. 1050; Pierre v. Louisiana, (1939) 59 Sup. Ct. 536.

[83]See Yick Wo v. Hopkins, (1886) 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220.

[84]Buchanan v. Warley, (1917) 245 U. S. 60, 38 Sup. Ct. 16, 62 L. Ed. 149; City of Richmond v. Deans, (1930) 281 U. S. 704, 50 Sup. Ct. 407, 74 L. Ed. 1128; Harmon v. Taylor, (1927) 273 U. S. 668, 47 Sup. Ct. 471, 71 L. Ed. 831.

[85]Plessy v. Ferguson, (1896) 163 U. S. 537, 16 Sup. Ct. 1138, 41 L. Ed. 256 (Harlan, J., dissenting); Ches. & Ohio Ry. Co. v. Kentucky, (1900) 179 U. S. 388, 21 Sup. Ct. 101, 45 L. Ed. 244.

[86]Gong Lum v. Rice, (1927) 275 U. S. 78, 48 Sup. Ct. 91, 72 L. Ed. 172. The case involved a Chinese child, but the principle is applicable to all kinds of segregation.

Whether the Supreme Court would uphold a law forbidding the teach-

equal accommodations is a troublesome one and has not been definitely determined.[87] In the recent case of *Missouri ex rel Gaines v. Canada,*[88] the Court compelled Missouri University to admit a negro as a law student, and held it to be a denial of equal protection to require him to go out of the state for such education, even though the state paid the tuition fees. Justices McReynolds and Butler dissented.

Certain kinds of apparent discrimination have withstood challenge because the Court was able to find a theoretical equality in the laws complained of. Thus, mixed marriages may be forbidden,[89] and adultery between the races punished more severely than that between persons of the same race.[90] And the Court has approved laws punishing alien ownership of real estate[91] on grounds peculiar to the state's power over land.

Moreover, it is well settled that the equal protection clause has no direct effect whatever on private persons. Therefore the Court refused to pass on the validity of a covenant against the sale of land to negroes,[92] and on the ejection of a negro from a train.[93] It is interesting to note that following the recent Constitutional Convention held in New York, an anti-discrimination clause was adopted which forbids private persons to deprive anyone of his "civil rights" because of his race or religion.[94] If this proposal is

ing of whites and negroes together in a private school is not clear. Berea College v. Kentucky, (1908) 211 U. S. 45, 29 Sup. Ct. 33, 53 L. Ed. 81 is no authority, since the Supreme Court upheld such a law only because the state court had decided the case on a non-federal ground: that the state could impose any restriction upon the right of one of its own corporations to teach. Justices Harlan and Day dissented; Justices Moody and Holmes concurred in the result only.

[87]In McCabe v. Atchison T. & S. F. Ry., (1914) 235 U. S. 151, 35 Sup. Ct. 69, 59 L. Ed. 169, the Court said that a state law was void which prohibited negroes from sharing accommodations with whites, and which permitted the railroad to provide dining car and sleeping car service only for whites. In Cummings v. Board of Education, (1899) 175 U. S. 528, 20 Sup. Ct. 197, 44 L. Ed. 262 the Court refused to enjoin maintenance of a public high school for whites, although negro high schools had been closed, since there was no evidence of an intent to discriminate.

[88](1938) 305 U. S. 337, 59 Sup. Ct. 232.

[89]State v. Tutty, (S.D. Ga. 1890) 41 Fed. 753; Scott v. State, (1869) 39 Ga. 321; Kinney v. Commonwealth, (1878) 30 Gratt. (Va.) 858.

[90]Pace v. Alabama, (1883) 106 U. S. 583, 1 Sup. Ct. 637, 27 L. Ed. 207.

[91]Terrace v. Thompson, (1923) 263 U. S. 197, 44 Sup. Ct. 15, 68 L. Ed. 255; Porterfield v. Webb, (1923) 263 U. S. 225, 44 Sup. Ct. 21, 68 L. Ed. 278; Webb v. O'Brien, (1923) 263 U. S. 313, 44 Sup. Ct. 112, 68 L. Ed. 318; Frick v. Webb, (1923) 263 U. S. 326, 44 Sup. Ct. 115, 68 L. Ed. 323.

[92]Corrigan v. Buckley, (1926) 271 U. S. 323, 46 Sup. Ct. 521, 70 L. Ed. 969.

[93]Chiles v. Chesapeake & Ohio R. Co., (1910) 218 U. S. 71, 30 Sup. Ct. 667, 54 L. Ed. 936.

[94]New York Constitution, art. I sec. 11.

implemented by punitive legislation, it may go far toward preventing the various kinds of discrimination practiced even in the North.

While we have been discussing discrimination against the negro, it must be borne in mind that there is discrimination against various other minorities and that the equal protection clause, as far as it goes, protects them also. It remains to be seen, however, how far this clause would extend to protect minorities against some of the forms of discrimination now being practiced in Germany—especially since the federal government is not bound by any equal protection clause. Let us hope that the good sense of the American people will never let such a situation arise.

IV. In Aid of Those Accused of Crime

It was the purpose of many of the provisions of the original constitution and of the Bill of Rights to protect persons accused of crime. These safeguards are essential to liberty, even though they sometimes seem to hamper prosecution of the guilty; for unjust enforcement of the criminal law has always been a favorite instrument of tyranny. The founding fathers were well aware of this truth; recent events abroad should sear it forever into our memories. Our fundamental law assures protection at various stages of criminal proceedings, omitting only the right to appeal. Most state constitutions have similar provisions. But the federal courts will not directly review violations of their provisions and, as we have seen,[95] the Supreme Court has, to only a very limited extent, considered infringement of these guaranties to be a violation of the due process clause of the fourteenth amendment. We shall take up the principal guaranties in the order in which they are likely to be used by a defendant, rather than in that in which they appear in the Constitution.

Indictment

According to the fifth amendment no one may be prosecuted for a crime, capital or "infamous," except after indictment by a grand jury. All offenses punishable by imprisonment in a penitentiary or at hard labor are considered to be "infamous."[96] Aliens,

[95]See notes 13-19 supra.

[96]The general rule was laid down in Ex parte Wilson, (1885) 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89, and Mackin v. United States, (1886) 117 U. S. 348, 6 Sup. Ct. 777, 29 L. Ed. 909. It was extended to cover a punishment of sixty days in a penitentiary in Wong Wing v. United States, (1896) 163 U. S. 228, 16 Sup. Ct. 977, 41 L. Ed. 140; and in United States v. Moreland, (1922) 258 U. S. 433, 42 Sup. Ct. 368, 66 L. Ed. 700 to punishment in the District of Columbia workhouse at hard labor for six months upon a

as well as citizens are entitled to the protection of this provision. Whereas they may be subjected to temporary detention as an incident to deportation, they may not be actually imprisoned as for a crime, unless first indicted.[97]

This guaranty, however, does not hold in the insular possessions such as Hawaii and Puerto Rico,[98] since the Supreme Court arrived at the conclusion that Congress might prescribe how much of the constitution should be applicable to them.[99] A contrary conclusion was reached in the case of Alaska,[100] that territory being considered an integral part of the United States.

DOUBLE JEOPARDY[101]

At the threshold of any trial the question may arise, has this defendant been tried before for the same offense? The fifth amendment, as well as the constitutions of most states, contain a prohibition against "double jeopardy," intended to prevent such second trial. But, like so many other constitutional provisions, this one also must not be taken too literally. A second trial is proper, when it results from the defendant's own action, as, for example, a motion for a new trial or an appeal,[102] or when it is held in a jurisdiction different from the one in which the first trial took place.[103] And, at least in the absence of a state constitutional provision (as in Connecticut), there can be a second trial after an appeal by the state on legal questions.[104]

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conviction for neglecting to support minor children. In the case last cited, Justices Brandeis, Holmes and Taft dissented on the ground that imprisonment in the workhouse for an offense not deemed serious could not be considered infamous.

[97]Wong Wing v. United States, (1896) 163 U. S. 228, 16 Sup. Ct. 977, 41 L. Ed. 140.

[98]Hawaii v. Mankichi, (1903) 190 U. S. 197, 23 Sup. Ct. 787, 47 L. Ed. 1016 and Dorr v. United States, (1904) 195 U. S. 138, 24 Sup. Ct. 808, 49 L. Ed. 128. Cf. Balzac v. Porto Rico, (1922) 258 U. S. 298, 42 Sup. Ct. 343, 66 L. Ed. 627.

[99]This, of course, was the problem of the Insular cases. See Downes v. Bidwell, (1901) 182 U. S. 244, 21 Sup. Ct. 770, 45 L. Ed. 1088.

[100]Rasmussen v. United States, (1905) 197 U. S. 516, 25 Sup. Ct. 514, 49 L. Ed. 862.

[101]For an extensive discussion of this subject see Problems Relating to the Bill of Rights, (1938) 6 New York State Constitutional Convention Report 77-104.

[102]See United States v. Ball, (1896) 163 U. S. 662, 16 Sup. Ct. 1192, 41 L. Ed. 300.

[103]United States v. Lanza, (1922) 260 U. S. 377, 43 Sup. Ct. 141, 67 L. Ed. 314—but many states, by statute, prohibit such second trial. See Grant, The Lanza Rule of Successive Prosecutions, (1932) 32 Col. L. Rev. 1309.

[104]Palko v. Connecticut, (1937) 302 U. S. 319, 58 Sup. Ct. 149, 82 L. Ed. 288. In this case the first trial resulted in a conviction for manslaughter;

Ex Post Facto Laws

Another question which may arise before the trial begins, is whether there has been any change in the law since the crime was committed. For both states and federal government are forbidden by the original constitution from changing the law so as to punish an act which had not been illegal when committed, or from increasing the punishment which was prescribed at the time the crime occurred.[105] But, while the Supreme Court has consistently set itself against any attempt to evade this salutary guaranty, it has not allowed it to be made the basis for mere obstruction. Thus many specific changes in procedure have been permitted to affect criminal trials, even though the challenged procedure had not prevailed at the time the offense under scrutiny was committed.[106]

The guaranty applies, as we have seen,[107] only to cases that are of a criminal character. On the whole this is a sensible rule, since, in civil matters, there are many occasions when retroactive laws are necessary and desirable. Protection against extreme instances of such retroactive legislation has been afforded by the due process clause.[108] But, since deportation is not considered to be punishment for crime, an alien may be deported under a law enacted after his arrival, for an act which had not been a ground for deportation under the law in force when he arrived or even when the act was committed.[109] Much injustice has resulted from this anomaly.

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the state appealed because of errors in the charge. The second trial resulted in a first degree conviction. The United States Supreme Court held that giving the state the right to appeal on issues of law was no denial of due process. A similar Philippine provision has, however, been held to be a violation of the express federal guaranty: Kepner v. United States, (1904) 195 U. S. 100, 24 Sup. Ct. 797, 49 L. Ed. 114 (a five-to-four decision).

[105]See Calder v. Bull, (1797) 3 Dall. (U.S.) 386, 1 L. Ed. 648; Thompson v. Utah, (1898) 170 U. S. 343, 18 Sup. Ct. 620, 42 L. Ed. 1061. For a recent example see Lindsey v. Washington, (1937) 301 U. S. 397, 57 Sup. Ct. 797, 81 L. Ed. 1182.

[106]Change in qualifications of witnesses: Hopt v. Utah, (1884) 110 U. S. 574, 4 Sup. Ct. 202, 28 L. Ed. 262.

Change in states' right to appeal: Mallett v. North Carolina, (1901) 181 U. S. 589, 21 Sup. Ct. 730, 45 L. Ed. 1015.

Change in manner of carrying out death sentence: Malloy v. South Carolina, (1915) 237 U. S. 180, 35 Sup. Ct. 507, 59 L. Ed. 905.

[107]See note 22, supra.

[108]See Nichols v. Coolidge, (1927) 274 U. S. 531, 47 Sup. Ct. 710, 71 L. Ed. 1184; Untermyer v. Anderson, (1928) 276 U. S. 440, 48 Sup. Ct. 353, 72 L. Ed. 645; Coolidge v. Long, (1931) 282 U. S. 582, 51 Sup. Ct. 306, 75 L. Ed. 562. But see contra: Milliken v. United States, (1931) 283 U. S. 15, 51 Sup. Ct. 324, 75 L. Ed. 809; United States v. Hudson, (1937) 299 U. S. 498, 57 Sup. Ct. 309, 81 L. Ed. 370.

[109]Bugajewitz v. Adams, (1913) 228 U. S. 585, 33 Sup. Ct. 607, 57 L. Ed. 978; Mahler v. Eby, (1924) 264 U. S. 32, 44 Sup. Ct. 283, 68 L. Ed.

TRIAL BY JURY

A criminal trial in the federal courts must take place before a jury of twelve. Most states have similar provisions, limited sometimes to particular kinds of crime, sometimes simply continuing existing practice. But despite the plain language of the sixth amendment, Congress may provide for trials without a jury in police courts in the District of Columbia, so long as the offense involved is a minor one.[110] However, serious crimes such as conspiracy arising out of a labor dispute,[111] or even such as driving an automobile recklessly[112] may not be tried without a jury.

In the recent *Clawans Case*,[113] however, the Court, over the dissent of Justices McReynolds and Butler, held that trial by jury might be dispensed with where the charge was that of selling merchandise without a license, even though the punishment might be a fine of $300 or imprisonment for ninety days. The majority recognized that, regardless of the nature of the crime, jury trial might be required if the punishment imposed was sufficiently severe, although no limits were indicated by the Court. The minority were of the opinion that, since trial by jury was guaranteed by the seventh amendment in civil cases involving more than $20, a like right should be granted in criminal cases when a substantial fine might be imposed.

The same rule has been adopted with regard to the application of the jury provision to aliens and the insular possessions as was applied in the case of indictment.[114]

THE RIGHT TO COUNSEL

Of prime importance to a defendant is the right to be represented by counsel. It has been expressly guaranteed by the sixth amendment; and most states have similar provisions. There can be no doubt, therefore, that denial of this right requires reversal of conviction, though if the case arise in a state, the Supreme Court can intervene only when it concludes, as in the first *Scotts-*

549. Cf. Johannessen v. United States, (1912) 225 U. S. 227, 32 Sup. Ct. 613, 56 L. Ed. 1066 and Luria v. United States, (1913) 231 U. S. 9, 34 Sup. Ct. 10, 58 L. Ed. 101 (actions to cancel naturalization certificate).

[110]Schick v. United States, (1904) 195 U. S. 65, 24 Sup. Ct. 826, 49 L. Ed. 99.

[111]Callan v. Wilson, (1888) 127 U. S. 540, 8 Sup. Ct. 1301, 32 L. Ed. 223.

[112]District of Columbia v. Colts, (1930) 282 U. S. 63, 51 Sup. Ct. 52, 75 L. Ed. 177.

[113]District of Columbia v. Clawans, (1937) 300 U. S. 617, 57 Sup. Ct. 660, 81 L. Ed. 843. See also Bailey v. United States, (App. D.C. 1938) 98 Fed. 306, soliciting prostitution.

[114]See notes 97-100 supra.

boro Case,[115] that such denial has amounted to a deprivation of due process. Even when, due to delay, there was no appeal, denial of counsel by a federal court, if not acquiesced in by the defendant, will so vitiate a conviction that it may be challenged at any time by writ of habeas corpus.[116]

Confrontation of Witnesses

Another right expressly given by the sixth amendment is that a defendant be confronted with the witnesses against him. The Supreme Court held it to be a violation of this provision for Congress to provide that, in prosecutions for receiving stolen goods, the fact of theft might be established merely by proving the conviction of the thief, without evidence of the actual occurrences.[117]

Self Incrimination

The fifth amendment, and most state constitutions, forbid compulsory questioning of a person about his own criminal activities. This guaranty has been much criticized as constituting an unnecessary limitation on the efficiency of prosecutions, its critics believing that under modern conditions it protects the guilty rather than the innocent.[118] So as to obtain needed testimony, legislatures have frequently extended immunity to persons compelled to testify.[119] Nevertheless, so long as prosecutors still bully and confuse accused persons when they take the stand, it will continue to be necessary to retain this protection. The subject is too complicated to permit adequate discussion in the limits of a paper such as this. And the issue it raises is one of general policy rather than of constitutional law.

A curious, though probably unsound,[120] application of this principle is its identification with the fourth amendment in barring

[115]Powell v. Alabama, (1932) 287 U. S. 45, 53 Sup. Ct. 55, 77 L. Ed. 158. See Howard v. Dodd, (D. Ind. 1938) 25 F. Supp. 844; in that case a state conviction was set aside by a writ of habeas corpus four years after the conviction.

[116]Johnson v. Zerbst, (1938) 304 U. S. 458, 58 Sup. Ct. 1019, 82 L. Ed. 1461 (Justice McReynolds and Butler dissented because they believed the evidence established a waiver).

[117]Kirby v. United States, (1899) 174 U. S. 47, 19 Sup. Ct. 574, 43 L. Ed. 890.

[118]See Cardozo, J., in Palko v. Connecticut, (1937) 302 U. S. 319, 326, 58 Sup. Ct. 149, 82 L. Ed. 288; 4 Wigmore, Evidence, (2d ed. 1923) sec. 2251, pp. 819 ff; Problems Relating to the Judicial Administration and Organization, (1938) 9 New York State Constitutional Convention Report 920, 929 ff.

[119]See 6 Jones, Evidence (2d ed. 1926) sec. 2486, pp. 4918 ff.

[120]See 4 Wigmore, Evidence (1st ed. 1904) 3122-3127.

the admission of evidence illegally seized. We shall now consider that subject.

SEARCHES AND SEIZURES

The fourth amendment prohibits "unreasonable" searches and seizures; it is silent on the consequences that flow from a violation of its provisions. Originally such violation was ignored in the course of a prosecution, and the government was allowed to use illegally seized evidence.[121] Later the technique was developed,[122] which is now well established, under which a defendant moves before trial to suppress illegally seized evidence. Failure, in a proper case, to grant such a motion will result in reversal of conviction;[123] and this will also follow if the evidence is received despite the defendant's failure to make the motion before trial, provided he learned of the seizure first at the trial.[124] However, this is the rule only when the seizure was a wrongful one and only when made under federal authority. Thus evidence may be received although illegally taken by private persons[125] or by state officers, unless these were cooperating with a federal agency.[126] There are circumstances, too, in which a search may be valid, although made without a warrant, as at the time of a lawful arrest,[127] or when it is that of a moving automobile under condi-

[121]See Fraenkel, Concerning Searches and Seizures, (1921) 34 Harv. L. Rev. 361.

[122]Weeks v. United States, (1914) 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, first approved this practice. See notes 123, 124 infra.

[123]Gouled v. United States, (1921) 255 U. S. 298, 41 Sup. Ct. 261, 65 L. Ed. 647; Amos v. United States, (1921) 255 U. S. 313, 41 Sup. Ct. 266, 65 L. Ed. 654; Byars v. United States, (1927) 273 U. S. 28, 47 Sup. Ct. 248, 71 L. Ed. 520; Gambino v. United States, (1927) 275 U. S. 310, 48 Sup. Ct. 137, 72 L. Ed. 293; Nathanson v. United States, (1933) 290 U. S. 41, 54 Sup. Ct. 11, 78 L. Ed. 159.

[124]Agnello v. United States, (1925) 269 U. S. 20, 46 Sup. Ct. 4, 70 L. Ed. 145.

[125]Burdeau v. McDowell, (1921) 256 U. S. 465, 41 Sup. Ct. 574, 65 L. Ed. 1048.

[126]Weeks v. United States, (1914) 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 650. See Byars v. United States, (1931) 273 U. S. 28, 33, 47 Sup. Ct. 248, 71 L. Ed. 520; cf. Center v. United States, (1915) 267 U. S. 575, 45 Sup. Ct. 230, 69 L. Ed. 795. The rule is otherwise if the state officers cooperate with the federal: Byars v. United States, (1927) 273 U. S. 28, 47 Sup. Ct. 574, 71 L. Ed. 520; Gambino v. United States, (1927) 275 U. S. 310, 48 Sup. Ct. 137, 72 L. Ed. 293. These holdings result from the refusal of the Supreme Court to include freedom from search within the rights protected by the due process clause of the fourteenth amendment. See note 15, supra.

[127]Adams v. New York, (1904) 192 U. S. 585, 595, 24 Sup. Ct. 372, 48 L. Ed. 575.

tions which indicate that a crime is being committed by the occupants.[128]

An important aspect of this problem is the ruling that not even a search warrant can validate a search for matter that is evidentiary only.[129] A search may be made only for material illegally possessed, such as counterfeit money, or for the instrumentalities of crime, such as an unregistered still. Yet in *Olmstead v. United States,*[130] though by a five-to-four decision, the Supreme Court held that any kind of evidence was admissible if obtained by wire-tapping, and this even though the wire-tapping was criminal in the state in which it took place. This decision rested on the double ground that wire-tapping was not a "search" and that the rule against the exclusion of evidence applied only when it was obtained in violation of a constitutional provision. However, in the recent *Nardone Case,*[131] the last point was ignored and evidence obtained by wire-tapping was held inadmissible because the wire-tapping violated the Federal Communications Act.

The rule that evidence illegally obtained may not be used has been criticized severely on the ground that it benefits only the guilty.[132] Yet it is clear that, unless such evidence be excluded, the protection given by the Constitution, the value of which is not disputed even by the critics of the "federal rule," becomes meaningless. Suits for damages offer no effective substitute; it is idle to expect criminal prosecution of officials the fruits of whose crime have been used by the very persons charged with initiating prosecutions. In this dilemma the federal rule provides the more satisfactory solution. As Mr. Justice Holmes has said:

"It is desirable that criminals should be detected, and to that end that all available evidence should be used. It also is desirable that the government should not itself foster and pay for other

[128]But see Husty v. United States, (1931) 282 U. S. 694, 51 Sup. Ct. 240, 75 L. Ed. 629; Carroll v. United States, (1925) 267 U. S. 132, 45 Sup. Ct. 280, 69 L. Ed. 543.

[129]Gouled v. United States, (1921) 255 U. S. 298, 41 Sup. Ct. 261, 65 L. Ed. 647.

[130](1928) 277 U. S. 438, 48 Sup. Ct. 564, 72 L. Ed. 944; Justices Holmes, Brandeis, Butler and Stone each wrote dissenting opinions.

[131](1937) 302 U. S. 379, 58 Sup. Ct. 275, 82 L. Ed. 314; Justices Sutherland and McReynolds dissented solely on a question of construction.

[132]See Cardozo, J., in People v. Defore, (1926) 242 N. Y. 13, 150 N. E. 585; Dist. Atty. Dewey of New York, N. Y. Times June 13, 1938 at 1:8.

See contra: Atkinson, Admissibility of Evidence Obtained through Unreasonable Searches and Seizures, (1925) 25 Col. L. Rev. 11; Governor Lehman of New York, N. Y. Times June 14, 1938 at 1:8. See also Broadhurst, Use of Evidence Obtained by Illegal Search and Seizure, (1936) 24 Ky. L. J. 191; Fraenkel, Recent Developments in the Law of Search and Seizure, (1929) 13 MINNESOTA LAW REVIEW 1.

crimes, when they are the means by which the evidence is to be obtained. If it pays its officers for having got evidence by crime I do not see why it may not as well pay them for getting it in the same way, and I can attach no importance to protestations of disapproval if it knowingly accepts and pays and announces that in future it will pay for the fruits. We have to choose, and for my part I think it a less evil that some criminals should escape than that the government should play an ignoble part."[133]

This rule is followed in less than half the states, but it has not been definitely rejected in all the others.[134] In a few states the subject is regulated by statute or constitutional provision.[135] In the Constitutional Convention held in New York in 1938, extensive debate resulted in the rejection of the federal rule, partly on the ground that it was undesirable, partly because it was felt that the subject should be handled by statute rather than constitutional enactment.[136] The convention adopted a novel provision relating to wire-tapping, however, one which forbids the practice except when authorized by a court order upon an affidavit setting forth facts justifying it.[137] The machinery thus set up is similar

[133](1928) 277 U. S. 438, 470, 48 Sup. Ct. 536, 72 L. Ed. 944.

[134]States which follow the federal rule: Hart v. State, (1925) 89 Fla. 202, 103 So. 633; State v. Arregui, (1927) 44 Idaho 43, 254 Pac. 788; People v. Castree, (1924) 311 Ill. 392, 143 N. E. 112; Flum v. State, (1923) 193 Ind. 585, 141 N. E. 353; Youman v. Commonwealth, (1920) 189 Ky. 152, 244 S. W. 860; People v. Marxhausen, (1919) 204 Mich. 559, 171 N. W. 537; Owens v. State, (1923) 133 Miss. 752, 98 So. 233; State v. Owens, (1923) 302 Mo. 348, 259 S. W. 100; State ex rel. Samlin v. District Court, (1921) 59 Mont. 600, 198 Pac. 362; Hess v. State, (1921) 84 Okla. 73, 202 Pac. 310; State v. Gooden, (1930) 57 S. D. 619, 234 N. W. 610; Hughes v. State, (1921) 145 Tenn. 544, 238 S. W. 588; State v. Gibbons, (1922) 118 Wash. 171, 203 Pac. 390; State v. Wills, (1927) 91 W. Va. 659, 114 S. E. 261; Hoyer v. State, (1923) 180 Wis. 407, 193 N. W. 189; State v. Peterson, (1920) 27 Wyo. 185, 194 Pac. 342.

In some states the rule applies only to matters purely evidentiary, not to contraband: State v. Agalos, (1919) 79 N. H. 241, 107 Atl. 314; State v. Bluth, (1923) 157 Minn. 145, 195 N. W. 789; State v. Simmons, (1922) 183 N. C. 684, 110 S. E. 591; State v. Chester, (1925) 46 R. I. 485, 129 Atl. 596—but in the last two cases the search was held lawful.

In a few states the question has not really been reconsidered since the development of the practice of moving to suppress: Johnson v. State, (1916) 152 Ga. 271, 109 S. E. 662; State v. Choroszy, (1923) 122 Me. 283, 119 Atl. 662; State v. Merra, (1927) 103 N. J. L. 361, 137 Atl. 575.

[135]Maryland, Code (1935) Art. 35, sec. 4a (bars use in misdemeanor cases).

Michigan, Constitution art. II sec. 10 (1936) (permits use as to certain dangerous weapons).

Texas, C. C. P. (1925, 1929) art. 727a (bars use in all cases).

In Mississippi a statute permitting use in liquor cases was held unconstitutional: Orick v. State, (1925) 140 Miss. 184, 105 So. 465.

[136]See N. Y. Times (1938) June 19 at IV 10:1, 29 at 1:8. But legislation is pending to make the federal rule applicable.

[137]New York, Constitution (1939) art. I sec. 12.

to that for search warrants. It will be interesting to observe how the courts will enforce this provision.

Fair Trials

The prime object of a criminal trial is, of course, to determine guilt or innocence by the application of legal rules. This is the essence of the due process of law guaranteed by the fifth amendment;[138] the defendant is entitled to a fair trial. In the federal courts, however, it is seldom necessary to fall back upon so broad a provision as this, on account of the numerous specific guarantees of the fifth and sixth amendments we have already considered.[139]

But the due process clause of the fourteenth amendment has often been invoked as the last protection available to a defendant convicted in a state court, usually the only contention by which appeal to the Supreme Court of the United States is possible. In a number of famous cases the Supreme Court has refused to reverse.[140] Sometimes it has even refused to take jurisdiction.[141]

[138]See 3 Story, Commentaries on the Constitution (1st ed. 1833) 681.

[139]See notes 114-131 supra. For reversals on general grounds see: Aldridge v. United States, (1931) 283 U. S. 308, 51 Sup. Ct. 470, 75 L. Ed. 1054 (trial court refused to permit inquiry into prejudice of talesmen against negroes); Quercia v. United States, (1933) 289 U. S. 466, 53 Sup. Ct. 689, 77 L. Ed. 1321 (trial court characterized defendant as unworthy of belief); Bergen v. United States, (1935) 295 U. S. 78, 55 Sup. Ct. 629, 79 L. Ed. 1314 (improper questions and summations by prosecuting attorney). See also Alford v. United States, (1931) 282 U. S. 687, 51 Sup. Ct. 218, 75 L. Ed. 624 (refusal to permit defense to show that government's witness was in custody of federal authorities as foundation for claim of bias).

[140]Thus it rejected the contention in the Chicago Haymarket case that the jury was unfairly chosen: Spies v. Illinois, (1887) 123 U. S. 131, 8 Sup. Ct. 22, 31 L. Ed. 80. Over the dissent of Justices Holmes and Hughes it denied a writ of habeas corpus to Leo Frank, despite evidence of mob feeling so high as to disturb the calm of the trial: Frank v. Magnum, (1915) 237 U. S. 309, 35 Sup. Ct. 582, 59 L. Ed. 969 (but see a different result reached later, note 142 infra). And in Snyder v. Massachusetts, (1933) 291 U. S. 97, 54 Sup. Ct. 330, 78 L. Ed. 674, while all the justices agreed that the right of a defendant to be present during his trial is fundamental, five of the justices were of the opinion that in the particular case defendant had suffered no harm by not being present while the jury had viewed the scene of the crime; Justices Sutherland, Brandeis, Butler and Roberts dissented.

[141]In 1927 neither Mr. Justice Holmes nor Mr. Justice Stone saw sufficient merit in the claim made by counsel for Sacco and Vanzetti that the trial judge had been unduly prejudiced to grant a stay of execution so that the whole court might pass on an application for certiorari. See Fraenkel, The Sacco Vanzetti Case (1931) 178-182. (Mr. Justice Brandeis refused to entertain the application because members of his family had interested themselves in the case; no other justice was available.) The Court in the third Scottsboro Case denied an application for certiorari which rested on a refusal to transfer the case to the federal courts under 28 U. S. C. A. 74, and on a claim of denial of due process because of the judge's charge. Patterson v. Alabama, (1937) 302 U. S. 733, 58 Sup. Ct. 124, 82 L. Ed. 566.

The Court has interfered, however, in other instances on the ground that the trial has been vitiated by some gross denial of the defendant's rights. In *Moore v. Dempsey,*[142] it ruled that, when it was claimed a mob had, in effect, made a trial an instrument of its desire to lynch, a writ of habeas corpus might not be dismissed, but evidence must be taken of the facts. In the *Mooney Case,*[143] it held that the state must afford a hearing to determine whether the defendant had been convicted by the deliberate use of perjured testimony. The Supreme Court has not yet handed down a ruling on whether a like result will follow even if the state had at the time of the trial no knowledge that the testimony was perjured.[144]

In the first *Scottsboro Case,* as we have already noted,[145] convictions were reversed because the accused had been denied an opportunity to obtain counsel. The Supreme Court has also reversed where a judge who imposed a fine was paid by being allowed to keep part of all fines he imposed.[146] In *Brown v. Mississippi,*[147] convictions were set aside because the only evidence against the defendants had been obtained from them by torture. Chief Justice Hughes, reviewing the requirements of due process, said in that case:

"The rack and torture chamber may not be substituted for the witness stand. The state may not permit an accused to be hurried to conviction under mob domination—where the whole proceeding is but a mask—without supplying corrective process. The state may not deny to the accused the aid of counsel. Nor may a state, through the action of its officers, contrive a conviction through the pretense of a trial which in truth is 'but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured.' And the trial equally is a mere pretense where the state authorities have contrived a conviction resting solely upon confessions obtained by violence."[148]

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[142](1923) 261 U. S. 86, 43 Sup. Ct. 265, 67 L. Ed. 543, Justices McReynolds and Sutherland dissenting.

[143]Mooney v. Holohan, (1935) 294 U. S. 103, 55 Sup. Ct. 340, 79 L. Ed. 791. The state supreme court then appointed a referee who decided against Mooney. His decision was confirmed: Mooney v. Smith, (1937) 10 Cal. 2nd 1, 73 P. 2nd 554, Langdon, J., dissenting. Certiorari denied (1938) 59 Sup. Ct. 61, Black and Reed, JJ., dissenting. The Court also refused to issue an original writ of habeas corpus: Ex parte Mooney, (1938) 59 Sup. Ct. 246.

[144]In Jones v. Kentucky, (C.C.A. 8th Cir. 1938) 97 F. (2d) 335 habeas corpus was issued because the state had failed to provide judicial machinery to correct a conviction based on perjury, even when there was no proof that the prosecutor knew of the perjury.

[145]See note 115, supra.

[146]Tumey v. Ohio, (1927) 273 U. S. 510, 47 Sup. Ct. 437, 71 L. Ed. 749.

[147](1936) 297 U. S. 278, 56 Sup. Ct. 461, 80 L. Ed. 682.

[148](1936) 297 U. S. 278, 285, 56 Sup. Ct. 461, 80 L. Ed. 682.

Certain general principles have also come to be recognized as integral parts of due process in criminal cases. First, the law under which a prosecution is conducted must be sufficiently definite to advise the public what acts are punishable under it.[149] Second, the evidence must prove the commission of a crime.[150] Third, the evidence must establish the crime charged in the indictment.[151] Presumably, also, the judge's charge must not permit a finding of guilty in violation of the last of these principles; perhaps it must conform to the standards of fairness generally recognized in the state. Until now, however, the Supreme Court has avoided considering these questions. The extent to which it will reverse a state conviction because of errors in the charge therefore remains uncertain.

Even though deportation proceedings are not considered criminal in character, a fair hearing in these is essential.[152]

The Right of Appeal

While an appeal in criminal cases is generally allowed as of right by federal and state laws, there is no constitutional guaranty of that right in the constitution of the United States, nor in those of many of the states. And the Supreme Court of the United States has often pointed out that the right to appeal is not essential to due process.[153] Nevertheless, when appeal is not available either because of lapse of time or for other reasons, the state must provide a method for the judicial review of constitutional issues. Failing it, the federal courts will interpose by writ of habeas corpus.[154] However, state courts need not entertain an application for such a writ, when the constitutional question could have been raised by appeal but was not.[155]

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[149]See Zakonaite v. Wolf, (1912) 226 U. S. 272, 33 Sup. Ct. 31, 57 L. Ed. 218. Cf. Chiuye Inovye v. Carr, (C.C.A. 9th Cir. 1938) 98 F. (2d) 46.

[150]United States v. Cohen Grocery Co., (1921) 255 U. S. 81, 41 Sup. Ct. 298, 65 L. Ed. 516; Herndon v. Lowry, (1937) 301 U. S. 242, 57 Sup. Ct. 732, 81 L. Ed. 1066. Lanzetta v. New Jersey, (1939) 59 Sup. Ct. 618.

[151]Fiske v. Kansas, (1927) 274 U. S. 380, 47 Sup. Ct. 655, 71 L. Ed. 1108.

[152]deJonge v. Oregon, (1937) 299 U. S. 353, 57 Sup. Ct. 255, 81 L. Ed. 278.

[153]See McKane v. Durston, (1894) 153 U. S. 684, 687, 14 Sup. Ct. 913, 38 L. Ed. 867; District of Columbia v. Clawans, (1937) 300 U. S. 617, 627, 57 Sup. Ct. 660, 81 L. Ed. 843.

[154]See notes 143, 144 supra.

[155]Woolsey v. Best, (1936) 299 U. S. 1, 57 Sup. Ct. 2, 81 L. Ed. 3. In the second Herndon Case, Herndon v. Lowry, (1937) 301 U. S. 242. 57 Sup. Ct. 732, 81 L. Ed. 1066, the constitutional issue was presented

V. In Aid of Property

While we are here concerned primarily with personal rights, no review of our subject would be intelligible which completely ignored property rights. We shall pass with a bare mention the requirement of the fifth amendment that private property may not be taken for public purposes without compensation and discuss only the due process clauses of that amendment and the fourteenth.

Property rights are, of course, entitled to the same kind of protection against procedural due process as are persons accused of crime. Generally it is enough that the owner of the property or business affected be given a fair opportunity to litigate the issues involved. The courts have often set aside rulings of administrative tribunals, such as rate making bodies, because they believed insufficient notice of the precise issue to be decided had been given the party interested.[156] When such notice has been given, however, the courts will not impose any particular form of procedure on administrative tribunals.[157] The recent increase in number and function of these has been attracting much attention to this problem.[158] Indeed, the Constitutional Convention held in New York in 1938 adopted proposals to insure judicial review of certain quasi-judicial administrative decisions both on the law and on the facts, proposals fortunately rejected at the polls.[159]

In addition to procedural matters of due process, the courts have, in the last few decades, invoked that clause against laws imposing taxes and various forms of regulation, on the ground that arbitrary laws are really not laws at all. And, in determining what laws are arbitrary, judges have allowed their own social and economic prejudices to control. Thus on the altar of due process the Supreme Court has slaughtered numerous laws enacted for the protection of the underprivileged: laws outlawing yellow dog con-

on habeas corpus after the same issue had been reviewed on appeal: Herndon v. State, (1934) 178 Ga. 832, 174 S. E. 597; (1934) 179 Ga. 597, 176 S. E. 620, appeal dismissed (1935) 295 U. S. 441, 55 Sup. Ct. 794, 79 L. Ed. 1530 (Brandeis, Stone and Cardozo dissenting). But the state court did not question the propriety of this procedure.

[156]Ohio Bell Tel. Co. v. Public Utility Comm., (1937) 301 U. S. 292, 57 Sup. Ct. 724, 81 L. Ed. 1093; Morgan v. United States, (1938) 304 U. S. 1, 23, 58 Sup. Ct. 773, 999, 82 L. Ed. 1129.

[157]N.L.R.B. v. Mackay Radio Co., (1938) 304 U. S. 333, 58 Sup. Ct. 904, 82 L. Ed. 1381 Cf. N.L.R.B. v. Biles Coleman L. Co., (C.C.A. 9th Cir. 1938) 98 Fed. (2d) 16; N.L.R.B. v. American Potash & Chemical Co., (C.C.A. 9th Cir. 1938) 98 Fed. 2d 488.

[158]See articles in (1938) 47 Yale L. J. 519 ff.

[159]New York Times (1938) Aug. 4 at 1.3; 15 at 1:2, 19 at 20:2; Nov. 9 at 1:2.

tracts,[160] laws fixing railway and utility rates,[161] laws regulating the hours of labor[162] and various businesses,[163] even, until just the other day, laws establishing minimum wages.[164] And, while the Court has already receded from this most extreme position,[165] it has not abandoned the principle which underlies all these cases: that a law violates due process if the purpose it seeks to accomplish or the method adopted to carry that purpose out appears to the majority of the judges contrary to the natural rights of businessmen or property owners. In astonishing numbers, decisions in this class of cases have rested upon the vote of a single justice.[166]

By thus giving to due process a substantive, rather than merely procedural meaning, the courts have constituted themselves deciders of policy against whom the only appeal is by the slow method of constitutional amendment or the uncertain pressure of public opinion. American courts have embarked here upon a course wholly without precedent in judicial annals; one for which judges are unsuited by training or experience, a course which has justly aroused violent resentment, even to the extent of its being sometimes proposed that the power of judicial review be altogether abolished.[167]

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[160]Adair v. United States, (1908) 208 U. S. 161, 28 Sup. Ct. 277, 52 L. Ed. 436 (Justices McKenna and Holmes dissenting); Coppage v. Kansas, (1915) 236 U. S. 1, 35 Sup. Ct. 240, 59 L. Ed. 441 (Justices Day, Holmes, Hughes dissenting).

[161]See Missouri ex rel. Southwestern Bell Tel. Co. v. Pub. Serv. Comm., (1923) 262 U. S. 276, 43 Sup. Ct. 544, 67 L. Ed. 981; Pacific Gas & E. R. Co. v. San Francisco, (1923) 265 U. S. 403, 44 Sup. Ct. 537, 68 L. Ed. 1075; McCardle v. Indianapolis Water Co., (1926) 272 U. S. 400, 47 Sup. Ct. 144, 71 L. Ed. 316; St. Louis O'Fallon R. Co. v. United States, (1929) 279 U. S. 461, 49 Sup. Ct. 384, 73 L. Ed. 798; West v. Chesapeake P. T. Co., (1935) 295 U. S. 662, 55 Sup. Ct. 894, 79 L. Ed. 1640. These cases all rested on Smyth v. Ames, (1898) 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819.

[162]Lochner v. New York, (1905) 198 U. S. 45, 25 Sup. Ct. 539, 49 L. Ed. 937.

[163]Adams v. Tanner, (1917) 244 U. S. 590, 37 Sup. Ct. 662, 61 L. Ed. 1336; Tyson v. Banton, (1927) 273 U. S. 418, 47 Sup. Ct. 426, 71 L. Ed. 718; New State Ice Co. v. Leibman, (1932) 285 U. S. 262, 52 Sup. Ct. 371, 76 L. Ed. 746; Carter v. Carter Coal Co., (1936) 298 U. S. 238, 56 Sup. Ct. 855, 80 L. Ed. 1160.

[164]Adkins v. Childrens Hospital, (1923) 261 U. S. 525, 43 Sup. Ct. 394, 67 L. Ed. 785; New York ex rel. Tipaldo v. Morehead, (1936) 298 U. S. 587, 56 Sup. Ct. 918, 80 L. Ed. 1347.

[165]See West Coast Hotel Co. v. Parrish, (1937) 300 U. S. 379, 57 Sup. Ct. 578, 81 L. Ed. 703.

[166]Of the cases cited in notes 162-165 supra, all were five-to-four decisions except New State Ice Co. v. Leibman and the Adkins Case. (The latter only because Mr. Justice Brandeis did not participate). For other such recent decisions see Fraenkel, Five-to-Four Decisions of Supreme Court, (1935) 2 U. S. Law Week 1010.

[167]See note 20, supra.

VI. In Aid of Opinion

One unlooked for result on the credit side has come out of this extended interpretation of the due process clause. As we have already noted, the Supreme Court has, after much hesitation, finally ruled that certain substantive rights, such as freedom of speech, of the press, of religion and assembly are so fundamental that denial of them by a state violates the due process clause of the fourteenth amendment. Thus the rights guaranteed by the first amendment against interference by the central government have been siphoned into the fourteenth amendment and become protected against infringement by the states. Strictly speaking, of course, the Court will not apply the literal provisions of the first amendment as against state action; it will review state action only when it has violated the fundamental rights of citizens. This distinction finds no reflection as yet in the decisions, but it may explain some instances in which the Court has declined to take jurisdiction of cases which originated in state courts.

These rights specified in the first amendment may all be called rights of opinion; the right to possess and express one's ideas (be they religious, political or economic) by speech, in writing or through meeting with one's fellow men. These are the rights essential to a democracy, the safeguarding of which is the first duty of enlightened government. How have they fared in our history?

Religious Freedom

Full religious liberty has never existed even in the United States.[168] At the time of the Revolution, only Protestants were fully protected; religious restrictions upon voting and the holding of office existed in many of the colonies and still to some extent continue.[169] Nor was any attempt made by the constitution or the early amendments to alter these conditions.[170] In the main, however, there have been in our history no direct infringements of religious liberty. Yet the United States has been judicially declared a "Christian country," with various curious consequences hardly consistent with full religious liberty.[171]

[168]See Whipple, Our Ancient Liberties (1927) 64 ff.

[169]See Hartogensis, Denial of Equal Rights to Religious Minorities and Non-Believers in the United States, (1930) 39 Yale L. J. 659, 665, 671. In several states office holding is restricted to believers in God: Ark. XIX Sec. 1; Md. Decl. of R. Sec. 37; N. C. VI Sec. 8; Pa. I Sec. 4. And in many states atheists are not accepted as witnesses.

[170]See Permoli v. New Orleans, (1845) 3 How. (U.S.) 589, 609, 11 L. Ed. 739.

[171]See Church of the Holy Trinity, (1892) 143 U. S. 457, 470, 12

Practices indulged in as religious may, however, be subject to state regulation. This fact was established when Mormonism became a national issue. In upholding convictions for polygamy, a practice originally commanded by the Mormon Church, Chief Justice Waite laid down the general rule that religious freedom cannot be asserted in justification of actions deemed by the legislature contrary to public policy:

"Laws are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices."[172]

Nor may religious beliefs be used as the basis for obtaining exemption from legal provisions of general application, provisions not designed to interfere with purely religious observances. Thus those aliens may not become citizens who, on account of their religious scruples, refuse to pledge military support in time of war[173]—and this, though the applicant be a woman or above military age! Even the dissenting Justices, Holmes, Brandeis, Stone and Hughes, did not question Congressional power to exact such a pledge, but merely doubted that Congress had intended to do so.

The Court has not yet actually decided that religious freedom is guaranteed against state action, but it has assumed as much while holding that the state action complained of did not violate such freedom. Thus it rejected a claim of pacifists that they be exempted from the requirement of military training at a state university,[174] and one made by members of the sect of Jehovah's Witnesses that they be relieved of the obligation to salute the flag while attending public school.[175] In these instances the deci-

Sup. Ct. 511, 36 L. Ed. 226; United States v. Macintosh, (1931) 283 U. S. 605, 625, 51 Sup. Ct. 570, 75 L. Ed. 1302. Cf. Bible reading in schools; see Hartogensis, note 169 supra, at 678.

[172]Reynolds v. United States, (1879) 98 U. S. 145, 25 L. Ed. 244, cf. Davis v. Beason, (1890) 133 U. S. 333, 10 Sup. Ct. 299, 33 L. Ed. 637. See, however, People v. Cole, (1916) 219 N. Y. 98, 113 N. E. 790 (practice of medicine in accordance with tenets of Christian Science Church not in violation of law).

[173]United States v. Schwimmer, (1929) 279 U. S. 644, 49 Sup. Ct. 448, 73 L. Ed. 889; United States v. Macintosh, (1931) 283 U. S. 605, 51 Sup. Ct. 570, 75 L. Ed. 1302; United States v. Bland, (1931) 283 U. S. 636, 51 Sup. Ct. 569, 75 L. Ed. 1319.

[174]Hamilton v. Regents, (1934) 293 U. S. 245, 55 Sup. Ct. 197, 79 L. Ed. 343. This case has been cited, Palko v. Connecticut, (1938) 302 U. S. 319, 324, 58 Sup. Ct. 149, 82 L. Ed. 288, as authority for including freedom of religion within those concepts of due process guaranteed against state action. Cf. Meyer v. Nebraska, (1923) 262 U. S. 390, 43 Sup. Ct. 625, 67 L. Ed. 1042.

[175]Gabrielli v. Knickerbocker, (1938) 96 Cal. 280, 82 P. (2d) 391, cert. denied (April 24, 1939) ..... Sup. Ct. ....., reversing (Cal. App. 1937) 74 P. (2d) 290; Leoles v. Landers, (1937) 184 Ga. 580, 192 S. E. 218, appeal

sions rested in part on the fact that the state had exerted no compulsion: the students were not obliged to attend either a public college or a public school. This, of course, is the doctrine of the *Civil Rights Cases* which we have already considered.[176]

The Court held also that no issue of religious liberty was involved in prosecutions for violation of an ordinance forbidding distribution of all pamphlets without a permit, where in the particular instances the pamphlets distributed were religious in character.[177]

And an attempt failed which tried to overthrow the Selective Draft Law of 1917 on the ground that its exemption in favor of certain sects transgressed the prohibition of the first amendment against Congressional establishment of any religion.[178]

Freedom of Speech and of the Press

These two rights overlap and may best be discussed together. The fundamental nature of their character has been recognized in many decisions, though with some limitations born chiefly of wartime hysteria, which are open to criticism. At an early period in our history the view was expressed that these guaranties were designed only to prevent censorship, not to interfere with punishment for words once uttered.[179] Even Justice Holmes at one time considered this the chief purpose of the provision.[180] On the other hand is, of course, the extreme position that no mere expression of opinion may be punished, nor may even advocacy of action, so long as no harmful result was actually produced

dismissed (1937) 302 U. S. 656, 58 Sup. Ct. 364, 82 L. Ed. 507; Nicholas v. Mayor, (Mass. 1937) 7 N. E. (2d) 577; Hering v. State Board of Education, (1937) 117 N. J. L. 455, 189 Atl. 629, affd. (1937) 118 N. J. L. 566, 194 Atl. 177, appeal dismissed (1938) 303 U. S. 624, 58 Sup. Ct. 742, 82 L. Ed. 1086; People ex rel. Fisk v. Sandstrom, (1939) 279 N. Y. 523; Johnson v. Town of Deerfield, (D. Mass. 1939) 25 F. Supp. 918, cert. denied (April 24, 1939) ..... Sup. Ct. .....; contra, Gobitis v. Minersville School District, (E.D. Pa. 1937) 21 F. Supp. 581; (E.D. Pa. 1938) 24 F. Supp. 271, now awaiting decision in the circuit court of appeals.

[176]See note 75, supra.

[177]Coleman v. Griffin, (1937) 302 U. S. 636, 58 Sup. Ct. 24, 82 L. Ed. 495 and Lovell v. Griffin, (1938) 303 U. S. 444, 58 Sup. Ct. 666, 82 L. Ed. 949. In the Lovell Case the Court reversed the conviction as violation of freedom of speech and the press. See note 200, infra.

[178]Arver v. United States, (1918) 245 U. S. 366, 38 Sup. Ct. 159, 62 L. Ed. 349.

[179]See Respublica v. Oswals, (1788) 1 Dall. (U.S.) 319, 325, 1 L. Ed. 155. But see contra, Cooley, Constitutional Limitations (1st ed. 1868) 421, 422.

[180]Patterson v. Colorado, (1907) 205 U. S. 454, 462, 27 Sup. Ct. 556, 51 L. Ed. 879.

by the advocacy or the words used did not directly incite to crime. But this view has received no judicial support.[181]

When first confronted, after the World War, with the extent of the guaranty, the Supreme Court of the United States rejected both extreme contentions. In the leading Espionage Act case, *Schenck v. United States,*[182] Justice Holmes, for a unanimous Court, laid down the rule which has come to be known as the "clear and present danger" rule, and which reads as follows:

"The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no court could regard them as protected by any constitutional right."[183]

It was no doubt the belief of the great liberal judges who joined in these decisions that individuals would receive by this formula some real measure of protection from unjust prosecution. Actually it has proved to be of little practical value in periods of hysteria, whether this be caused by war or by labor troubles. At times such as these, juries are prone to convict on the flimsiest evidence, regardless of subtle distinctions drawn by judges in their charges, and appellate courts prove equally ready to overlook absence of evidence, in the supposed need of the community. This was illustrated very soon after the enunciation of the clear and present danger rule itself, in a group of war cases in which Justices Holmes and Brandeis dissented because they believed the evidence insufficient to justify conviction.[184] Nevertheless, the

[181]This extreme view was rejected even by Chafee, Freedom of Speech in War Time (1920) 7. He emphasized the social interest in free speech (37) and urged that "the great interest in free speech should be sacrificed only when the interest in public safety is really imperiled, and not, as most men believe, when it is barely conceivable that it may be slightly affected." He preferred Hand in Masses Publishing Co. v. Patten, (S.D. N.Y. 1917) 244 Fed. 535 (revd. however, (C.C.A. 2nd Cir. 1917) 246 Fed. 24 on technical grounds) to the "clear and present danger test" of Holmes, seen notes 182, 183 infra.

[182](1919) 249 U. S. 47, 39 Sup. Ct. 247, 63 L. Ed. 470. See also Frohwerk v. United States, (1919) 249 U. S. 204, 39 Sup. Ct. 249, 63 L. Ed. 561; Debs v. United States, (1919) 249 U. S. 211, 39 Sup. Ct. 252, 63 L. Ed. 566. See criticism of some of these cases in Chafee, Freedom of Speech in War Time (1920) 89 ff.

[183]249 U. S. 47, 52.

[184]Abrams v. United States, (1919) 250 U. S. 616, 40 Sup. Ct. 17, 63 L. Ed. 1173; Schaefer v. United States, (1920) 251 U. S. 466, 40 Sup. Ct. 259, 64 L. Ed. 360 (in this case Justice Clarke dissented separate-

test is probably as good a one as can be devised, provided speech should ever be punishable where there is no accompanying action.

For a long time it has been doubtful whether the clear and present danger test is applicable to state criminal syndicalism laws which were enacted on the assumption that certain kinds of speech were harmful to the state. For many years, indeed, the Supreme Court had intimated that freedom of speech and freedom of the press were not protected by the federal Constitution against interference by the states.[185] When, finally, the Court began to review convictions under these state laws, it ruled that the legislative declaration of the necessity of punishing certain kinds of speech was presumptively controlling. As a matter of fact, no case has been found in which the effect of such presumption in favor of these laws has been permitted to be overcome. Thus a Minnesota statute barring the teaching of pacifism was upheld, over the sole dissent of Mr. Justice Brandeis;[186] the conviction of Gitlow for publishing the Left Wing Manifesto[187] and that of Anita Whitney for taking part in the organization of the Communist Labor party[188] were affirmed. Justices Holmes and Brandeis dissented in the *Gitlow Case* and concurred specially in the *Whitney Case*. They expressed the view that, regardless of presumptions attaching to legislation, a defendant should always have the right to show that in his own case there was not in fact any clear danger that harm to the state would presently result from his words. Mr. Justice Brandeis thus eloquently stated his opinion:

"Fear of serious injury cannot alone justify suppression, of free speech and assembly. Men feared witches and burned women. It is the function of speech to free men from the bond-

ly); Pierce v. United States, (1920) 252 U. S. 239, 40 Sup. Ct. 205, 64 L. Ed. 542.

[185]See Patterson v. Colorado, (1907) 205 U. S. 454, 27 Sup. Ct. 556, 51 L. Ed. 879; Fox v. Washington, (1915) 236 U. S. 273, 35 Sup. Ct. 383, 59 L. Ed. 573. And in Prudential Ins. Co. v. Cheek, (1922) 259 U. S. 530, 42 Sup. Ct. 516, 66 L. Ed. 1044, a passing statement denied that the constitution imposed any restrictions on the states in connection with freedom of speech.

[186]Gilbert v. Minnesota, (1920) 254 U. S. 325, 41 Sup. Ct. 125, 65 L. Ed. 287 (Mr. Justice Holmes concurred in result; Chief Justice White dissented on the ground that the subject matter had been covered by Act of Congress). Here Mr. Justice Brandeis criticized the previous tendency to exalt property over personal rights, saying at 343:

"I cannot believe that the liberty guaranteed by the fourteenth amendment includes only liberty to acquire and to enjoy property."

[187]Gitlow v. New York, (1925) 268 U. S. 652, 45 Sup. Ct. 625, 69 L. Ed. 1138.

[188]Whitney v. California, (1927) 274 U. S. 357, 47 Sup. Ct. 641, 71 L. Ed. 1095.

age of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. . . .

"Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom."[189]

In these cases the majority of the Court altogether ignored the clear and present danger test.

Those anti-criminal syndicalism statutes which prohibited the advocacy by speech or writing of the overthrow of the government by force or violence were the product of the red-baiting hysteria which followed the Russian Revolution and which was so sensationally exemplified by the raids of Attorney General Palmer.[190] Some of the laws even prohibited membership in an organization which advocated any of the forbidden doctrines, with the result that many persons were convicted, whose sole offense was membership in the Communist party.[191] In the *Whitney Case* Mr. Justice Sanford intimated, for the majority, that membership alone in such an organization might be sufficient to justify punishment.[192] However, in that case other acts were proved, so that what decision the Court would have made on this subject is not certain.

To sustain a conviction, however, it is necessary at least to prove that the organization to which the accused persons belong does actually advocate unlawful doctrines. For lack of such

[189](1927) 274 U. S. 357, 376, 377, 47 Sup. Ct. 641, 71 L. Ed. 1095.

[190]See Chafee, Freedom of Speech in War Time (1920) 229 ff.

[191]See for instance, People v. Ruthenberg, (1924) 229 Mich. 315, 201 N. W. 358; State v. Boloff, (1931) 138 Or. 568, 4 P. (2d) 326. In the Ruthenberg Case an appeal taken to the United States Supreme Court was dismissed because of defendant's death. (1927) 273 U. S. 782, 47 Sup. Ct. 569, 71 L. Ed. 890.

[192](1927) 274 U. S. 357, 371, 372, 47 Sup. Ct. 641, 71 L. Ed. 1095.

proof with regard to the I. W. W., the Court reversed a conviction in *Fiske v. Kansas.*[193] Nor is punishment permissible if the acts charged against a defendant are lawful ones; thus a conviction for displaying a red flag in violation of California's anti-red-flag law was set aside because the law forbade such display in "opposition" to government, and this general language might reach a manifestation of hostility by perfectly lawful means.[194]

So in the *Herndon Case,*[195] over the dissent of Justices McReynolds, Van Devanter, Sutherland and Butler, the Supreme Court ruled that the defendant's right of freedom of speech had been violated, since there was no proof that he had himself advocated any unlawful doctrine,[196] and also because, as defined by the state courts, the statute was too vague to justify the conviction of any one.[197] Mr. Justice Roberts quoted with approval the clear and present danger test, criticized the notion advocated by the state that speech might be punished because it had a dangerous trend and made clear that the power of a state to punish speech may be exercised only under exceptional circumstances.

These cases have involved prosecutions on account of the supposed harmful character of the speech or literature itself. Others have arisen in which there was no claim that the contents of the words used violated any law, and in which the prosecution

[193](1927) 274 U. S. 380, 47 Sup. Ct. 655, 71 L. Ed. 1108. Cf. Burns v. United States, (1927) 274 U. S. 328, 47 Sup. Ct. 650, 71 L. Ed. 1077 which affirmed a conviction on slightly different evidence. Cf. the recent decision refusing to permit deportation of a Communist without proof that the Communist party actually advocated unlawful acts: Strecker v. Kessler, (C.C.A. 5th Cir. 1938) 95 F. (2d) 976. See (1938) 52 Harv. L. Rev. 137, 48 Yale L. J. 111. In deJonge v. Oregon, (1937) 299 U. S. 353, 57 Sup. Ct. 255, 81 L. Ed. 278, the sufficiency of the evidence adduced to show illegal advocacy by the Communist Party was not questioned.

[194]Stromberg v. California, (1931) 283 U. S. 359, 51 Sup. Ct. 532, 75 L. Ed. 1117. But see People v. Immonen, (1935) 271 Mich. 384, 261 N. W. 59 (statute barring any display of a red flag upheld, but convictions reversed for errors at trial).

[195]Herndon v. Lowry, (1937) 301 U. S. 242, 57 Sup. Ct. 732, 81 L. Ed. 1066. See the earlier decision, Herndon v. Georgia, (1935) 295 U. S. 441, 55 Sup. Ct. 794, 79 L. Ed. 1530 refusing jurisdiction on technical grounds, over the dissent of Justices Brandeis, Stone and Cardozo.

[196]He was charged with inciting to insurrection through solicitation of members in the Communist Party and distribution of booklets. Proof of the aims of the party was confined to these booklets, one of which advocated the establishment of a black belt where negroes were to have the right of self-determination. This, said the state court and the minority, necessarily involved the use of force. The majority ruled otherwise, since there was no proof that Herndon had advocated the establishment of such a belt, or that any of the persons he had solicited as members knew that the establishment of such a belt was being urged.

[197]See cases cited in note 150 supra.

rested on the circumstances of the delivery or distribution of the words. Municipalities have endeavored to restrict street meetings and pamphlet distribution by requiring permits, and have even tried to justify the total prohibition of such activities on the ground that meetings interfere with traffic and distribution of leaflets litters the streets. Until recently there have been no authoritative rulings on these two subjects.

In 1897 the Supreme Court, in *Davis v. Massachusetts*,[198] upheld a conviction for speaking on the Boston Common without a permit. This case, which has often been considered an authority in support of municipal restrictions on street meetings, was decided without any reference to rights of free speech. Plaintiff had proceeded on the theory that, as a citizen, he had certain property rights in the Common which the city could not deny him; the Court rejected this view, and held that since the city, as owner, might altogether have forbidden the holding of meetings on the Common it could require a permit.

It has been supposed that the recent decision in *Lovell v. Griffin*[199] points the other way. There a conviction for distributing a pamphlet on private property without the permit required by an ordinance was reversed on the ground that freedom of the press forbids any such restriction on the distribution of unobjectionable matter. Chief Justice Hughes said:

"Whatever the motive which induced its adoption, its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship. The struggle for the freedom of the press was primarily directed against the power of the licensor. It was against that power that John Milton directed his assault by his 'Appeal for the Liberty of Unlicensed Printing.' And the liberty of the press became initially a right to publish '*without* a license what formerly could be published only *with* one.' While this freedom from previous restraint upon publication cannot be regarded as exhausting the guaranty of liberty, the prevention of that restraint was a leading purpose in the adoption of the constitutional provision. Legislation of the type of the ordinance in question would restore the system of license and censorship in its baldest form.

"The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These

[198] (1897) 167 U. S. 43, 17 Sup. Ct. 731, 42 L. Ed. 71. To like effect are People ex rel. Doyle v. Atwell, (1921) 232 N. Y. 96, 133 N. E. 364; People v. Smith, (1934) 263 N. Y. 255, 188 N. E. 745.

[199] (1938) 303 U. S. 444, 58 Sup. Ct. 666, 82 L. Ed. 949. See application of the rule of this case in People v. Banks, (1938) 168 Misc. Rep. 515, 6 N. Y. S. (2d) 41 and C. I. O. v. Hague, (D. N.J. 1938) 25 F. Supp. 127, (C.C.A. 3rd Cir. 1939) 101 Fed. (2d) 774.

indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion."[200]

It must be borne in mind, however, that in the *Lovell Case* the Court was not concerned with distribution on the public streets and that the Court expressly intimated that distribution might be punished if it was done in an offensive manner or littered the streets or obstructed traffic. And ordinances which punish the distribution of leaflets in order to prevent street littering have been generally upheld by the courts.[201]

The better view, however, should be that neither leaflet distribution nor street meetings may be prohibited because of the fear of resultant littering or obstruction of traffic. That does not mean that a municipality may not punish a person who actually litters the streets or obstructs the traffic. The same consideration should apply to the doctrine recently invoked by Mayor Hague, that fear of disorder because of the upopular views of the speaker justifies barring a meeting.[202] Persons guilty of disorder should be punished; the speaker should be unmolested unless he has, by incitement, caused the disorder. In all these situations the public interest is better served by increased appropriations for street cleaners and policemen than by the suppression of leaflet distribution or street meetings.

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[200](1938) 303 U. S. 444, 451, 58 Sup. Ct. 666, 82 L. Ed. 949.

[201]City of Milwaukee v. Snyder, (Wis. 1938) 283 N. W. 301 certiorari granted April 17, 1939; People v. Young, (1938) 3 Cal. App. Supp. 62, 85 P. (2d) 231, now on appeal to the United States Supreme Court; Commonwealth v. Nichols, (Mass. 1938) 18 N. E. (2d) 166, now on appeal to the United States Supreme Court. The Lovell Case was distinguished on the ground that the ordinance there considered forbade distribution on private property as well as on the streets.

Earlier decisions upholding convictions on the theory that street littering may be prevented are: People v. White, (1935) Cal. Cr. A. 1255; Sieroty v. City of Huntington Park, (1931) 111 Cal. App. 377 (dealt with advertising matter).

On the other hand convictions have been set aside on the ground that such ordinances should not be construed as applicable to non-commercial matter: Coughlin v. Sullivan, (1924) 100 N. J. L. 42, 126 Atl. 177, People v. Johnson, (1921) 117 Misc. Rep. 133, 191 N. Y. S. 750, or on the ground that the ordinances violated freedom of speech: City of Chicago v. Schultz, (1930) 341 Ill. 208, 173 N. E. 276; People v. Armstrong, (1899) 73 Mich. 288, 41 N. W. 275; New Rochelle v. McCormick, June 11, 1935, Westch. L. J. 997; Ex parte Pierce, (1934) 127 Tex. Cr. 35, 75 S. W. 2nd 264. The first two of this last group of cases emphasize the fact that the ordinances were too broad in that proof of littering was not necessary.

See also People v. Armentrout, (1931) 118 Cal. App. 761, 1 P. (2d) 556. See (1937) 5 Bulletin I. J. A. 147.

[202]C.I.O. v. Hague, (D. N.J. 1938) 25 F. Supp. 127, affirmed (C.C.A. 3d Cir. 1939) 101 F. (2d) 714.

In *C.I.O. v. Hague*,[203] Judge Clark in part accepted the views just outlined. He warned against the use of street littering ordinances for the purpose "of protecting the minds of the people who walk those streets against being littered with certain kinds of ideas and again traditionally perhaps, being frightened." He recognized that the *Davis Case* was not controlling on the subject of meetings and ruled that although the city had the right to bar street meetings, it had no right to bar meetings in the public parks. He reached this latter conclusion because the recreation purposes of the parks included "an easement of assemblage."

However, Judge Clark suggested a method whereby the Jersey City authorities might in fact exercise a considerable degree of censorship. He said that where the evidence indicated that a person desiring a permit had spoken "in such fashion that audiences similar to those to be reasonably expected in Jersey City have indulged in breaches of the peace," then a copy of the speech could be required in advance and censored, or else the speaker could be bound over to keep the peace. This very objectionable suggestion was, however, purely dictum, since the Court expressly stated that the record indicated no basis for the exercise of such censorship as to any of the persons involved in the law suit. Accordingly, the decree left out all references to censorship. It also modified the opinion on the subject of street meetings by ruling that so long as the city permitted any street meetings to be held it must allow the plaintiffs also to hold such meetings.

On appeal to the circuit court of appeals, this decision was strengthened. The majority of the Court held the ordinance barring street meetings unconstitutional because it constituted censorship, and also because it had been administered in a discriminatory manner. The portion of the decree which permitted plaintiffs to hold street meetings only so long as others were allowed to do so was stricken out as unnecessary, in view of the ruling that the ordinance was unconstitutional. Of the conduct of the authorities Judge Biggs said:

"The interpretation of the rights of free speech and free assembly contended for by the appellants is shocking and places these rights in the hands of those who would destroy them.

"If the ill-intentioned threatened riot, speech may not be had. Under what conditions, then, would not the cry of riot be raised? Applying the appellants' doctrine literally, political speakers

[203] (D. N.J. 1938) 25 F. Supp. 127, affirmed (C.C.A. 3rd Cir. 1939) 101 F. (2d) 774, with a modification—now awaiting decision from the United States Supreme Court.

might not stump a city in any election if their opponents objected to what they had to say and threatened disorder. The strict application of such a rule would result eventually in the existence of but one political party as is now the case under totalitarian governments."

This decision is a notable advance in the history of civil liberties. It is to be hoped that the Supreme Court will affirm it in all respects.

Questions more directly related to newspapers deal with contempt, the use of the mails, censorship and taxation. Freedom of the press has been restricted by the power of the courts to punish as a contempt the publication of comment about judicial proceedings when the comment is calculated to impede the administration of justice.[204] Until now the United States Supreme Court has refused to hold a conviction for contempt to be a denial of freedom of the press, whether as guaranteed by the first amendment[205] or by the due process clause of the fourteenth.[206]

There has, however, been no thorough discussion of the subject. The Supreme Court has contented itself with the routine statement that freedom of the press does not mean the freedom to do wrong. The subject has assumed new importance because of a number of recent instances of punishment for newspaper utterances.[207] If, as seems probable, some such case will soon reach

[204]See Nelles and King, Contempt by Publication, (1928) 28 Col. L. Rev. 525; Contempt of Court for Publications, (1936) 5 I. J. A. Bulletin 63.

[205]Toledo Newspaper Company v. United States, (1918) 247 U. S. 402, 38 Sup. Ct. 560, 62 L. Ed. 1186. The articles objected to were, it was found, calculated to inspire resistance to an injunction. Justices Holmes and Brandeis dissented. They did not discuss the constitutional issue, but merely the power of the Court under the Congressional statute. Holmes expressed the opinion that a judge was "expected to be a man of ordinary firmness of character," and that the judge in the case should not have been influenced by the articles complained of.

[206]Patterson v. Colorado, (1907) 205 U. S. 454, 27 Sup. Ct. 556, 51 L. Ed. 879. This case was decided before the Court had extended the meaning of the due process clause of the fourteenth amendment to include freedom of speech. (See note 185, supra.) Mr. Justice Holmes for the majority, in dismissing the writ of error, indicated that in any event the constitutional provision did not prevent punishment of publications after they were made. He rejected the contention that the proceedings were invalid because the judges sat in their own cases. Justices Harlan and Brewer dissented on the ground that substantial constitutional issues were raised; the former also reached the conclusion that the action of the court below was a violation of freedom of the press.

[207]See The Times Mirror Company v. The Superior Court now on appeal to the California Supreme Court; (for opinion of the lower court on demurrer see the Los Angeles News, August 1938 Supplement page 1): Woodbury v. Commonwealth, (Mass. 1936) 3 N. E. (2d) 779. See contra, State v. American News Company, (1936) 64 So. Dak. 385, 266 N. W. 827. See (1938) 87 U. Pa. L. Rev. 120; (1938) 48 Yale L. J. 54.

the United States Supreme Court, it is to be hoped that it will deal with the problem in a more comprehensive answer.

The social importance of a full discussion of public affairs, including criticism of the courts, is too great to permit the judges, who themselves are criticized, to sit in judgment on their critics. Surely it is possible to vindicate the dignity of the courts without the use of this summary process. The constitutional guaranties should require, at least, that persons who are charged with the publication of improper statements about judges be tried in the ordinary manner. And comment which is fair should not be punishable at all merely because the legal proceedings discussed are still pending.

The Supreme Court has consistently upheld the power of Congress to exclude from the mails matter deemed harmful because of fraud, immorality or seditious character.[208] This broad power is sustained on the theory that the use of the mails is a privilege which can be granted or withheld at the pleasure of the legislature. It is a view which ignores the importance of the mail service, especially (on account of the second class mailing privilege) its importance in regard to periodicals. It is to be hoped that the Court will set itself against any attempt to use this power in order to censor opinion.

At least in *Near v. Minnesota*[209] over the dissent of the four conservative justices, the Court denied to a state the power to enjoin the further publication of a newspaper charged with being a public nuisance on account of its persistent publication of scandalous matter. But Chief Justice Hughes intimated that a different result would have been reached, had the charge been the publication of obscene matter. Thus the door was opened to censorship of this sort of material.[210]

The only other censorship cases which have reached the Supreme Court involved motion pictures. The Court treated these as spectacles, not organs of opinion, and therefore upheld state censorship laws;[211] and the view has been extended to include

[208]In re Rapier, (1892) 143 U. S. 110, 12 Sup. Ct. 374, 36 L. Ed. 93; Public Clearing House v. Coyne, (1904) 194 U. S. 497, 24 Sup. Ct. 789, 48 L. Ed. 1092. See Deutsch, Freedom of the Press and of the Mails, (1938) 36 Mich. L. Rev. 703.

[209](1931) 283 U. S. 697, 51 Sup. Ct. 625, 75 L. Ed. 1357.

[210]See Alpert, Censorship of Obscene Literature, (1938) 52 Harv. L. Rev. 40.

[211]Mutual Film Corp. v. Ohio Ind. Comm., (1915) 236 U. S. 230, 35 Sup. Ct. 387, 59 L. Ed. 552; Mutual Film Corp. v. Kansas, (1915) 236 U. S. 248, 35 Sup. Ct. 393, 59 L. Ed. 561. The Court considered only state constitutional provisions since the modern view of the due process clause had not yet been accepted.

newsreels as well as motion picture plays.[212] These decisions are not consistent with a broad view of freedom of expression. That should be maintained regardless of the medium employed. Fear of punishment after the event would, in most instances, be sufficient to deter violators of the law; and the judgment of a jury on what is objectionable should be preferred to that of bureaucrats. In no other way can the inevitable bigotry of censorships be guarded against.

Two other newspaper cases require brief comment. In *Grosjean v. American Press Co.*,[213] the Supreme Court unanimously held void a Louisiana tax on advertising, on the ground that it was designed to restrict the circulation of large newspapers rather than to produce revenue. In the *Associated Press Case*,[214] the Court ruled that freedom of the press had not been infringed by the provisions of the National Labor Relations Act which prohibits the dismissal of employees for their organizational activities. The case is remarkable because, for the first time in this whole series of cases, the four conservative Justices saw an issue of free speech involved where their liberal brethren could not perceive one. The dissenters argued that it was a denial of free speech to require a newspaper to retain an employee active in union affairs, because, as an editorial writer, his union attitude might conflict with the newspaper's policy. The answer of the majority was that nothing in the Act prevented the discharge of an employee whose bias prevented him from carrying out instructions.

Other issues of freedom of speech and of the press have been raised in a number of cases decided by the National Labor Relations Board. To what extent is it an interference with constitutional rights for the Board to order an employer to stop circulating among his employees material hostile to labor unions? The question has been much debated in the press.[215] To the writer it seems clear that no constitutional issue is involved when an employer uses speech or writing to intimidate or coerce his employees. Thus far, at least, the Labor Board has not ruled against

[212] Pathe Exchange Inc. v. Cobb, (1922) 202 App. Div. 450, aff'd 236 N. Y. 539, 142 N. E. 274.

[213] (1936) 297 U. S. 233, 56 Sup. Ct. 444, 80 L. Ed. 660.

[214] (1937) 301 U. S. 103, 57 Sup. Ct. 650, 81 L. Ed. 953.

[215] See New York Times (1938) July 8, 16:1; July 12, 18:3, 5; July 13, 7:4; July 14, 20:6; July 23, 5:5; July 25, 1:5, (1938) 145 New Republic 278, 347; (1938) 48 Yale L. J. 72; 7 I. J. A. Bull. 25. See also N. L. R. B. v. Union Pacific Stages, (C.C.A. 9th Cir. 1938) 99 Fed. 153 at 178.

employers except in cases in which the latter not only distributed offensive material, but also committed unlawful acts, as in the *Ford Case*,[216] where many acts of terrorism and intimidation were established. In such instances as this an application of the "clear and present danger" rule appears to justify the orders of the Board. This rule should be applicable to this situation just as it is to cases arising under the various criminal syndicalism statutes.

Freedom of Assembly

Correlative with the right to hold an opinion, to express it and to publish it, must be the right to associate freely with others who share it. This right of assembly was long ago recognized as inherent in free institutions.[217] And recently the Supreme Court placed the right of assembly among those fundamental rights embraced within the due process clause of the fourteenth amendment.

In *de Jonge v. Oregon*,[218] the Court unanimously reversed a conviction for criminal syndicalism which rested solely on the fact that the defendant assisted at a meeting held under the auspices of the Communist Party. The Chief Justice said:

"These rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed. The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government."[219]

The ruling in this case is important rather for its implications than for the actual decision. That was on very narrow grounds; and at any rate, it is not likely similar prosecutions would often be attempted. The decision has nevertheless been useful because

[216](1937) 4 N.L.R.B. No. 81—The Board has withdrawn this order—See Ford Motor Co. v. N.L.R.B., (1939) 59 Sup. Ct. 301—a new order is pending.

[217]United States v. Cruikshank, (1875) 92 U. S. 542, 23 L. Ed. 588.

[218](1937) 299 U. S. 353, 57 Sup. Ct. 255, 81 L. Ed. 278.

[219](1937) 299 U. S. 353, 364, 57 Sup. Ct. 255, 81 L. Ed. 278.

of its emphasis on the right to meet freely without police interference, so long as the persons meeting do nothing unlawful. Just as the *Griffin Case* helped people circulate expressions of their viewpoint, so has the *de Jonge Case* helped groups freely to hold meetings in private halls. Should the Court decide that street meetings come also under constitutional protection, as it may have done in the *Hague Case* by the time this paper appears, a great step will have been taken toward making the guaranties of freedom of speech, of the press and of assembly truly effective.

Yet, here, as in other fields, reasonable regulation of assemblies will be upheld. The Court so ruled in New York's Ku Klux Klan case, some years ago.[220] There the law challenged required all associations which imposed oaths on their members to register a membership list with the Secretary of State and made it a crime to belong to an association, or attend one of its meetings, knowing that no such list had been filed. The Court when it sustained this as a reasonable police measure, did not, nevertheless, discuss any rights of the defendants to assemble freely. A new test of this law was avoided, by reversal on the facts of a conviction of the Nazi Bund.[221]

Education

Analogous to the rights of opinion expressly specified in the first amendment is the right to determine the education of one's children, a right nowhere mentioned in the constitution, but read into the due process clause by the Supreme Court. The issue arose when the antagonism of the World War produced a variety of laws prohibiting the teaching of German to young school children, and, as part of the so-called Americanism of the post war period, of other foreign languages as well. The Court held all these laws unconstitutional, over the dissent of Mr. Justice Holmes.[222] In line with his general philosophy that where reasonable men might differ about the desirability of a law the decision of a legislature should not be disturbed, Justice Holmes could see that reasons might be advanced why young children should receive their school instruction in English.

[220]New York ex rel. Bryant v. Zimmerman, (1928) 278 U. S. 63, 49 Sup. Ct. 61, 73 L. Ed. 184.

[221]People v. Mueller, (1938) 255 App. Div. 316, 7 N. Y. S. (2d) 522.

[222]Meyer v. Nebraska, (1923) 262 U. S. 390, 43 Sup. Ct. 625, 67 L. Ed. 1042; Bartels v. Iowa, (1923) 262 U. S. 404, 43 Sup. Ct. 628, 67 L. Ed. 1047. Cf. Farrington v. Tokuskige, (1927) 273 U. S. 284, 47 Sup. Ct. 406, 71 L. Ed. 646 applying the same principle to laws of a territory which placed under public control all "foreign language" schools.

Mr. Justice Holmes joined the rest of the Court, however, in condemning an attempt made in certain states to outlaw private schools altogether, agreeing that the state had no power to "standardize its children by forcing them to accept instruction from public teachers only."[223] Mr. Justice McReynolds said the state had wide powers of regulation over schools and could require teachers to be of "patriotic disposition." And, in the various Jehovah's Witnesses flag-salute cases, attacks upon school regulations on the ground that they interfered with parents' rights to control the education of their children failed as they did on the religious ground already discussed.

We have ignored certain of the amendments as lacking in either importance or controversial character. Thus the second guarantees the right to bear arms—but not the right to maintain private armies;[224] the third protects against the quartering of soldiers; the seventh requires jury trial in civil actions other than the most trivial; the eighth prohibits excessive bail and cruel and unusual punishments. But in the enumeration of the rights fixed by the constitution either by express statement or judicial interpretation, one category is conspicuous by its absence: the rights of labor. That omission is not, of course, strange, since it is only in very recent times that labor has grown sufficiently powerful in the economic scene to command a place in the constitutional scheme. Despite this absence of constitutional sanctions, it is impossible, however, to close a discussion of the Bill of Rights without some consideration of labor's claims, if only as an index of changes to come in the near future. As we have seen, a cumulative number of the cases which have arisen under the topics already discussed had their origin in labor controversies.

VII. In Aid of Labor?

It is obvious that the preservation of civil liberties in the accustomed fields is essential to the freedom and functioning of labor organizations, perhaps even to a greater extent than to any other group in the community. And labor itself has been quick to recognize this fact.

But it is not enough that labor be free to exercise the rights granted to all. There are certain specific rights which it believes

[223]Pierce v. Society of Sisters of Holy Names, (1925) 268 U. S. 510, 45 Sup. Ct. 571, 69 L. Ed. 1070.

[224]See Presser v. Illinois, (1886) 116 U. S. 252, 6 Sup. Ct. 580, 29 L. Ed. 615.

itself to be entitled to under modern conditions of industry, and would like to see protected by constitutional enactments. These are: the right to bargain collectively; the outlawing of yellow dog contracts; the right to demand a closed shop; and, of course, the right to strike, with its concomitant weapons, picketing and the boycott, free from harassing injunctions. With much variation among the states, these rights have all received some legislative or judicial sanction. But, except for a few provisions outlawing blacklists,[225] state constitutions are silent on the topics. In the recent New York Convention proposals embodying most of the subjects were defeated, only the one guaranteeing the right of collective bargaining having been approved.[226]

It is impossible to review here the great mass of decisions on labor subjects. Nor is it necessary. The task has recently received a great deal of attention.[227] We shall confine ourselves in the main to outlines and to the leading cases in the United States Supreme Court.

Collective Bargaining

While without constitutional sanction, this right has at least been given judicial recognition sufficient to validate legislation which seeks to preserve it. The Supreme Court has upheld both the Railway Labor Act and the National Labor Relations Act, which guarantee collective bargaining in interstate commerce.[228] Thus employers may be forbidden to interfere with their

[225]Ariz. XVIII sec. 9; N. D. XVII sec. 212; Utah XVI sec. 4. Several states, however, imposed an eight hour day on public works. Ariz. XVIII sec 1; Id. XIII sec. 2; N. M. XX sec. 19; Ohio II sec. 37; Okla. XXIII sec. 1; Utah XVI sec. 6; Wyo. XIX sec. 2.

[226]See N. Y. Times (1938) Aug. 12 at 1:3. N. Y. Const. (1939) Art. I sec. 17.

[227]See Fraenkel, Recent Statutes Affecting Labor Injunctions and Yellow Dog Contracts, (1936) 30 Ill. L. Rev. 854; Frankfurter and Greene, The Labor Injunction (1930); Hellerstein, Picketing Legislation and the Courts, (1932) 10 N. C. L. Rev. 158, Secondary Boycotts in Labor Disputes, (1938) 47 Yale L. J. 341; Larson, The Labor Relations Acts—Their Effect on Industrial Warfare (1938) 36 Mich. L. R. 1237, 1272; Lien, Labor Law and Relations (1938); Magruder, Development of Collective Bargaining, (1937) 50 Harv. L. Rev. 1071. Warm, A Study of the Judicial Attitude toward Trade Unions and Labor Legislation (1939) 23 Minnesota Law Review 255; articles in (1938) 5 Law and Contemporary Problems 175 ff. See also Bulletin published monthly since May 1932 by the International Juridical Ass'n; Note, (1937) 50 Harv. L. Rev. 1295; Note, (1938) 51 Harv. L. Rev. 520.

[228]Texas & N. O. R. Co. v. Brotherhood of Ry. & S. S. Clerks, (1930) 281 U. S. 548, 50 Sup. Ct. 427, 74 L. Ed. 1034; Virginian R. Co. v. System Federation No. 40, (1937) 300 U. S. 515, 57 Sup. Ct. 592, 81 L. Ed. 789; Washington, Virginia and Maryland Coach Co. v. N. L. R. B. (1937) 301

employees' free choice of representatives; they may be required to deal with the representatives of a majority only; they may be compelled to reinstate employees discharged on account of their organizational activities. As Chief Justice Hughes has said:

"The legality of collective action on the part of employees in order to safeguard their proper interests is not to be disputed. It has long been recognized that employees are entitled to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work. Congress was not required to ignore this right of the employees but could safeguard it and seek to make their appropriate collective action an instrument of peace rather than of strife. Such collective action would be a mockery if representation were made futile by interference with freedom of choice. Thus the prohibition by Congress of interference with selection of representatives for the purpose of negotiation and conference between employers and employees, instead of being an invasion of the constitutional right of either, was based on the recognition of the rights of both."[229]

Yet Congress can at any time repeal these laws. It is even conceivable that that body (or a state legislature) could constitutionally enact laws of a nature exactly opposite to the existing ones, laws which would deny the right to organize. Hence the demand for constitutional protection of this right.

Yellow Dog Contracts

As we have seen,[230] early attempts to outlaw yellow dog contracts failed through judicial veto, on the theory that the right to hire and fire is essential to an employer's freedom to conduct his business. Even in the collective bargaining cases just discussed, the Supreme Court distinguished, but did not overrule, these early decisions. Yet it is to be hoped that, as now constituted, the Court will reach a different conclusion when the issue is again presented under the Norris-La Guardia Act or some of the recent state laws. There is basis for the expectation in the fact that the new laws differ from those previously condemned. They impose no criminal

U. S. 142, 57 Sup. Ct. 648, 81 L. Ed. 965; N. L. R. B. v. Jones and Laughlin, Inc., (1937) 301 U. S. 1, 57 Sup. Ct. 615, 81 L. Ed. 893. The Court had, indeed, indicated its understanding of the necessity of organization even before these laws had been enacted. See American Steel Foundries v. Tri-City Central Trades Council, (1921) 257 U. S. 184, 42 Sup. Ct. 72, 66 L. Ed. 189.

[229]Texas & N. O. R. Co. v. Brotherhood of Ry. & S. S. Clerks, (1930) 281 U. S. 548, 571, 50 Sup. Ct. 427, 74 L. Ed. 1034.

[230]See note 160 supra. See also People v. Marcus, (1906) 185 N. Y. 257, 77 N. E. 1073 and other cases cited by Frankfurter and Greene at 146 n. 54.

penalties, but simply deprive the courts of jurisdiction to enforce yellow dog contracts, sometimes, however, also declaring these to be against public policy. It is difficult to see how a Court which has upheld legislation to protect collective bargaining can void laws designed to implement this legislation by striking down a device whose sole purpose is to prevent collective bargaining. That, in recent times, no employer has sought to enforce yellow dog contracts by injunction,[231] may be taken as recognition of the validity of these new laws.

The Closed Shop

On this subject the Supreme Court has been silent. And recent cases in other jurisdictions are in great conflict. In New York the closed shop is legal, except under special conditions;[232] in New Jersey it is subject to many restrictions;[233] in some states it is illegal altogether.[234] The subject is inherently difficult, due to the conflict of rights involved. On the one hand it is said that no one should be forced to join a union as a condition of being able to earn his living; on the other, that it is unfair for a worker to benefit by a union's efforts without sharing in the necessary sacrifice and responsibility. In some cases a closed shop may be essential to the continued existence of the union; in others a preferential shop may be a satisfactory solution.[235] Clear it is that if closed shop agreements are to be recognized, the union must admit all qualified persons to membership.[236] This is a subject which will necessitate much study before it can receive constitutional formulation.

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[231]As in Hitchman Coal Co. v. Mitchell, (1917) 245 U. S. 229, 38 Sup. Ct. 65, 62 L. Ed. 260.

[232]Nat. Protective Ass'n v. Cumming, (1902) 170 N. Y. 315, 63 N. E. 369; Williams v. Quill, (1938) 277 N. Y. 1, 12 N. E. 2d 547. But see Auburn Draying Co. v. Wardell, (1919) 227 N. Y. 1, 124 N. E. 97. See also (1938) 6 I. J. A. Bull. 147; Abelow, The Closed Shop in New York, (1938) 7 Brooklyn L. Rev. 459.

[233]Lehigh Structural Steel Co. v. Atlantic S. W., (V. Ch. 1921) 92 N. J. Eq. 131, 111 Atl. 376; Wilson v. Newspaper & Mail Deliveries Union, (V. Ch. 1938) 123 N. J. Eq. 347, 197 Atl. 720.

[234]See Erdman v. Mitchell, (1903) 207 Pa. St. 79, 56 Atl. 327. Keith Theatre, Inc. v. Vachon (1936) 134 Me. 392, 187 Atl. 692; Simon v. Schwachman, (1938) 18 N. E. 2d (Mass.).

[235]See the arguments of Brandeis before he became a judge before the United States Commission on Industrial Relations (1915) Senate Doc., 64th Congress, 1st Sess. Vol. 26 (Serial Vol. 6936) 7679-81, reprinted, Fraenkel, ed., The Curse of Bigness (1934) 93-95.

[236]See Bigelow, V. Ch. in the Wilson Case, note 233 supra.

THE RIGHT TO STRIKE, PICKET AND BOYCOTT

The right to strike is, of course, generally recognized—at least in theory. It is expressly preserved by the National Labor Relations Act, but, because of the peculiar nature of the business there affected, it is somewhat restricted by the National Railway Labor Act.[237] Yet the courts will sometimes enjoin strikes if they believe them called for illegal purposes. And, even when the strike itself may not be enjoined, its efficacy is often curtailed by burdensome restrictions upon picketing and other activities.

Compulsory arbitration, with its drastic interference with the right to strike, has been tried but once in this country, in Kansas. At the instance of manufacturers, the Supreme Court held this law unconstitutional in so far as it attempted to regulate wages and hours in industries not affected with a public interest.[238] Yet the law survived as a weapon against strikers. In the first case which reached the Supreme Court, *Howat v. Kansas,*[239] the Court did not pass on any constitutional issue, but dismissed the appeal on the ground that the injunction rested on general equitable principles, not necessarily upon the challenged law. In the second case, *Dorchy v. Kansas,*[240] the law was upheld in so far as it justified enjoining a strike called for an illegal purpose (in that instance, the enforcing of the wage claim of a single employee). This, the Court concluded, amounted to an attempt at coercion.

In the recent case of *Senn v. Tile Layers Protective Union*[241] the Court, over the dissent of the four conservative justices, held valid a strike called to enforce a union rule which forbade an employer from himself working at his trade. The right to strike thus depends upon what a majority of the Court may think about the propriety of the ends for which the strike is called. With the breaking up of the former conservative bloc by the retirements of Justices Van Devanter and Sutherland, we may look forward to decisions more consistently favorable to labor than has been the case in the past.

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[237] (1935) 45 U. S. C. 155, 156, 160.

[238] Wolf Packing Co. v. Court of Ind. Rel., (1923) 262 U. S. 522, 43 Sup. Ct. 630, 67 L. Ed. 1103; (1925) 267 U. S. 552, 45 Sup. Ct. 441, 69 L. Ed. 785.

[239] (1922) 258 U. S. 181, 42 Sup. Ct. 277, 66 L. Ed. 550, but recent decisions seem to indicate that the Court will take jurisdiction if the lower court relied on a statute to any extent: Senn v. Tile Layers Protective Union, (1937) 301 U. S. 468, 57 Sup. Ct. 857, 81 L. Ed. 1229.

[240] (1926) 272 U. S. 306, 47 Sup. Ct. 86, 71 L. Ed. 248. See also earlier decision in same case, (1924) 264 U. S. 286, 44 Sup. Ct. 323, 68 L. Ed. 686.

[241] (1937) 301 U. S. 468, 57 Sup. Ct. 857, 81 L. Ed. 1229.

The right to picket and boycott will generally depend upon the right to strike. And there are also problems of the means employed. Thus group picketing was at one time declared unlawful, as bound to have an intimidatory effect.[242] And secondary boycotts have been enjoined as violations of the anti-trust laws, even though no unfair means were adopted.[243] The Supreme Court also (although this was many years ago) approved an injunction issued to prevent the breach of yellow dog contracts, despite the fact that the employer might have terminated these contracts at will.[244] This decision has not been universally followed.[245]

In the *Senn* case, on the other hand, Mr. Justice Brandeis said that the right to picket was based on the right of free speech.[246] Thus, perhaps, he laid the foundation for some future decision protecting that right against abridgement by judicial or legislative action.[247]

Injunctions

One of labor's chief complaints has been the abuse of injunctions. To redress these grievances, statutes were passed several decades ago. But in 1921 the Supreme Court in *Truax v. Corrigan*[248] held these void over the dissent of Justices Holmes, Brandeis, Clarke and Pitney. The majority ruled that such laws violated due process in legalizing inherently unlawful practices and denied equal protection because the restriction on the issuance of injunction was confined to labor cases. Chief Justice Taft could see no basis for special classification of these.

The *Senn Case* lessened the evil effect of that decision.[249] In this instance the four conservative judges constituted the minor-

[242]See American Steel Foundries v. Tri-City Central Trades Council, (1921) 257 U. S. 184, 42 Sup. Ct. 72, 66 L. Ed. 189.

[243]Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n. (1927) 274 U. S. 37, 47 Sup. Ct. 522, 71 L. Ed. 916, Justices Holmes, Brandeis dissenting.

[244]Hitchman Coal Co. v. Mitchell, (1917) 245 U. S. 229, 38 Sup. Ct. 65, 62 L. Ed. 260. Justices Holmes, Clarke, Brandeis dissenting.

[245]See Interborough Rapid Transit Co. v. Lavin, (1928) 247 N. Y. 65, 159 N. E. 863; Stilwell Theatre Inc. v. Kaplan, (1932) 259 N. Y. 405, 182 N. E. 63.

[246](1937) 301 U. S. 468, 478, 57 Sup. Ct. 857, 81 L. Ed. 1229.

[247]Such, in effect, have been the holdings in Shuster v. International Assn., (1937) 293 Ill. App. 177, 193, 12 N. E. 2d 50 (1931) Kraemer Hosiery Co. v. American Fed. F. F. H. Workers, 305 Pa. St. 206, 215, 157 Atl. 588. In re Lyons, (Cal. Superior Ct. 1938) 94 Cal. App. 70, 81 P. (2d) 190; French Sardine Co. v. Deep Sea & Purse Seine Fisherman's Union, (Cal. Superior Ct.) Los Angeles News, July 1938 Supp. p. 3; but see contra. In re Connolly, id. p. 4.

[248](1921) 257 U. S. 312, 42 Sup. Ct. 124, 66 L. Ed. 254.

[249](1937) 301 U. S. 468, 57 Sup. Ct. 857, 81 L. Ed. 1229.

ity. They believed the *Truax Case* to be controlling. Unfortunately, the majority did not repudiate entirely the unrealistic basis of the equal protection part of that decision; Mr. Justice Brandeis simply said that no constitutional argument could be advanced against the Wisconsin statute then before the Court, since, unlike the Arizona law of the earlier case, it legalized no unlawful acts. Therefore the employer had been denied no protection, since "one has no constitutional right to a remedy against the lawful conduct of another."[250] It is to be hoped the Court will soon expressly overrule the *Truax Case* and recognize the validity of the separate classification of labor cases.

In upholding similar provisions of the Norris-LaGuardia Act which restrict the manner in which injunctions may be issued in labor disputes, the Court had no similar difficulty.[251] That question was not, of course, complicated by any issue of equal protection, since Congress is restricted by no such clause.[252] And the Court has given a broad interpretation of the definition of labor disputes in that law, overruling a tendency of some lower courts to emasculate it.[253] In *Lauf v. Shinner*,[254] Mr. Justice Butler dissenting, the Court in effect held that the law was applicable though none of a particular employer's employees belonged to the labor union involved in the strike. And in *New Negro Alliance v. Sanitary Grocery Co.*,[255] the Court ruled that a con-

[250](1937) 301 U. S. 468, 478, 57 Sup. Ct. 857, 81 L. Ed. 1229.

[251]Lauf v. Shinner, (1937) 303 U. S. 323, 58 Sup. Ct. 578, 82 L. Ed. 867.

[252]See note 10, supra.

[253]See I. J. A. Bulletin and cases cited in notes 254, 255 infra. See also I. L. G. W. U. v. Donnelly Garment Co., (1938) 304 U. S. 243, 58 Sup. Ct. 875, 82 L. Ed. 1316 where the Court, although not passing on the merits, reversed on technical grounds an order which, on the ground that the acts complained of were unlawful, held (W.D. Mo. 1938) (21 F. Supp. 807) that the Norris-LaGuardia Act did not apply. See (W.D. Mo. 1938) 23 F. Supp. 998 and (C.C.A. 8th Cir. 1938) 99 F. (2d) 309 proceedings holding the law applicable.

[254]Lauf v. Shinner, (1937) 303 U. S. 323, 58 Sup. Ct. 578, 82 L. Ed. 867. Whether this ruling will apply where the real dispute is between rival unions is uncertain. See, holding that such dispute is not a "labor dispute": United Electric Coal Co. v. Rice, (C.C.A. 7th Cir. 1935) 80 F. 2d 1, cert. den. (1936) 297 U. S. 714, 56 Sup. Ct. 590, 80 L. Ed. 1000; Newton v. Laclede Steel Co., (C.C.A. 7th Cir. 1936) 80 F. 2d 636; Union Premier Food Stores, Inc. v. Retail Food Clerks and Managers Union, (C.C.A. 3rd Cir. 1938) 98 F. 2d 821. See contra: Blankenship v. Kurfman, (C.C.A. 7th Cir. 1936) 96 F. (2d) 450; Houston & North Texas Lines v. Local Union No. 886. (W.D. Okla. 1938) 24 F. Supp. 619; Mason Manufacturing Co. v. United Furniture Workers, Los Angeles News, July 1938 Supp. p. 3 (Cal. Superior Ct.) Fur Workers Union v. Fur Workers Union, (1939 C.A. D.C.).

[255](1938) 303 U. S. 552, 58 Sup. Ct. 703, 82 L. Ed. 1012.

troversy was none the less a labor dispute because it grew out of racial or religious discrimination in the selection of employees. Justices McReynolds and Butler dissented because they were unable to conceive how Congress could constitutionally authorize "mobbish" interference with an employer's rights, forgetting that the Norris-LaGuardia Act legalizes no conduct, but merely prevents the reckless granting of injunctions which was common before its passage.[256]

These recent decisions of the Supreme Court show a greater understanding than earlier of the realities in the field of labor controversies. But although restrictions on the issuance of injunctions have been thus finally approved, these remain subject wholly to legislative control. It is not strange, therefore, that labor should desire some constitutional protection for the right to strike, picket and boycott, free from the hampering effects of injunctions.

VIII. Some Proposals

Let us suppose we were charged with the task of rewriting the civil liberties provisions of the constitution. What would be the changes we should propose? First, we should bring all the rights together into one article. Then we should make every provision expressly binding as well on the states as on the federal government. So far, probably, we should arouse no great controversy, although we should somewhat have extended the area of federal concern.

Among the more debatable possible changes are these: should the power of the federal government extend to interference with civil liberties by private persons? Should the due process clause be rewritten to restrict it to its original, procedural, meaning? Should specific labor clauses be added to the constitution?

Restraints on Private Action

So long as the Supreme Court adheres to the principle that Congress can prohibit only state and not individual action,[257] the effective protection of civil liberties rests with the states. Our history has shown that the states cannot always be relied on to play their part. The greatest infringements of personal rights

[256]See authorities cited in note 227 supra.
[257]Notes 68, 69, 75, supra.

come not from direct state action, but from private forces which the state is unwilling to check. The recent disclosures before the LaFollette Committee[258] make this abundantly clear. No effective restriction is possible on the fascism today rampant in sections of Alabama, California and Kentucky, to mention only the most conspicuous instances, without federal intervention. It is important, therefore, that Congress be given power to punish interference with personal rights by private agencies, as well as by state action.

Due Process

In spite of the more humane attitude the Court has taken in recent decisions, the due process clause remains a potential obstacle to all progressive legislation. Many believe the only course is to deprive the courts of power to declare laws unconstitutional.[259] Others are of the opinion that affirmative grants of power to Congress and state legislatures would accomplish the end. Advocates of the latter course recognize, however, the danger that particular legislation may not be covered by such grants, no matter how broadly framed. The Court has done strange things when construing some of the existing amendments.[260] One possible alternative would be a redefinition of the due process clause such that the power of courts to review legislation would be greatly restricted, while preserving judicial review of executive, administrative or judicial acts to the extent that these fail in giving an interested party a proper hearing.[261]

Such reformulation would require also an express statement of certain rights now embraced by the due process clause, such as the right to determine the education of one's children which we have already considered.[262] It might be desirable to provide explicitly against vague and indefinite criminal laws. And other

[258]Hearings of Sub-committee of Committee on Education and Labor of United States Senate, under Resolution 266 of the 74th Congress, Second Session, continued in 75th Congress and Report No. 46, 75th Congress, in various parts (1937, 1938).

[259]See note 167 supra.

[260]For the Court has emasculated the very broad powers granted by the sixteenth amendment. See: Eisner v. Macomber, (1920) 252 U. S. 189, 40 Sup. Ct. 189, 64 L. Ed. 521; Helvering v. Independent Life Ins. Co., (1934) 292 U. S. 371, 54 Sup. Ct. 758, 78 L. Ed. 1311.

[261]"No person shall be deprived of life, liberty or property by the action of any judicial or executive tribunal or officer, except after due notice and a fair and impartial hearing."

[262]See notes 222, 223 supra.

problems may present themselves on fuller consideration of this troublesome question. Yet it seems to the writer that this suggested restoration of due process to its original connotation affords an excellent method of taking the sting out of the doctrine of judicial review.

Labor Cases

The need for some constitutional formulation of labor's rights has already been indicated. It may, at this point, perhaps, be appropriate to point to some general facts which support the demand. Labor has suffered greatly from the courts, particularly from judges of first instance. Recent experience in New York[263] has indicated that liberal decisions by high courts are no guaranty of similar decisions at special term. In most cases it is useless to appeal, due to the expense and delay involved. There is some belief, however, that judges who now ignore the rulings of appellate courts and pervert the meaning of statutes might hesitate similarly to treat guarantees explicitly written into the constituion. The experiment is worth trying.

Miscellaneous

Other possible changes relate to habeas corpus, freedom of expression, discrimination, and voting. It would be desirable to make the writ of habeas corpus available whenever the civil courts were functioning, thus preventing the misuse of martial law in labor disturbances. While many states have constitutional provisions making the civil authorities supreme over the military,[264] and some state constitutions assert that the writ of habeas corpus may never be suspended,[265] no connection exists between these provisions. That relation should be consummated and some provision inserted in the federal constitution which would permit federal review of detentions under martial law.

Steps should be taken, further, to extend the guarantees of free speech and press to all forms of expression of opinion, regardless of the medium of expression employed, thus extending protection to the stage, the motion picture and the radio.

Two problems arise in connection with discrimination: shall

[263]See (1936) 5 I. J. A. Bull. 5; People ex rel Sandnes v. Sheriff, (1937) 164 Misc. Rep. 355, 299 N. Y. S. 9; Stalban v. Friedman, N. Y. Law Jour., April 3, 1939 p. 1507.

[264]As in Md., Decl. R. 30; see also id. 32; West Va. III S. 12.

[265]As in Md. III S. 55; West Va. III S. 4.

the grounds be widened, so as to make it clear that segregation is as discriminatory in law as it really is in fact? And shall the fifteenth amendment, at least, be broadened so as to make it impossible for anyone to be denied the right to vote because of his social, political or religious views?

And perhaps the time has come to provide for the direct election of the President and to authorize Congress to fix the qualifications for voters for federal officers. As things are today, there is great variation in the qualifications the states now impose and a small minority may control the electoral vote of certain states. By restrictive legislation the class of voters can be progressively narrowed and the formation of effective opposition parties altogether prevented. Democracy requires a wide electorate with opportunity for the registering of minority opinion and there is no reason why the nation as a whole should suffer from the backwardness of certain communities. The subject is one which needs serious consideration, especially because, tied up with the matter of the suffrage, is that of education and the money to be spent upon it.

In Conclusion

It may be asked, why write more guarantees into the Constitution? The record of the past 150 years is not such as to encourage the belief that rights are made secure merely by writing them down. Even when the highest courts, as has not always been the case, have respected the guarantees, the powerful interests which actually control local areas have often ignored their decisions. The fight for civil liberties must be fought over and over again. In spite of which fact occasional court victories do have useful consequences.

What is fixed in the constitution is at least an ideal that shapes men's conduct. Over a hundred years ago, Judge Story recognized this. He said:

"It may be thought, that all paper barriers against the power of the community are too weak to be worthy of attention: they are not so strong, as to satisfy all, who have seen and examined thoroughly the texture of such a defense. Yet, as they have a tendency to impress some degree of respect for them, to establish the public opinion in their favor, and to rouse the attention of the whole community, it may be the means to control the majority from those acts, to which they might be otherwise inclined."[266]

[266]Commentaries (1st ed. 1833) Vol. 3, p. 720, paraphrasing Madison, 1 Lloyd's Debates 431.

In these days when fascist repression has spread into parts of even our own country, it is of the greatest importance that the personal rights of individuals be preserved and extended to the full. For it is these personal rights that are of the essence of democracy: the form of government defined eloquently by Thomas Mann as "inspired by the consciousness of the dignity of man."[267]

[267]The Coming Victory of Democracy (1938) 19.