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COMMENTS

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ASSURING THE RIGHT TO AN ADEQUATELY PREPARED DEFENSE

Criminal defendants frequently claim that they did not have the benefit of adequate legal assistance in their defense. This claim is, as an unsympathetic court said a few years ago, "one of the most commonly raised and least successful grounds [for reversal] employed by convicted defendants." [1] The reason for these claims and the resulting denials, according to an equally unsympathetic court, is that "[i]n the mind of the dissatisfied defendant, the line between unsuccessful defense counsel and incompetent counsel is readily confused." [2] This attitude is epitomized by a recent commentator who contends that the likely denial is "not necessarily bad for it can be safely assumed that most claims of ineffective assistance of counsel are frivolous." [3] However, these sentiments cannot be interpreted to mean that criminal defendants do not have a constitutional right to adequate legal assistance, that the right is never lost, or that the courts never give a new trial for this reason.[4]

This comment will examine one area of the general right to adequate assistance of counsel: the issue of the defendant's right to a continuance. It will focus on those elements of inadequate preparation for trial that lead courts to reverse and vacate convictions. Specifically, it will discuss situations where late appointment of defense counsel precludes adequate preparation and also situations where adequate time was available but unused. It will also discuss both situations where the trial court denied defense requests for continuances and situations where the defense failed to request more time.

The purpose of this comment is not to explore new avenues to reversals of convictions. Rather its purpose is to identify those situations in which additional time for preparation may be needed and therefore should be given in order that the accused receive a fundamentally fair trial that comports with the demands of the sixth amendment while at the same time leaving no legitimate complaint which could be used by the defendant to open the case to a full evidentiary hearing.

I. *Historical and Definitional Background*

Although the complaint of inadequate assistance of counsel was not unknown before 1932,[5] its utility

[1] Pennsylvania *ex rel.* Alexander v. Banmiller, 184 Pa. Super. 554, 136 A.2d 489 (1957). *See also* United States v. Edwards, 152 F. Supp. 179, 185 (D.C.), *aff'd*, 256 F.2d 707 (D.C. Cir.), *cert. denied*, 358 U.S. 847 (1958).

[2] United States *ex rel.* Cooper v. Reincke, 333 F.2d 608, 614 (2d Cir.), *cert. denied*, 379 U.S. 909 (1964). Diggs v. Welch, 148 F.2d 667, 670 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945) is another example of judicial skepticism:

> The opportunity to try his former lawyer has its undoubted attraction to a disappointed prisoner. . . . He may realize that his allegations may not be believed but the relief from monotony offered by a hearing in court is well worth the trouble of writing them down.

[3] Grano, *The Right to Counsel: Collateral Issues Affecting Due Process*, 54 MINN. L. REV. 1175, 1243 (1970) [hereinafter cited as Grano].

[4] The leading article on the right to adequate representation is Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 NW. U.L. REV. 289 (1964) [hereinafter cited as Waltz]. *See also* Bines, *Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus*, 59 VA. L. REV. 927 (1973); Craig, *The Right to Adequate Representation in the Criminal Process: Some Observations*, 22 SW. L.J. 260 (1968); Finer, *Ineffective Assistance of Counsel*, 58 CORNELL L. REV. 1077 (1973) [hereinafter cited as Finer]; Grano, *supra* note 3; Comment, *The Right to Counsel and the Neophyte Attorney*, 24 RUTGERS L. REV. 378 (1970); Note, *Criminal Codefendants and the Sixth Amendment: The Case for Separate Counsel*, 58 GEO. L.J. 369 (1969); Note, *Effective Assistance of Counsel for the Indigent Defendant*, 78 HARV. L. REV. 1134 (1965); Comment, *Effective Representation—an Evasive Substantive Notion Masquerading as Procedure*, 39 WASH. L. REV. 819 (1964) [hereinafter cited as Comment, *Effective Representation*]; Note, *Effective Assistance of Counsel*, 49 VA. L. REV. 1531 (1963).

[5] *See, e.g.*, People v. Nitti, 312 Ill. 73, 143 N.E. 448 (1924) (complaint successfully raised); People v. Blevins, 251 Ill. 381, 96 N.E. 214 (1911) (complaint successfully raised); Sayre v. Commonwealth, 194 Ky. 338, 238 S.W. 737 (1922) (complaint unsuccessfully raised). *See generally* Comment, *Effective Representation*, *supra* note 4, at 819–21.

to criminal defendants became apparent when the Supreme Court in *Powell v. Alabama*[6] gave the issue a constitutional dimension by reversing the convictions in the Scotsboro case. The Court stated that the defendants were as much entitled to legal assistance during the pre-trial period as at the trial itself. The general appointment of the entire county bar to represent the defendants was not an effective appointment of counsel because none of the appointed lawyers prepared for the trial. Because of this situation, "the defendants did not have the aid of counsel in any real sense. . . ." [7] In short, there was a "denial of effective and substantial aid." [8] After considering the speed with which the defendants were pushed through the judicial process, the Court held that "the failure of the trial court to make an effective appointment of counsel was . . . a denial of due process within the meaning of the Fourteenth Amendment." [9]

Lower courts have generally interpreted *Powell* as meaning that at least some minimum level of assistance and performance is required at all critical periods of the proceedings.[10] *Powell* emphasized that perhaps the time between arraignment and trial was the most critical period of the proceedings: a time "when consultation, thorough-going investigation and preparation were vitally important. . . ." [11] However, the Court has given little guidance to lawyers and lower courts as to what constitutes adequate preparation. In *Avery v. Alabama*[12] it unanimously rejected an appeal from a condemned defendant who claimed that a denial of a continuance for more time to prepare deprived him of the customary opportunity to consult, investigate and prepare a defense. The Court held that no certain minimum time is constitutionally required for preparation by trial counsel. Looking at the facts,[13] it appeared to the Court that counsel had been zealous in their defense of Avery. The Supreme Court affirmed since there was no showing at a hearing for a new trial (held immediately after the conviction) that counsel would have done better with more time.

Although the Court in *Avery* cited *Powell* with approval, it is difficult to reconcile the result with this statement from the earlier case: "Neither [defense counsel] nor the court could say what a prompt and thorough-going investigation might disclose as to the facts." [14] If no one can say what proper investigation will reveal, then the defendant has a heavy burden indeed to show what counsel could do with the benefit of additional time to avoid the prejudice to the defendant. The inference from *Avery* that even the most minimal amount of time may be constitutionally adequate to investigate and prepare thus creates tension with the *Powell* rule that a person may be denied due process of law when forced to trial with inadequately prepared counsel.

While the Court has periodically reiterated its concern for well prepared trial counsel,[15] it has not resolved the underlying tension. Most recently it reasserted the *Avery* principle in *Chambers v. Maroney*[16] by declining "to fashion a *per se* rule requiring reversal of every conviction following tardy appointment of counsel. . . ." [17] It also declined to order an evidentiary hearing to determine whether the right to counsel was denied whenever a habeas corpus petition alleges a belated appointment.[18]

State and lower federal court dispositions of claims that defense counsel was not adequately prepared at the time of trial have not been consistent.[19] The variety of standards defining and

[6] 287 U.S. 45 (1932).
[7] *Id.* at 57.
[8] *Id.* at 53.
[9] *Id.* at 71.
[10] The most abrupt disagreement with the view that the sixth amendment gives a right to counsel that does in fact give assistance is found in Mitchell v. United States, 259 F.2d 787 (D.C. Cir.), *cert. denied*, 358 U.S. 850 (1958). The court held that *Powell* mandated a *procedural* requirement of effective appointment so that it is possible for the lawyer to provide an adequate defense. "We think the term 'effective assistance' . . . does not relate to the quality of the service rendered by a trial lawyer. . . ." *Id.* at 793. This interpretation ignores the statement in *Powell* that the defective appointment caused a "denial of effective and substantial aid." 287 U.S. at 53. *Mitchell* was criticized in Waltz, *supra* note 3, at 293 and Comment, *Effective Representation*, *supra* note 3, at 822–23.
[11] 287 U.S. at 57.
[12] 308 U.S. 444 (1940).
[13] Two lawyers were appointed three days before the one day trial. The Court felt that the trial judge had not abused his discretion in denying the motion for a continuance and emphasized that the crime had occurred and the trial was held in a small community where it was not difficult to contact necessary witnesses and make the required investigation.
[14] 287 U.S. at 58.
[15] Note the epigramatic dicta in Hawk v. Olson, 326 U.S. 271, 278 (1945) ("The defendant needs counsel and counsel needs time . . .") and White v. Ragan, 324 U.S. 760, 764 (1945) ("[I]t is a denial of the accused's constitutional right to a fair trial to force him to trial with such expedition as to deprive him of the effective aid and assistance of counsel.").
[16] 399 U.S. 42 (1970).
[17] *Id.* at 54.
[18] *Id.*
[19] *See* Section II *infra*.

describing inadequate representation illustrate the inconsistent holdings on claims of poor legal assistance.[20]

By far the most common definition has been the "farce or mockery" standard. The following formulation of the farce or mockery standard was stated by the Fifth Circuit in *Williams v. Beto*:[21]

> relief from a final conviction on the ground of incompetent or ineffective counsel will be granted only when the trial was a farce, or a mockery of justice, or was shocking to the conscience of the reviewing court, or the purported representation was only perfunctory, in bad faith, a sham, a pretense, or without adequate opportunity for conference and preparation.[22]

The apparent philosophy behind this standard is that something is better than nothing; the defendant has no ground for complaint where the representation was not a "nullity." [23] It leaves defenseless the accused person whose lawyer was of some small help but who made serious and prejudicial errors. This standard is also vague since it is stated in the negative and does not specify the elements of good representation. Nevertheless, until recently at least, most courts applied this standard.[24]

Several courts have employed positive definitions of adequate representation. In *MacKenna v. Ellis*,[25] the Fifth Circuit held that effective counsel was "not errorless counsel, . . . but counsel reasonably likely to render *and rendering* reasonably effective assistance." [26] While this definition is more neutral in tone, the use of "effective" in the definition means that "effective assistance" is self-defining and redundant. The Sixth Circuit recently adopted the *MacKenna* standard for testing sixth amendment claims of inadequate assistance.[27]

Professor Waltz concluded that "[u]nsatisfactory as it may seem to those desirous of objective prospectively usable standards, all of these judicial admonitions can only be translated as the familiar command that persons accused of crimes be accorded a 'fair trial.' " [28] But in the decade following Waltz's article, a number of cases have subsequently developed a negligence-customary skill definition. In *Moore v. United States*[29] the Third Circuit held that "the standard of adequacy of legal services as in other professions is the exercise of the customary skill and knowledge which normally prevail at the time and place." [30] Given the

[20] Nor has there been a shortage of terms designating the problem. Most courts and commentators refer to the right to "effective counsel." *See, e.g.*, Bonaparte v. Smith, 362 F. Supp. 1315 (S.D. Ga. 1973) and note 4 *supra*. This probably stems from the use of that term by the Court in *Powell*. A few have used the term "incompetent." *See, e.g.*, People v. Johnson, 45 Ill. 2d 501, 259 N.E.2d 796 (1970); Comment, *Incompetency of Counsel as a Ground for Attacking Criminal Convictions*, 4 U.C.L.A.L. Rev. 400 (1957). Others term the issue to be "adequate assistance" of counsel. *See, e.g.*, Moore v. United States, 432 F.2d 730 (3d Cir. 1970) and note 4 *supra*. The confusion is increased by using the terms simultaneously. *See, e.g.*, West v. Louisiana, 478 F.2d 1026, 1032 (5th Cir. 1973) (all three terms); Comment, *The Right to Competent and Effective Counsel under the Uniform Code of Military Justice*, 46 Tul. L. Rev. 293 (1971).

"Adequate assistance" will be used throughout this Comment. "Incompetency" implies an inherent inability to do the job which is only one aspect of the problem. "Ineffective" implies that ability is somehow judged by counsel's degree of success in defending clients. *See* United States v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973) (McKinnon, J., dissenting); Williams v. Beto, 354 F.2d 698, 705 (5th Cir. 1965).

[21] 354 F.2d 698 (5th Cir. 1965).

[22] *Id.* at 704. *See also* Johns v. Perini, 462 F.2d 1308 (6th Cir. 1972); Scalf v. Bennett, 408 F.2d 325 (8th Cir. 1969); Root v. Cunningham, 344 F.2d 1 (4th Cir. 1965); Lunce v. Overlade, 244 F.2d 108 (7th Cir. 1957); Diggs v. Welch, 148 F.2d 667 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945); Bonaparte v. Smith, 362 F. Supp. 1315 (S.D. Ga. 1973).

[23] Andrews v. Robertson, 145 F.2d 101, 102 (5th Cir. 1944) *cert. denied*, 324 U.S. 874 (1945).

[24] Three federal courts of appeals recently specifically rejected the "farce or mockery" standard. In Beasley v. United States, 491 F.2d 687, 693 (6th Cir. 1974), the court stated that "the 'farce and mockery' test should be abandoned as a meaningful standard for testing sixth amendment claims." In West v. Louisiana, 478 F.2d 1026, 1033 (5th Cir. 1973), the court rejected the Williams v. Beto, 354 F.2d 698 (5th Cir. 1965), definition quoted in the text at note 22. The District of Columbia Circuit Court concluded in Scott v. United States, 427 F.2d 609, 610 (D.C. Cir. 1970), the "farce and mockery" standard is "no longer valid as such but exists in the law only as a metaphor that the defendant has a heavy burden to show requisite unfairness."

[25] 280 F.2d 592 (5th Cir. 1960), *modified*, 289 F.2d 928, *cert. denied*, 368 U.S. 877 (1961).

[26] *Id.* at 599. (Emphasis by the court.) The Fifth Circuit recently reasserted the *MacKenna* standard in West v. Louisiana, 478 F.2d 1026 (5th Cir. 1973).

[27] Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974).

[28] Waltz, *supra* note 4, at 305.

[29] 432 F.2d 730 (3d Cir. 1970).

[30] *Id.* at 736. *See also* United States v. Hines, 470 F.2d 225 (3d Cir. 1972), *cert. denied*, 410 U.S. 968 (1973); Chambers v. Brierley, 459 F.2d 1020 (3d Cir. 1972); Kott v. Green, 303 F. Supp. 821, 822 (N.D. Ohio 1968) (Criminal defendants are entitled to expect their lawyers "to perform at least as well as any attorney with ordinary training in the legal profession, and to exercise the usual amount of skill and judgment exhibited by an attorney conscientiously seeking to protect his client's interests."); State v. Anderson, 117 N.J. Super. 507, 519, 285 A.2d 234, 240 (App. Div., 1971) (normal and customary skill).

Supreme Court's recent test in *McMann v. Richardson*[31] for "reasonably competent advice" [32] to a client ("whether that advice was within the range of competence demanded of attorneys in criminal cases"),[33] the standard of skill for purposes of the comparison is that of a lawyer actively practicing criminal law.

The negligence-customary skill test finds support in recent opinions and should be adopted as a general standard for measuring claims of inadequate assistance.[34] However, a caveat is in order. When the defendant makes no allegations of conflict of interest[35] or inadequate preparation,[36] the reviewing court is being asked to review the tactics and trial judgments of counsel. Except for extreme situations,[37] courts hesitate to second guess the lawyer.[38] Since there is a presumption that any attorney appearing before the court is competent,[39] the trial courts may feel that nearly any choice of trial tactics is debatable, especially by experienced criminal defense lawyers.

II. *Adequate Assistance of Counsel and the Need for a Continuance*

Trial courts may continue a case when it appears necessary to achieve a fair trial. The rule is well established that the exercise of this power is within the discretion of the judge.[40] As a natural result of this policy, the appellate courts vacate convictions only when the denial of a continuance means the loss of a fundamental right. Even then the claims are critically examined.[41] This policy has the tacit approval of the Supreme Court. In *Ungar v. Sarafite*[42] it stated that "[t]here are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process." [43] The Court concluded that the answer must be found in the circumstances of each case, especially in the reasons presented to the trial judge.

Relying upon *Avery v. Alabama*,[44] the Court upheld the denial of a continuance requested by a defendant, a lawyer, who claimed that he needed more time to engage counsel for his contempt hearing. The Court concluded that the facts and issues were clear in the case, that the witnesses and evidence were readily available and that the motion was not made until the day of the hearing. Even though the defendant conceded that he needed only a small period of time, he gave no reason for his situation. The Court did not explicitly hold that this conduct amounted to a waiver of the right to adequate assistance of counsel, but it seems clear that the Court agreed with the trial judge's assumption that the defendant waived this privilege by his conduct.

While the granting of continuances is discretionary, trial courts can abuse their discretion so that the denial of a continuance constitutes a denial of due process. Given the Supreme Court's emphatic statements on the right to adequate assistance of

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[31] 397 U.S. 759 (1970).

[32] *Id.* at 770.

[33] *Id.* at 771. One commentator fashioned a "malpractice standard" based on, and similar to, some of the above cases:

> [W]hether counsel exhibited the normal and customary degree of skill possessed by attorneys who are *fairly skilled* in the criminal law and who have a fair amount of expertise at the criminal bar.... [T]he relevant question should be whether counsel's behavior was such that reasonably competent and fairly experienced criminal defense lawyers might debate its propriety. If such a debate may exist, assistance should not be found ineffective.
>
> (Emphasis in original)

Finer, *supra* note 4, at 1080.

[34] *See* notes 30 and 31 and accompanying text *supra*.

[35] Where a lawyer is unable to give his full devotion to two or more clients whose interests may conflict, the courts have not been hesitant to reverse. *See, e.g.*, Glasser v. United States, 315 U.S. 60 (1942) (amount of prejudice to defendant due to joint representation need not be shown); United States v. Wisniewski, 478 F.2d 274 (2d Cir. 1973) (reversible if possibility of conflict); Austin v. Erickson, 477 F.2d 620 (8th Cir. 1973) (reversible if substantial possibility of conflict of interest); United States v. Foster, 469 F.2d 1 (1st Cir. 1972) (trial judge must comment on risks of joint representation); Ford v. United States, 379 F.2d 123 (D.C. Cir. 1967) (automatic reversal if record does not indicate an informed decision to accept joint counsel). *But see* United States v. Rubin, 433 F.2d 442 (5th Cir. 1971) (trial judge has no affirmative duty to inquire regarding the impropriety of joint representation). *See generally* Note, *Criminal Codefendants and the Sixth Amendment: the Case for Separate Counsel*, 58 GEO. L.J. 369 (1969).

[36] *See* Section III *infra*.

[37] *E.g.*, Lunce v. Overlade, 244 F.2d 108 (7th Cir. 1957); Smotherman v. Beto, 276 F. Supp. 579 (N.D. Tex. 1967); Abraham v. State, 228 Ind. 179, 91 N.E.2d 358 (1950).

[38] *E.g.*, Odom v. United States, 377 F.2d 853 (5th Cir. 1967); People v. Dudley, 46 Ill. 2d 305, 263 N.E.2d 1 (1970), *cert. denied*, 402 U.S. 910 (1971).

[39] United States *ex rel.* Feeley v. Ragen, 166 F.2d 976 (7th Cir. 1948); Crowe v. State, 356 F. Supp. 777 (D.S.D.), *aff'd*, 484 F.2d 1359 (8th Cir. 1973).

[40] *See, e.g.*, United States v. Pigford, 461 F.2d 648, 649 (4th Cir. 1972) (the denial of "a continuance is a matter which lies within the sound discretion of the court and is not to be overturned in the absence of a showing of abuse of that discretion.")

[41] *E.g.*, United States v. Sanchez, 483 F.2d 1052 (2d Cir. 1973); United States v. Earley, 482 F.2d 53 (10th Cir. 1973).

[42] 376 U.S. 575, *reh. denied*, 377 U.S. 925 (1964).

[43] *Id.* at 589.

[44] 308 U.S. 444 (1940).

counsel, it is clear that a denial of a continuance necessary to prepare for trial is a reversible abuse of discretion. This conclusion thus poses the harder question: under what circumstances should the defendant and his attorney be allowed more time for conference, investigation of the facts and research of the applicable law?

The most obvious occasion in which the trial court need not grant more time is where the defense fails to request it. Without reasons in support of the motion, the judge cannot learn what additional investigation and research is contemplated and whether it may possibly help the defendant. The failure to request a continuance generally precludes appellate relief based on a claim of inadequate time for preparation because requesting a continuance is the only way the defendant can directly indicate a need for more time.

It should be noted that the unavailability of appellate relief in cases where counsel made no request for more time does not mean that relief is never given on direct appeal. Convictions, especially convictions of defendants with new lawyers for the appeal, can be reversed where no additional time was requested.[45] These cases require trial performance so inadequate as to result in an unfair trial. It is counsel's trial performance rather than preparation which is reviewable because a significant part of the record consists of counsel's performance, the adequacy of which can be argued on appeal. Chances of success on this approach, however, are lower because appellate courts are loath to judge the courtroom conduct of defense counsel as opposed to the preparation.

When counsel fails to alert the court of insufficient consultation, research or investigation, the defendant must assert the claim in a collateral attack. The defendant is no longer bound by the record; new evidence can be presented at a hearing on the petition for relief. The underlying legal basis for such a collateral attack is the duty of the lawyer to prepare. The Fourth Circuit has characterized the duty as "an affirmative obligation to make suitable inquiry to determine whether valid [defenses] exist." [46]

This well recognized duty will not support general claims of unpreparedness. The defendant must specifically allege facts reasonably susceptible to proof at a habeas corpus hearing which tend to show that counsel's handling prejudiced the defendant's case. The allegations can consist of extrinsic factors such as a lack of time for preparation or intrinsic factors such as the unexplained failure to investigate indications of an alibi, self-defense, insanity or diminished capacity.

Implicit in the general duty to be prepared is the obligation to move for a continuance if unprepared.[47] Requesting additional time where it is needed accomplishes two things. Presumably the trial court will grant the necessary time. If the request is denied, counsel has perfected the record for possible appeal or collateral attack by stating why the defense was inadequately prepared and what specifically could be accomplished with more time.

Some courts refuse to vacate convictions in cases where defense counsel failed to request time for additional preparation.[48] These cases hold that counsel should have brought the problems to the attention of the trial judge who has the duty to grant or refuse the motion.

More often, however, courts grant relief when the defendant shows specific reasons why counsel should have requested more time. *In re Saunders*[49] is a good example of this situation. The defendant, with a new attorney, claimed his original attorney failed to request additional time to investigate facts suggestive of a diminished capacity defense. Specifically, he alleged that his lawyer did not request the defendant's medical records reflecting hospitalization for two head injuries which resulted in organic brain damage, personality change and epilepsy even though the lawyer knew of the general nature and existence of the records. Nor did the lawyer order a psychiatric examination even though the defendant's mother volunteered to pay the costs for a private defense psychiatrist. Shortly after the guilty verdict, but before the penalty phase of the trial, the lawyer received a letter and several reports from a clinical psychologist confirming the defendant's and defendant's mother's claims about his mental-medical history. The lawyer did not use the information either to reopen the guilt phase or as evidence in mitigation during the

[45] *E.g.*, State v. Anderson, 117 N.J. Super. 507, 285 A.2d 234 (App. Div. 1971), *aff'd. per curiam, modified on other grounds*, 60 N.J. 437, 290 A.2d 447 (1972).

[46] Jones v. Cunningham, 313 F.2d 347, 353 (4th Cir.), *cert. denied*, 375 U.S. 832 (1963).

[47] *See, e.g.*, Stokes v. Peyton, 437 F.2d 131 (4th Cir. 1970); Downer v. Dunaway, 53 F.2d 586 (5th Cir. 1931). *Cf.* State v. Anderson, 117 N.J. Super. 507, 285 A.2d 234 (App. Div. 1971), *aff'd. per curiam, modified on other grounds*, 60 N.J. 437, 290 A.2d 447 (1972).

[48] *See Ex parte* Gammon, 255 Ala. 502, 52 So. 2d 369 (1951); Swanson v. Jones, 151 Neb. 767, 39 N.W.2d 557 (1949).

[49] 2 Cal. 3d 1033, 472 P.2d 921, 88 Cal. Rptr. 633 (1970) (en banc).

penalty phase of California's bifurcated criminal trial system.

The court granted the habeas corpus petition based on the failure of the attorney to consider the indicated defense. The purpose of factual and legal investigations, the court noted, is to make possible informed decisions on the client's behalf. While tactical reasons may have existed supporting the decision to withhold the defense for possible use in a plea for clemency, the failure to learn of the defendant's mental condition in the three and one-half months available removed rational support from that decision. An informed tactical decision that appears questionable in retrospect would probably not be grounds for reversal. But here, as the Ninth Circuit held in quite similar circumstances,

> the possible defense of diminished capacity was withheld not through deliberate though faulty judgment, but in default of knowledge that reasonable inquiry would have produced, and hence in default of any judgment at all.[50]

Defendants must also point to specific failures of counsel's pre-trial effort from which arises the possibility of prejudice. The failure to investigate the facts usually follows from the inadequate consultation with the defendant. In some instances counsel is guilty of a total failure to learn the underlying fact pattern of the case;[51] however, even this failure is not certain to cause reversal.[52] Courts vacate convictions for a variety of more specific allegations of what counsel failed to do. Convictions have been reversed for failure to investigate the physical circumstances of the crime,[53] to investigate the prosecutrix and medical examination results in a rape case,[54] to develop an insanity defense when the facts strongly suggested it,[55] to consider moving to suppress evidence seized under questionable circumstances,[56] to investigate an alibi which the evidence strongly indicate[57] and to interview a prosecution witness and learn that the witness would not testify.[58] In each of these cases the convicted person was able to show that something more could have been done with more time that would have precluded the possibility of prejudice to the defendant.

Courts also vacate convictions where counsel failed to research applicable law. For example, a court held that when incorrect advice caused the defendant to change his plea to guilty, there was an abuse amounting to inadequate representation,[59] as is advising a guilty plea without knowing what sentence is possible,[60] advising a guilty plea to a felony charge without knowing that the crime is a misdemeanor,[61] ignorance of criminal procedure by an out of state lawyer,[62] failure to learn the elements of the crime,[63] and failure to file a written plea of not guilty by reason of insanity when that failure meant the defendant was conclusively presumed to have been sane at the time of the offense.[64]

The more common claim of insufficient preparation is found in those cases where defense counsel requests additional time which the trial court denies. The courts are nearly unanimous in holding that a continuance must be given when the defendant was not given enough time to plan his case properly.[65] Indigent defendants often face trial with a tardily appointed lawyer. In the extreme case this means appointment immediately preceding trial. The courts will not hesitate to reverse convictions in these instances. In the words of one judge, "no time is never enough." [66] In *United States v. Vasilick*,[67] for example, the attorney was not even present when appointed. Thirty minutes later, absent any investigation or prior contact with the defendant, the attorney proceeded to trial. Eighteen years later, the district court concluded

[50] Brubaker v. Dickson, 310 F.2d 30, 39 (9th Cir. 1962), *cert. denied*, 372 U.S. 978 (1963) (quoted in *Saunders*).

[51] *E.g.*, Walker v. Caldwell, 476 F.2d 213 (5th Cir. 1973) (perfunctory appointment).

[52] *See, e.g.*, United States v. Trigg, 392 F.2d 860 (7th Cir.), *cert. denied*, 391 U.S. 961 (1968); Swanson v. Jones, 151 Neb. 767, 39 N.W.2d 557 (1949).

[53] Kott v. Green, 303 F. Supp. 821 (N.D. Ohio 1968).

[54] Coles v. Peyton, 389 F.2d 224 (4th Cir.), *cert. denied*, 393 U.S. 849 (1968).

[55] McLaughlin v. Royster, 346 F. Supp. 297 (E.D. Va. 1972).

[56] United States *ex rel.* Williams v. Brierley, 291 F. Supp. 912 (E.D. Pa. 1968).

[57] Johns v. Perini, 462 F.2d 1308 (6th Cir. 1972).

[58] Viscarra-Delgadillo v. United States, 395 F.2d 70 (9th Cir. 1968). *Cf.* Pennington v. Beto, 437 F.2d 1281 (5th Cir. 1971).

[59] Kienlen v. United States, 379 F.2d 20 (10th Cir. 1967).

[60] Wilson v. Rose, 366 F.2d 611 (9th Cir. 1966).

[61] Walker v. Caldwell, 476 F.2d 213 (5th Cir. 1973).

[62] Lunce v. Overlade, 244 F.2d 108 (7th Cir. 1957).

[63] Roberts v. Dutton, 368 F.2d 465 (5th Cir. 1966).

[64] Schaber v. Maxwell, 348 F.2d 664 (6th Cir. 1965).

[65] *But see* United States v. Trigg, 392 F.2d 860 (7th Cir.), *cert. denied*, 391 U.S. 961 (1968) (appointment just before trial); Daugherty v. Beto, 388 F.2d 810 (5th Cir. 1967), *cert. denied*, 393 U.S. 986 (1968) (appointment just before trial).

[66] Joseph v. United States, 321 F.2d 710, 712 (9th Cir. 1963), *cert. denied*, 375 U.S. 977 (1964). *See also* United States v. Yodock, 224 F. Supp. 877 (M.D. Pa. 1963); United States v. Vasilick, 206 F. Supp. 195 (M.D. Pa. 1962).

[67] 206 F. Supp. 195 (M.D. Pa. 1962).

that the defendant was presumptively prejudiced and ordered a new trial.

One court recently carved an exception from the rule against late appointments. The district court in *United States ex rel. Navarro v. Johnson*[68] denied a petition for a writ of habeas corpus claim of inadequate preparation and inadequate performance. The lawyer met with the defendant only five minutes on the morning of the trial. But the court emphasized that the Public Defender Association had been appointed some time earlier at the preliminary hearing. An earlier case from the Third Circuit held that the timeliness of appointment of counsel must be measured by the time a defender organization is appointed by the court and not the time the particular trial lawyer is assigned to the case.[69] In *Navarro* the court found that the public defender had carefully studied the file which contained the results of an interview of the defendant done earlier by an Association staff member. The defendant charged his lawyer with failing to produce two witnesses for the defendant, but it was shown that the Association tried unsuccessfully to locate them and the defendant's own testimony at the habeas corpus hearing showed that they could not possibly have seen the occurrence. The attorney also spoke with an arresting officer but characterized his testimony as "disastrous" to the defendant.[70] In light of these attendant circumstances the court held that the preparation was adequate.

The court in *Navarro* concluded that the defendant had not shown evidence of poor preparation. Alternatively, it could be argued that the five minute conference established a presumption of inadequate preparation but that the presumption was rebutted by the prosecution's evidence that the Association had done considerable work on the case which the attorney studied and by the defendant's inability to show how additional preparation time would have helped.

Nevertheless, *Navarro* is a disturbing case. The Court repeats the controlling standard of adequacy for the Third Circuit, *i.e.*, "the exercise of the customary skill and knowledge which normally prevail at the time and place."[71] However, the lawyer whose preparation was questioned had only very recently graduated from law school. During his first week with the Association he tried thirty-eight cases; *Navarro* was number thirty-nine. If such a trial case load is considered "normal" or "customary," then the quality of "adequate" representation for a given defendant will be determined by the representation given to criminal defendants as a group.

Most courts also reverse in cases where the defendant was given some time to investigate and confer, but only in an amount insufficient for the particular case.[72] Reviewing courts have found the time given to defendants too short where counsel was appointed shortly before or on the day of trial,[73] the day before trial[74] and a week before trial.[75] Like the cases where no time was available, some of these cases are extreme examples of injustice. *Walder v. Caldwell*[76] is illustrative. The dedefendant petitioned for a writ of habeas corpus following his guilty plea and conviction. The attorney failed to investigate the facts, the possibility of a motion to suppress or of plea bargaining. He testified at the district court hearing that he followed a substantially different practice when representing fee clients rather than appointed clients. That the defendant was a victim of injustice is evident considering that he pleaded guilty to, and was sentenced for, felonies when the crimes charged were misdemeanors and that his sentence was greater than the statute allowed.

The Fourth Circuit holds that a tardy appointment [the day of or the day before trial] of defense counsel is prima facie evidence of prejudice to the defendant and that the burden then shifts to the prosecution to show that the defendant was not in fact prejudiced.[77] This policy avoids the problem of

[68] 365 F. Supp. 676 (E.D. Pa. 1973).

[69] Moore v. United States, 432 F.2d 730 (3d Cir. 1970).

[70] United States *ex rel.* Navarro v. Johnson, 365 F. Supp. 676, 688 (E.D. Pa. 1973).

[71] Moore v. United States, 432 F.2d 730, 736 (3d Cir. 1970).

[72] *But see* Frates v. Bohlinger, 472 F.2d 149 (1st Cir. 1973) (appointed day of trial when defendant appeared without counsel); Turner v. Maryland, 318 F.2d 852 (4th Cir. 1963) (defendant admitted he had no information to give counsel); Goforth v. United States, 314 F.2d 868 (10th Cir.), *cert. denied*, 374 U.S. 812 (1963) (same as *Frates*); United States v. Wight, 176 F.2d 376 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950) (15 minutes enough time).

[73] Walker v. Caldwell, 476 F.2d 213 (5th Cir. 1973) (shortly before trial); Rastrom v. Robbins, 440 F.2d 1251 (1st Cir.), *cert. denied*, 404 U.S. 863 (1971) (four hours); Moore v. United States, 432 F.2d 730 (3d Cir. 1970).

[74] Twiford v. Peyton, 372 F.2d 670 (4th Cir. 1967); Jones v. Cunningham, 313 F.2d 347 (4th Cir.), *cert. denied*, 375 U.S. 832 (1963).

[75] Smotherman v. Beto, 276 F. Supp. 579 (N.D. Tex. 1967).

[76] 476 F.2d 213 (5th Cir. 1973).

[77] Garland v. Cox, 472 F.2d 875 (4th Cir. 1973); Coles v. Peyton, 389 F.2d 224 (4th Cir.), *cert. denied*, 393 U.S. 849 (1968); Fields v. Peyton, 375 F.2d 624

judging the actual trial performance of the lawyer. As a panel from that circuit recently stated, "In a situation where the ultimate fact [counsel's adequacy] is difficult to prove, but the intermediate fact [late appointment] is established, we hold that it is appropriate to presume ineffective assistance." [78]

This presumption, however, is not irrebuttable as illustrated by *Turner v. Maryland*.[79] The attorney did not consult with the defendant until one half hour before the trial and did not read statements taken from the defendant until five minutes before trial. He failed to argue in behalf of the defendant during the trial and neglected to advise the defendant of the right to appeal. But the conviction was affirmed when the defendant stated at his habeas corpus hearing that he was unable to give any information on which to build a defense.[80]

Although no facts were developed at the hearing showing what more could have been done, *Turner* remains a problem case. The defendant accepted assistance because he recognized that he needed someone to prepare his defense. Thus the case implies that in those cases that appear hopeless, the defendant can get a "fair trial" even when the representation is almost no representation at all. The result leaves the significance of the presumption open to question. In *United States v. Fisher*[81] the Fourth Circuit recently held that "conviction without effective legal representation is a misplaced sanction for the shortcomings of a defendant's attorney." [82] In the light of this position, it is not likely that the presumption of prejudice could be overcome so easily today.[83]

There is, however, support for the proposition that a late appointment is not necessarily reversible error. In *Avery v. Alabama*[84] the Supreme Court held that three and one-half days were sufficient even though the crime had been committed several years before the trial date and despite the fact that the defense attorneys wanted more time because they had had no opportunity to confer with doctors who might have given testimony favorable to a defense of insanity. The Court emphasized that counsel had not shown any specific testimony or evidence indicating that they could have done better with more time.

In *Chambers v. Maroney*[85] the Supreme Court did not deal directly with the presumption of prejudice. However, the Court indirectly referred to a less stringent approach in dealing with the presumption of prejudice. In *Chambers* the legal aid attorney first met the defendant shortly before trial. Noting that he was from the same legal aid society as another attorney who represented the defendant at a prior trial on the same charge, the Court stressed that the court of appeals made a careful examination of the record and had "ample grounds for holding that the appearance of a different attorney at the second trial had not resulted in prejudice to the petitioner." [86] *Chambers* was more a decision not to rule than a ruling, and its effect is uncertain. The Supreme Court of Pennsylvania has suggested, however, that it "seemingly vitiated" the presumption of prejudice rule of the Fourth Circuit.[87]

Two jurisdictions have specifically rejected the rule. The Third Circuit briefly held that a later appointment constituted a prima facie case of denial of effective assistance of counsel, thus shifting the burden of proving lack of prejudice to the state,[88] but, following *Chambers*, rejected this position in favor of a "strong inference of prejudice from the failure to appoint counsel until the day of trial or very shortly prior thereto." [89] The First Circuit has agreed that there is no presumption of inadequacy due to a late appointment. In reversing a conviction, the court in *Rastrom v. Robbins*[90] held that the minimum acceptable time can vary widely. The court adopted a "totality of the circum-

(4th Cir. 1967); Twiford v. Peyton, 372 F.2d 670 (4th Cir. 1967); Jones v. Cunningham, 313 F.2d 347 (4th Cir.), *cert. denied*, 375 U.S. 832 (1963).

[78] Garland v. Cox, 472 F.2d 875, 879 (4th Cir. 1973). *Cf.* United States v. Knight, 443 F.2d 174 (6th Cir. 1971).

[79] 318 F.2d 852 (4th Cir. 1963).

[80] The Third Circuit also found that the presumption of prejudice could be overcome. *See* United States *ex rel.* Mathis v. Rundle, 394 F.2d 748 (3d Cir. 1968).

[81] 477 F.2d 300 (4th Cir. 1973).

[82] *Id.* at 304.

[83] *But see* Garland v. Cox, 472 F.2d 875, 879 (4th Cir. 1973) ("The moment that contravening evidence is presented from any source, the presumption vanishes completely—as if it had never existed.").

[84] 308 U.S. 444 (1940). *See also* Chambers v. Maroney, 399 U.S. 42 (1970) and note 72 *supra*.

[85] 399 U.S. 42 (1970).

[86] *Id.* at 53.

[87] Commonwealth v. Woody, 440 Pa. 569, 572, 271 A.2d 477, 480 (1970).

[88] United States *ex rel.* Mathis v. Rundle, 394 F.2d 748 (3d Cir. 1968).

[89] Moore v. United States, 432 F.2d 730, 735 (3d Cir. 1970). Ironically the conviction in *Moore* was vacated even though the per se rule requiring reversal was abandoned, while the court applying a presumption of prejudice standard, in *Mathis*, held that the presumption was rebutted when counsel testified that he was unable to say that he was unprepared.

[90] 440 F.2d 1251 (1st Cir.), *cert. denied*, 404 U.S 863 (1971).

stances" rule followed by most other jurisdictions.[91]

The circumstances to which the courts in nonpresumption jurisdictions look for the possibility of prejudice focus on the ability of the lawyer to prepare and on the actual amount of time and effort invested in pre-trial stages. In *Rastrom* the court concluded that it was error to deny a continuance requested by an inexperienced attorney who had only four hours to prepare since the trial judge could have either granted the continuance or could have appointed more experienced counsel. The holding is based on the logical assumption that the neophyte lawyer needs comparatively more time on a case before he or she can advise the defendant and conduct the trial.[92]

Other courts have specifically mentioned and stressed the overburdening case load of public defenders. In *Coles v. Peyton*[93] the court held that appointing two public defenders to represent fifty-eight defendants over a three-month period was solid evidence of prejudice to the defendants.[94] These cases usually contain other examples of poorly prepared counsel so the importance of a heavy case load should not be overestimated.[95]

Several other criteria exist for testing the sufficiency of representation between the time of appointment of counsel and the time of trial. According to one court "the question [of late appointment of counsel] necessarily involves a comparison of the appointment with all the attendant circumstances. . . ." [96] One factor would be the gravity of the charge. Generally, counsel devotes more time in preparation for a trial involving a more serious crime which probably carries a more severe penalty.[97] A closely related factor is the type of defense anticipated. Some defenses, such as insanity, require considerable preparation time. The extent of counsel's participation in similar cases is another factor.[98] Courts also consider what counsel learned from the defendant which reduced the area of necessary preparation. The courts especially notice whether the defendant is able to assist counsel.[99] Several courts take note of work done by prior counsel before the lawyer in question was assigned for trial. In *United States v. Abshire*[100] a former counsel had been on a case for six months and was well prepared. The conviction was affirmed because newly appointed co-counsel had the benefit of this preparation.[101]

Criminal defendants in some cases come to trial defended by counsel who had adequate time for preparation and should have been prepared but who nevertheless request a continuance. The court in those cases is being asked to grant additional time because of the conduct of the defendant or the lawyer when the trial should be held immediately.

Trial judges who deny these continuances traditionally are upheld on appeal regardless of where the fault lay. When the trial judge has reason to believe that the requested delay has more to do with the defendant's desire to avoid trial than with the time required to prepare, the resulting convictions are affirmed. The only exception to this general rule is in favor of those defendants who, for mental or emotional reasons, are unable to assist or cooperate with their lawyers.[102]

The crucial aspect of cases involving denials of requests for continuances is the effort made by the trial judge to determine whether a delay is needed. Continuances have been rejected where, for example, defendants claimed unprepared counsel because more time was needed to interview witnesses.

[91] *See, e.g.*, Callahan v. Russell, 423 F.2d 450 (6th Cir. 1970); United States v. Knohl, 379 F.2d 427 (2d Cir.), *cert. denied*, 389 U.S. 973 (1967); Mosley v. Dutton, 367 F.2d 913 (5th Cir. 1966), *cert. denied*, 387 U.S. 942 (1967).

[92] 440 F.2d 1251 (1st Cir.), *cert. denied*, 404 U.S. 863 (1971). *See also* Smotherman v. Beto, 276 F. Supp. 579 (N.D. Tex. 1967).

[93] 389 F.2d 224 (4th Cir.), *cert. denied*, 393 U.S. 849 (1968). *See also* United States *ex rel.* Adams v. Rundle, 294 F. Supp. 194 (E.D. Pa. 1968).

[94] *But see* United States *ex rel.* Navarro v. Johnson, 365 F. Supp. 676, 689 (E.D. Pa. 1973) (thirty-eight cases in first week of work of recent law school graduate is acceptable case load).

[95] Thomas v. State, 251 Ind. 2d 546, 242 N.E.2d 919 (1969) (case load should not determine rights of defendants).

[96] Moore v. United States 432 F.2d 730, 735 (3d Cir. 1970).

[97] *See, e.g.*, the discussion on seriousness of offense and severity of punishment in United States v. Fisher, 477 F.2d 300, 302–303 (4th Cir. 1973).

[98] *Id. See also* United States v. Tyler, 459 F.2d 647 (10th Cir. 1972).

[99] Moore v. United States, 432 F.2d 730 (3d Cir. 1970) (Defendant unable to effectively assist attorney). *See also* Frates v. Bohlinger, 472 F.2d 149 (1st Cir. 1973) (conviction affirmed where defendant was able to assist counsel); Rastrom v. Robbins, 440 F.2d 1251 (1st Cir.), *cert. denied*, 404 U.S. 863 (1971) (defendant unable to communicate with counsel); McLaughlin v. Royster, 346 F. Supp. 297 (E.D. Va. 1972) (defendant institutionalized and unable to cooperate due to terror of death penalty).

[100] 471 F.2d 116 (5th Cir. 1972).

[101] *See also* Chambers v. Maroney, 399 U.S. 42 (1970); United States *ex rel.* Navarro v. Johnson, 365 F. Supp. 676 (E.D. Pa. 1973). *But see* United States v. Fisher, 477 F.2d 300 (4th Cir. 1973).

[102] *See* text accompanying note 99 *supra*.

In one case,[103] the trial judge's colloquy with counsel showed that there was a *possibility* that a witness could not have fully exonerated the defendants or offered relevant testimony and the willingness to testify was unascertainable; in another case[104] the conviction was affirmed where the defendant made no effort to employ discovery and where there was no reason to believe that an additional witness would have added to previously received testimony.

On other occasions, defendants, perhaps sensing the possible outcome of their prospective trial, become disenchanted with their legal representation and request more time to hire a new attorney. While the courts are obligated to hear the defendant's reasons for wanting new counsel,[105] they are not required to grant a continuance to allow time to find a replacement.[106] The denial causes the defendant either to proceed without assistance[107] or with the original lawyer.[108] The appellate opinions often mention that defendants precipitate this problem by failing to cooperate with the attorney they seek to replace.[109]

The refusal to continue the case often is based on the inaccuracy of the reasons asserted for the delay. In *United States v. Harrelson*[110] the defendant urged what probably would have been sufficient to obtain a continuance: that lead counsel was hospitalized, that the prosecution was obstructing discovery, and that his other counsel was unprepared. The motion was denied because the trial judge's lengthy hearing showed these charges were untrue.

These cases often involve trials which the trial court has previously continued.[111] In *Marxuach v. United States*[112] the defendants got two ten-day continuances, but were denied a third. They asked again because one defendant was allegedly hospitalized and were again denied. Another motion was denied when one attorney was hospitalized and the defendants did not want another attorney. Finally the defendant refused to attend the trial and was found in a hospital though he was not in need of hospitalization. The court of appeals affirmed the conviction noting that a defendant has a right to counsel of his choice, "[h]owever, this subsumes good faith on the part of the defendant, something the court had abundant reason for questioning." [113] Such conduct is received as an attempt to frustrate the prosecution and is sometimes viewed as "at least a waiver of a right to anything beyond the most minimal postponement. . . ." [114] Whether there is a "waiver" or not, the courts unanimously rely on the discretionary power of the trial judge to affirm these convictions.

The courts face a more difficult question when the attorney and his client had sufficient time for preparation but due to the poor effort by the lawyer they need and request additional time. Unlike the cases discussed above, the problem is not the product of the defendant's effort to avoid trial. The judge must weigh the advantages of a speedy trial and disposition of the case against trying a person who would arguably have better representation but for the laxity of his lawyer.

The traditional response of reviewing courts was negative and the courts rejected most claims that the denial of a continuance deprived the defendant of the adequate assistance of counsel for several reasons. First, most claims of this nature involved defendants with retained counsel. These defendants got less sympathy than defendants for whom counsel was appointed. The courts used principles of agency[115] and state action[116] to carve

[103] United States v. Cawley, 481 F.2d 702 (5th Cir. 1973).

[104] United States v. Harris, 436 F.2d 775 (9th Cir. 1970). *See also* United States v. Villella, 459 F.2d 1028 (9th Cir. 1972).

[105] People v. Marsden, 2 Cal. 2d 118, 465 P.2d 44, 84 Cal. Rptr. 156 (1970).

[106] Ungar v. Sarafite, 376 U.S. 575, *reh. denied*, 377 U.S. 925 (1964); United States v. Casey, 480 F.2d 151 (5th Cir. 1973); United States v. Morrissey, 461 F.2d 666 (2d Cir. 1972); United States v. Pigford, 461 F.2d 648 (4th Cir. 1972); People v. Washington, 41 Ill. 2d 16, 241 N.E.2d 425 (1968).

[107] *E.g.*, United States v. Casey, 480 F.2d 151 (5th Cir. 1973) (counsel gave notice of 20 days that he would not represent the defendant).

[108] *E.g.*, United States v. Pigford, 461 F.2d 648 (4th Cir. 1972).

[109] *See, e.g.*, United States v. Pigford, 461 F.2d 648 (4th Cir. 1972) (defendant refused to return to state in which trial was held to assist counsel); People v. Washington, 41 Ill. 2d 16, 241 N.E.2d 425 (1968) (defendant caused two month delay in start of trial).

[110] 477 F.2d 383 (5th Cir. 1973).

[111] *See, e.g.*, Ungar v. Sarafite, 376 U.S. 575, *reh. denied*, 377 U.S. 925 (1964) (two short continuances); United States v. Sanchez, 483 F.2d 1052 (2d Cir. 1973) (three continuances); United States v. Earley, 482 F.2d 53 (10th Cir. 1973) (long series of postponements); United States v. Rosenthal, 470 F.2d 837 (2d Cir. 1972) (two continuances); United States v. Pigford, 461 F.2d 648 (4th Cir. 1972) (one continuance); Marxuach v. United States, 398 F.2d 548 (1st Cir.), *cert. denied*, 393 U.S. 982 (1968) (two continuances).

[112] 398 F.2d 548 (1st Cir.), *cert. denied*, 393 U.S. 982 (1968).

[113] *Id.* at 551.

[114] Frates v. Bohlinger, 472 F.2d 149, 151 (1973). *Cf.* People v. Washington, 41 Ill. 2d 16, 241 N.E.2d 425 (1968).

[115] *See, e.g.*, Sayre v. Commonwealth, 194 Ky. 338, 238 S.W. 737 (1922), where the court agreed that the appellant would have been as well served had he had

an exception for retained attorneys from the constitutional requirements of adequate assistance of counsel. Most jurisdictions have now rejected this distinction.[117] Courts also relied on the discretionary power of the trial judge, a power reinforced by the Supreme Court,[118] to avoid re-examining the merits of the refusal to continue the proceedings. Finally these cases were decided before the extensive developments in constitutional criminal procedural law that occurred during the last twenty years.

As a result there is now a discernible trend toward appellate examination of the reasons offered in support of continuance motions and the reasons given for refusal. The corollary of this trend is an increased tendency to reverse and remand those cases in which counsel indicate with specificity the possibility that additional time will substantially benefit the defendant and in those cases in which the court denies a continuance and counsel follows with a defense that indicates the lawyer was in fact unprepared.

It follows that a mere assertion that the defendant needs more time unsupported by specific reasons or supported by erroneous reasons will not suffice for appellate relief. In *United States v. Sanchez*[119] the defendants were granted three continuances but were denied a fourth when both attorneys sought to withdraw from the case. One requested permission to withdraw because the defendants had another attorney, and the other attorney sought to withdraw because of a broken ankle suffered ten months previously and emotional problems. The court rejected the requests and proceeded to trial. The defendants' appeal was rejected based on the apparent bad faith of the defendant and on the fact that during the trial the attorneys gave an active defense. The trial judge also concluded that adequate time was available and that the failure to call two witnesses did not cause the absence of important testimony.[120]

Another court affirmed conviction of a defendant whose counsel requested additional time to inspect the analysis of drugs taken from the defendant.[121] The court observed that counsel had possession of a sample four days before trial and concluded that forty-five minutes was sufficient for examination.

Two recent federal courts of appeals cases illustrate the increased tendency to reverse convictions in trials where the trial judge denied a motion for a continuance. In *United States v. Fisher*[122] the Court of Appeals for the Fourth Circuit reversed the conviction of Ronald Fisher who failed to report for induction into the armed forces and keep his local selective service board advised of his address. Fisher retained an attorney and paid him $250, but the relationship ended when he could not afford the trial fee. Fisher then retained another attorney who assured him that if a trial proved necessary, they could get a continuance since the attorney had another trial scheduled the same day. However, the trial judge, prior to the trial, refused to continue the case. The judge also ordered the first attorney to appear for the defendant since he had not requested permission of the court for withdrawal. The first attorney appeared on one day's notice and requested a continuance which the court denied. The judge censured the attorney for his lack of preparation and failure to consult with the defendant. One hour later the trial began and Fisher was convicted on both counts.

Fisher is instructive because it focuses on the criteria which reviewing courts look to in assessing

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no attorney at all. Nevertheless the court concluded that

> ... negligence, unskillfulness, or incompetency of counsel is imputed to the client ... when a defendant selects an attorney to represent him, the counsel ... become[s] the mouthpiece and other self of his client, by which the client is forever bound ....

Id. at 342–43, 238 S.W. at 739.

[116] *See, e.g.*, the classic exposition of the state action doctrine in United States *ex rel.* Darcy v. Handy, 203 F.2d 407, 426 (3d Cir.) (*per curiam*)(Maris, J., concurring), *cert. denied*, 346 U.S. 865 (1953):

> The [fourteenth] amendment ... is directed only to action by a state and its command ... is that the state through its officers shall not deny to a defendant in a criminal case the effective assistance of counsel for his defense. This may well impose a definite obligation upon the state through its courts to appoint competent counsel for indigent defendants in criminal cases. There is, however, ... "a vast difference between lacking the effective assistance of competent counsel and being denied the right to have the effective assistance of competent counsel." It is only the latter for which the state is responsible, the former being normally the sole responsibility of the defendant who selected his counsel. (footnotes omitted)

[117] *See, e.g.*, United States *ex rel.* Hart v. Davenport, 478 F.2d 203 (3d Cir. 1973) (citing *Shelley v. Kramer*); United States v. Foster, 469 F.2d 1 (1st Cir. 1972); Stokes v. Peyton, 437 F.2d 131 (4th Cir. 1970); Blanchard v. Brewer, 429 F.2d 89 (8th Cir. 1970), *cert. denied*, 401 U.S. 1002 (1971); United States *ex rel.* Maselli v. Reincke, 383 F.2d 129 (2d Cir. 1967); Wilson v. Rose, 366 F.2d 611 (9th Cir. 1966); Shipman v. Gladden, 253 Ore. 192, 453 P.2d 921 (1969); Abraham v. Indiana, 228 Ind. 179, 91 N.E.2d 358 (1950).

[118] Avery v. Alabama, 308 U.S. 444 (1940).

[119] 483 F.2d 1052 (2d Cir. 1973).

[120] *See also* United States v. Villella, 459 F.2d 1028 (9th Cir. 1972) (conviction affirmed when counsel gave no reason why witnesses were not located).

[121] United States v. Schrenzel, 462 F.2d 765 (8th Cir. 1972).

[122] 477 F.2d 300 (4th Cir. 1973).

a claim of inadequate preparation. First, the court noted that the case was appropriate for appeal because the colloquy between the judge and the two attorneys was part of the record. The court also noted that it was presented with a "claim based on an established insufficiency of preparation, not on his counsel's subjective assertion that he was not prepared for trial." [123] Writing for the court, Judge Butzner emphasized that contrary to the government's contention, selective service litigation is complex and the offenses are serious with the possibility of substantial incarceration. That the lawyer gave an active defense at the trial was discounted: "Swershy's defense of Fisher during the trial, though aggressive, did not nullify the inevitable prejudice resulting from the lack of advance preparation." [124]

The court also looked to what counsel could have done to better the defense. Specifically counsel might have bolstered the defendant's credibility by offering character testimony or testimony about attempts to reduce an unrelated felony charge to a misdemeanor thus enabling him to enlist. To the contention that Fisher waived a continuance by stating that he knew of no witnesses and was willing to proceed with the trial, the court answered that the defendant's remarks did not constitute an intentional waiver of a known right in light of the district judge's remarks about showing specific need and the possibility of assessing costs to counsel for the delay. The court even observed that "the lack of preparation impaired trial counsel's effectiveness in explaining the need for a continuance." [125] The court noted that its holding would be the same whether it applied a presumption of ineffectiveness or a "totality of the circumstances" approach.[126]

Judge Butzner recognized the need to expedite criminal cases and the power of judges to censure attorneys who delay cases by failure to prepare, but he concluded, "conviction without effective legal representation is a misplaced sanction for the shortcomings of a defendant's attorneys." [127] Significantly, the court did not raise the problem of retained versus appointed counsel.[128]

The second case, *West v. Louisiana*,[129] comes from the Fifth Circuit. Unlike *Fisher*, *West* involved a state criminal proceeding that reached the federal courts in the form of a petition for habeas corpus. The district court granted the petition and the court of appeals, Judge Wisdom writing the majority opinion, affirmed. The defendant, Limmie West, was convicted of armed robbery and sentenced to forty-nine years, six months at hard labor. Before the trial started his attorney, whom he had also retained on previous occasions, spoke with him for at most one hour and perhaps for as little as five minutes.[130] The attorney moved for a continuance contending that he had no opportunity to confer with defendant and was not prepared for trial.[131] The trial court concluded that the defendant was attempting to avoid trial and that the statement that other counsel had been retained was a ploy to evade trial since the defendant had previously used the attorney who now requested a delay.

The record made at an unsuccessful state habeas corpus hearing showed that the lawyer made no investigation, called no witnesses and moved for a directed verdict when the prosecution completed its case. When the court denied the motion, the lawyer immediately rested the case, and the jury voted to convict. The court of appeals held that effective counsel is "counsel reasonably likely to render *and rendering* reasonably effective assistance" [132] and concluded that West's lawyer failed to meet this test.

The state contended that whether the representation was adequate was irrelevant. Because West had privately retained his attorney, the state argued that it was not responsible for any failures of counsel because the actions of privately retained counsel cannot constitute state action. Judge Roney agreed on this point in his dissent. He contended that the cases on point held that misfeasance by privately retained counsel is not state action and therefore cannot constitute a denial of due process or equal protection. The majority was unconvinced. It directly considered the state action issue and rejected it as a basis of precluding relief to defendants who employ their own attorneys.[133]

[123] *Id.* at 302.
[124] *Id.* at 303.
[125] *Id.* at 304.
[126] *Id.* at 302 n.3. *See* notes 77–83 and 88–91 and accompanying text *supra*.
[127] 477 F.2d at 304. *Cf.* United States v. Davis, 442 F.2d 72 (10th Cir. 1971).
[128] *See* note 117 and accompanying text *supra*.
[129] 478 F.2d 1026 (5th Cir. 1973).
[130] *Id.* at 1033–34.
[131] *Id.* at 1035 (Roney, J., dissenting). The motion for continuance and reasons for the denial are mentioned only by Judge Roney.
[132] 478 F.2d at 1033. This standard was originally announced in MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960).
[133] The court stated that "to 'administer justice without respect to persons, and do equal right to the poor and to the rich' [28 U.S.C. § 453] we must apply the same standard, whether counsel be court appointed or privately retained." *Id.* at 1033 (footnote omitted).

Judge Roney also disagreed with the majority on another issue. As he stated it, "in the federal state context, how tightly does the Constitution control the state trial judge's decision as to whether a trial should be postponed at the request of defendant and his retained counsel?" [134] At the heart of his dissent lies Judge Roney's displeasure with the district court for granting the petition after reviewing the thirty-three page state habeas corpus hearing without conducting its own hearing. Only a more detailed hearing, he stated, could have developed the fact that the defendant sought delay for delay's sake. "If this delay can be accomplished by lack of preparation, then lack of preparation is exactly what the defendant wants." [135]

Judge Roney also seemed impressed by the weight of the evidence against West. He asked in effect, what good would more preparation have done.[136] If Judge Roney is interpreted to mean that before collateral relief is granted the court should require that the defendant make at least some minimal showing that counsel failed to prepare and that he, the defendant, was possibly prejudiced by the failure, then his remarks are well taken. In this case the district judge and a majority on the court of appeals felt that this showing had been made. But if his remarks are to be interpreted as meaning that because the evidence of guilt is overwhelming, the failure of counsel to prepare should be ignored, then his conclusion should be rejected. For example, with adequate preparation the defense lawyer might successfully challenge the admissibility of evidence or testimony. Proof that the defendant committed the act is not proof of guilt for the element of intent may be impossible to establish due to diminished capacity, or the defendant may be legally insane. The defendant deserves counsel who will also engage in plea bargaining if indicated and desired by the defendant. West's forty-nine year, six month sentence is strong evidence that this approach was not followed.

Conclusion

The problem for trial judges faced with requests for additional time by counsel who assert they cannot give adequate representation is the result of the tension between the *Powell v. Alabama*[137] right to adequate assistance of counsel and the *Avery v. Alabama*[138] holding that the courts may deny requests for additional time if the court in the reasonable exercise of its discretion concludes that counsel had sufficient time. For Judge Roney in his dissenting opinion in *West v. Louisiana*,[139] the *Avery* principle should prevail: "There seems little point in following a broad rule as to the discretion of trial judges if we are to follow a narrow rule in the effective counsel-trial preparation dichtomy." [140]

The Supreme Court in *Avery* restricted the right to adequately prepared defense counsel, but certain recent federal court cases show that the *Avery* principle has withered since its announcement in 1940. If a trial judge, faced with a motion to continue, affirmatively seeks information from counsel regarding how the additional time will be used and what will be accomplished and learns that there is the possibility that additional time will substantially benefit the defendant, then the judge should continue the trial for a reasonable period of time with the admonition that counsel use the time and prepare in the manner indicated. When the trial judge fails to make specific inquiry of counsel or orders the case to trial despite learning that counsel is not prepared, the reviewing court should reverse or vacate the conviction. The point emphasized is that the trial judge must diligently inquire into the problem and make the inquiry part of the record in order to entertain the motion on an informed basis and to generate a record that facilitates direct review of the issue.[141] To do otherwise is to lose sight of the broad scope of the right to counsel implied in the due process and equal protection clauses, expressly commanded by the sixth amendment and confirmed by Supreme Court decisions for more than forty years.

[134] *Id.* at 1036 (Roney, J., dissenting).
[135] *Id.*
[136] *Id.* at 1037.
[137] 287 U.S. 45 (1932).
[138] 308 U.S. 444 (1940).
[139] 478 F.2d 1026 (5th Cir. 1973).
[140] *Id.* at 1036 (Roney, J., dissenting).
[141] One commentator has suggested that counsel be required to file a confidential worksheet with the court before trial specifying time spent in consultation and investigation, witnesses interviewed and other work done on the case. This would become part of the record on collateral attack. Presumably it could be part of the record on direct appeal. *See* Grano, *supra* note 3, at 1248–49.

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THE CHALLENGE OF OBSOLETE PENAL STATUTES

Obsolete[1] criminal statutes are a source of difficulty to litigants and the judiciary. To remove the threat of enforcement of these statutes requires either repeal by the legislature or abrogation by the judiciary. The problems of inducing a legislature to repeal an unwanted, or perhaps forgotten statute are discussed elsewhere.[2] The courts are seldom confronted with the challenge of obsolete criminal statutes because their existence is often unknown or ignored both by citizens, legislators, and law-enforcement officials. After non-enforcement for a substantial period of time, coupled with blatant violation by the citizenry, their once-perceived threat may pass from the consciousness of potential victims of their enforcement.[3] These statutes cease to carry any weight as prohibitions, and, as a result, their chances of being repealed by the legislature are sharply diminished.[4] Similarly, they are not likely to be challenged in the courts because their offensiveness has been neutralized by what might be construed by citizens as an affirmative administrative choice not to enforce their provisions.[5] In the rare cases that came before the courts challenging statutes that might be deemed obsolete, the statutes usually possessed some characteristic that made them objectionable, and thus unforgotten. A particular policy of enforcement may resurrect the statute to harass certain groups, or it may be that the statute is in glaring conflict with modern conceptions of individual liberty. In the latter case, the statute might serve as a curb[6] on permissible behavior in spite of a history of non-enforcement.

Consistent with the notion that "[t]he first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong,"[7] is the citizen's interest in having some means available to ensure that this requirement is fulfilled. The law must be flexible. But legislation is only as flexible as it is efficient, and in the case of old forgotten statutes, legislatures are seldom alert to the need of clearing the code books of antique or outmoded enactments. Since the courts are more adapted than

[1] For the purpose of this comment, an obsolete criminal statute is one that is not only seldom, if ever enforced, but one which is out of keeping with present mores. Extreme examples would be a statute against blasphemy, or one forbidding the exhibition of movies depicting violent felonies. For examples of such obsolete statutes, *see* Baker, *Legislative Crimes*, 23 MINN. L. REV. 135 (1939); Bonfield, *The Abrogation of Penal Statutes by Nonenforcement*, 49 IOWA L. REV. 389, 391–92 (1964) (hereinafter cited as Bonfield). Non-enforcement alone is not determinative of obsolescence; other motives such as difficulty of proof of the elements of a crime, or the relative infrequency of the crime may lead to non-enforcement of a statute. Conversely, a statute need not go unenforced to be obsolete.

[2] A. BICKEL, THE LEAST DANGEROUS BRANCH 146 (1962); J. C. GRAY, THE NATURE AND SOURCES OF THE LAW 192 (2d ed. 1921) (hereinafter cited as GRAY); JOHNSON, LAW ENFORCEMENT 340 (1930); Bonfield, *supra* note 1, at 391; Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543 (1960); Rodgers, *Desuetude as a Defense*, 52 IOWA L. REV. 1, 13–17 (1966) (hereinafter cited as Rodgers); Comment, *Dead Laws, or Only Dying?*, 94 JUST. P. 358 (1930).

[3] Many statutes which are actively enforced are virtually unknown to most citizens. Merely that these statutes are unknown does not deprive them of vitality or fairness. Some of this validity and fairness disappears, however, when a law is intentionally or inadvertently neglected. Enforcement of a penal statute has as one of its primary purposes the effect of deterrence. If a statute is not enforced it cannot deter those who do not know of its existence, and much of its validity is thereby lost. Furthermore, in the absence of enforcement (which is by constitutional dictate a public process) citizens not otherwise aware of the statute will have no warning of its existence. They are deprived of an opportunity to know whether or not their acts are criminal.

[4] Organized efforts to reform state codes are recent phenomena, and are not a product of legislative self-consciousness, but of outside initiative. *See, e.g.*, Joost, *Need for Recodification of Criminal Laws of Massachusetts*, 3 PORTIA L.J. 45 (1967); Merrill, *Operation Obsolescence in Oklahoma*, 48 A.B.A.J. 276 (1962); Comment, *Iowa Criminal Law—a Need for Reform*, 51 IOWA L. REV. 883 (1966).

[5] That this assumption would be well-founded, *see* the discussion in K. DAVIS, DISCRETIONARY JUSTICE 84–96 (1971) of the deliberate administrative choices by police to not enforce certain penal statutes in spite of almost universal ordinances requiring policemen to apprehend all offenders. Violation of these penal statutes does not necessarily show moral turpitude or have a personal effect on other non-consenting citizens. Givelber, *The Application of Equal Protection Principles to Selective Enforcement of the Criminal Law*, 1973 U. ILL. L. FORUM 88, 97 (1973). Examples given in the article are Sunday closing laws, post-no-bills laws, and licensing laws. *See also* Kartozian, *Dead Law—Dead Letter?*, 2 PORTIA L.J. 75, 95 (1966).

[6] In Papachristou v. City of Jacksonville, 405 U.S. 156, 164 (1972), the Court overturned a vagrancy statute of Elizabethan origin on the grounds that it was void for vagueness. Justice Douglas, writing for the majority, remarked that the activities forbidden by the statute had become part of the amenities of life incident to freedoms specifically protected by the constitution.

[7] O. W. HOLMES, THE COMMON LAW 36 (reissued, 1963).

legislatures to reflect the needs of individual justice, they are often more finely tuned to the current demands of the community. It is the use of courts in maintaining flexibility in the statutory criminal law that will be examined here. Two principal means of meeting the problems caused by obsolete statutes are available to litigants. The first is a defense to a prosecution under a statute that takes cognizance of the present social relationship between that statute and the defendant. The second is an anticipatory proceeding, such as a declaratory judgment or injunction, which permits a re-evaluation of the purpose and fairness of the statute, without requiring its prior enforcement against the litigant.

I. Defenses

Since one of the principal hazards posed by the existence of an obsolete penal statute is the possibility that it may be unexpectedly enforced, some defenses to surprise prosecutions must be made available to the defendant. Often the more mundane defenses of self-defense, alibi, duress or necessity are not available, and the defendant needs one that will exonerate him on the basis of his relationship with the statute, rather than his relationship to the act committed.

The Desuetude Defense

One historical defense which has received recent reconsideration[8] is the concept of desuetude. This doctrine was developed in Roman Law and continues to have vitality in some civil law or quasi-civil law systems.[9] Its substance is the idea that prolonged non-enforcement of a law deprives it of vitality and effectively repeals it. The doctrine is based on the philosophy that law reflects the custom of society and that custom is both the source and the equal of statutory law.[10] Where the doctrine is in use today certain proofs must be made before the concept may be invoked. These are that the statute must not have been enforced at all for a substantial period of time during which cases appropriate for application of the statute arose, and that a new practice contrary to the statute has developed and been in wide and regular use for a sufficient period of time indicating that the practice had been adopted by the community.[11]

These requirements severely limit the usefulness of the doctrine, since sporadic enforcement would prevent the statute from falling into desuetude. Also there might be some difficulty in determining whether a statute could be found partially in desuetude.[12] The problems of proof are apparent. Records of prosecutions might be hard to verify, and the establishment of a contrary custom would be dependent on a notion of community and upon the qualifications of the litigant to establish the existence and prevalence of such a custom. The use of desuetude in Scottish law demonstrates some of these problems. There, the burden of proving desuetude falls on the party challenging the statute, and it is not satisfied merely by a finding that there have been no prior prosecutions under the act for a considerable period of time, or that it was readily apparent that the actions prohibited by the statute were often and openly committed.[13]

The position of the American courts toward desuetude is unclear. It was used extensively in state courts in the nineteenth century, with regard to both English statutes applied in the colonies and to older state statutes.[14] The Supreme Court

[8] *Compare* Bonfield, *supra* note 1, *with* Rodgers, *supra* note 2.

[9] *E.g.*, Norway, Scotland. *See* Bonfield, *supra* note 1, at 402–06 for a brief account of its operation in these two countries.

[10] This philosophy was the basis of Roman law which found that the source of law was the general practice of mankind, *jus gentium*. This law was a changing emanation from society, less susceptible to abstract formulation than to ad hoc consideration on a case-by-case basis. This attitude is to be contrasted with that of English common law, which, out of a singular mixture of Roman precedent, rationalist theory, and substrate custom, arrived at the seemingly contradictory doctrines that "time does not run against the king" and "statutes in derogation of the common law will be strictly construed." These two doctrines arose from the gradual allocation of power between the judiciary and the parliament in England. The modern result is the supremacy of parliament (which originally was merely a council of the king) and the rule of stare decisis. *See* T. Plucknett, Concise History of the Common Law 309, 312, 323, 338 (1956); Gray, *supra* note 2, at 190; H. Maine, Ancient Law c. 3 (9th ed. 1883); C. H. McIlwain, Constitutionalism; Ancient and Modern 50 (rev. ed. 1947); Bonfield, *supra* note 1, at 398.

[11] Bonfield, *supra* note 1, at 398–99; Philip, *Some Reflections on Desuetude*, 43 Jurid. Rev. 260, 261 (1931).

[12] M'Ara v. Magistrates of Edinburgh, (1913) Sess. Cas. 1059, 1075. This case held that a statute might be found partly in desuetude where portions of the statute were separable.

[13] Brown v. Magistrates of Edinburgh, (1913) Scots L.T.R. 456, 457, 460. In this case members of the public sought a declaration that magistrates could not license cinemas to be open on Sunday in contravention of an old statute. The court ruled that the plaintiffs lacked standing, and thus avoided deciding whether the statute was void for desuetude. *But cf.* M'Ara v. Magistrates of Edinburgh, (1913) Sess. Cas. 1059, 1067, 1075–1076.

[14] Gray, *supra* note 2, at 196, discusses how the states adopted only those English statutes which were "suited to our condition," a phrase that gave wide discretion to the states to fashion new rules without regard to the old. Some state cases that utilized the doctrine of

even applied it once, but the precedent has dubious value.[15] It was flatly rejected as a defense in *District of Columbia v. John R. Thompson Co.*[16] The Court held that the failure of the executive branch to enforce a law did not result in its modification or repeal since the power to repeal laws is as much a legislative function as their enactment.[17] The Court recognized that this attitude could lead to hardship because of lack of notice, but it insisted that the condition of disuse was only "an ameliorating factor in enforcement." [18] The ruling in this case might be explained by the need of the Court to overrule the segregationist decision of the lower court.[19] Furthermore, the particular statutes had received some publicity immediately prior to the prosecution and the local authorities had announced that they intended to enforce the law.[20]

The later case of *Poe v. Ullman*[21] confused the issue. In that case the Court used the history of non-enforcement of the statute to claim the case was not ripe for adjudication. Without mentioning the doctrine of desuetude, the Court remarked that the statute had not been enforced for over eighty years, and that this was evidence of the actual law of the state.[22] Comparing this with *Thompson*, the Court accepted the concept of desuetude in one situation, but not in another without regard to consistency. Recent federal cases in the lower courts indicate an unwillingness to apply the doctrine because of uncertainty over its legal acceptance.[23]

The indecision of the Court could be attributed to the self-restraint exercised by the Court in order to avoid the accusation that it had usurped legislative functions. It should be recalled that when judge-made law becomes obsolete, the courts do not hesitate to disregard stare decisis and "repeal" their own rules.[24] These changes in judicially-created rules encompass the interpretation of a particular statute.[25] This activity could be characterized both as an ongoing effort by the courts to cooperate with the legislatures in maintaining the statutes as timely reflections of current mores, and as a check on untrammeled legislative power.[26] From the point of view of each of these functions,

desuetude are: James v. Commonwealth, 12 S. & R. 220 (1805) (Pennsylvania); O'Hanlon v. Myers, 10 Rich. 128 (1856) (South Carolina). *Contra*, Pearson v. International Distillery, 72 Iowa 348 (1887); Snowden v. Snowden, 1 Bland 550 (1829) (Maryland). *See also* Note, 64 HARV. L. REV. 1181, 1187 (1951).

[15] Adams v. Norris, 64 U.S. 353 (1860). The action arose in California and the state law involved was interpreted in the civilian tradition.

[16] 346 U.S. 100 (1953). In this case the Court upheld convictions under two acts promulgated in 1872 and 1873 making it criminal to segregate the races in public facilities. The acts had never been enforced.

[17] *Id.* at 114. The Court quoted two old state cases as authority for its action.

[18] *Id.* at 117.

[19] C. J. Stephens of the Court of Appeals had said,

> [T]he enactments having lain unenforced for 78 years, in the face of a custom of race disassociation in the District, the decision of the municipal authorities to enforce them now . . . was a determination that the enactments reflect a social policy which is now correct, although it was not correct—else the enactments would have been enforced heretofore.

John R. Thompson Co., Inc. v. District of Columbia, 203 F.2d 579, 592 (D.C. Cir. 1953).

The Court's concern was probably not confined to Judge Stephens' statement, however. This case predated the Civil Rights Legislation of the 1960's and most of the other Civil Rights Legislation available was of the same vintage as the acts at issue here. To hold these acts void for desuetude would effectively void the others, and deal a severe blow to desegregation efforts.

[20] Reply Brief for District of Columbia at 14–15, District of Columbia v. John R. Thompson Co., 346 U.S. 100 (1953).

[21] 367 U.S. 497 (1961).

[22] *Id.* at 502.

[23] *See, e.g.*, United States v. Elliott, 266 F. Supp. 318, 326 (S.D.N.Y. 1967), where the district court rejected desuetude as a defense to a criminal prosecution under a previously unenforced federal statute prohibiting a conspiracy in the United States to destroy foreign property overseas. The court mentioned that the validity of the defense was unsettled.

[24] A rather frank example of this in another area of law is Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970), where the Court disposed of the wrongful death rule of an earlier case, The Harrisburg, 119 U.S. 199 (1886), on the grounds that it not only had no historical justification, but that it had been largely abandoned. The Court found that subsequent state and federal legislation had indicated that the former rule was no longer an expression of present policy.

An earlier case, Glidden Company v. Zdanok, 370 U.S. 530 (1962), stated that stare decisis is not so rigidly applied in constitutional as in non-constitutional cases. The Court said, though, that when Congress acts on its own understanding and this conflicts with earlier cases, then the policy underlying the doctrine of stare decisis—protection of generated expectancies—actually militates in favor of re-examining the decisions. *Id.* at 543.

[25] The judicial power to interpret statutes is not without limits. To preserve the separate integrity of judicial and legislative functions, courts have evolved rules of statutory interpretation, the most permissive of which is that which mandates that the legislative purpose should be adhered to. Frequent resort to this role permits a court to change the meaning of the words of a statute, and thus allows the court more discretion in interpretation than it might have in the interpretation of case law under the rules of stare decisis. E. H. LEVI, AN INTRODUCTION TO LEGAL REASONING 32 (1970).

[26] Of course, there are dangers in permitting the judiciary too much freedom to change its interpretations of statutes. A statutory interpretation becomes a gloss to the statute, and in effect a quasi-legislative rule. Therefore, greater judicial consistency is needed in this instance. *Id.*

desuetude should be considered a valid defense to a criminal prosecution under an obsolete statute.

A recent treatment of the doctrine of desuetude suggests a legislative solution to the problem of obsolete statutes.[27] An amendment to the mistake of law defense of the Model Penal Code is proposed by one writer.[28] This amendment would read,

> (3) A belief that conduct does not legally constitute an offense is a defense to a prosecution for that offense based upon such conduct when: . . .; or
>
> (c) he acts in reasonable reliance upon a clear practice of non-enforcement of the statute or other enactment defining the offense by the body charged by law with responsibility for enforcement, unless notice of intent to enforce the statute or other enactment is reasonably made available prior to the conduct alleged.[29]

It is not difficult to envision a penal statute under which prosecutions would be very rare, although the social policy giving rise to the statute would continue to be strong.[30] The proposed defense does not differentiate this kind of situation from one of genuine obsolescence. Furthermore, this defense is grounded on the acceptance of a more broadly defined mistake of law defense which has yet to gain acceptance.

Defense of Mistake of Law

The traditional view toward this defense is that expressed by Holmes, "[T]o admit the excuse of ignorance of the law at all would be to encourage ignorance where the law-maker has determined to make men know and obey, and justice to the individual is rightly outweighed by the larger interests on the other side of the scales." [31] Culpability is not subjective, but objective. The concept of ignorance of the law and that of mens rea are closely intertwined. In the early development of these concepts it was felt that if a mistake of law negated culpability, proof of specific intent should be required to make a prima facie case.[32] This was the rarer case, however, and since most criminal law was in tune with the morals of the time, mistake of law was not a defense.[33] Consequently, ignorance of the law can presently negate specific intent, but it is not an excuse for crimes not requiring it.[34] The distinction between specific and general intent can be illustrated by the difference between a man who takes a raincoat from a restaurant under the impression that it is his, thus having no intent even to perform the act which constitutes the crime, and the man who buys stolen goods, knowing that they are stolen, but unaware that his action is a criminal offense. In the latter case intent to perform the act of buying the goods existed, although intent to breach the statute did not. In the latter case no defense of mistake is available, since the rule for criminal intent is that intent to commit the act is what is required, not intent to breach the law.

Justification for the rule always returns to the historical view that law, as the reflection of mores, is knowable by all. In present society, however, where there is a sharp increase in crimes requiring no mental state, and where only the most obvious, heinous, and publicized of crimes will be known to most of the population, the justification for the rule becomes convenience. The problems of proof of ignorance of the law would rival those of the insanity defense for their complexity and hazards.[35] There is also the view that the enforcement of new or forgotten laws serves to inform the public of their existence, and thus speeds up their assimilation into community mores.[36] This latter theory seems based on the assumption made by Holmes that "public policy sacrifices the individual for the common good." [37] It also implies that the mores of the community are not developed from within, but im-

[27] Rodgers, *supra* note 2, at 25–28.

[28] Model Penal Code 2.04(3).

[29] Rodgers, *supra* note 2, at 28.

[30] *See, e.g.*, the penal statute in United States v. Elliott, 266 F. Supp. 318 (S.D.N.Y. 1967), which prohibited conspiracies in the United States to destroy specific property abroad in countries with which the United States was at peace.

[31] O. W. Holmes, The Common Law 48 (reissued 1963).

[32] Hall & Seligman, *Mistake of Law and Mens Rea*, 8 U. Chi. L. Rev. 641, 644 (1941). This was evident in the crime of burglary where mistaken entry would exonerate the burglar. Hence, the common law developed the requirement that the prosecution prove that the burglar broke and entered with the intent to commit a felony.

[33] *Id.*

[34] N. LaFave & A. Scott, Criminal Law 357 (1972).

[35] *Id.* at 364. Hall & Seligman, *Mistake of Law and Mens Rea*, 8 U. Chi. L. Rev. 641, 647, (1941) suggest an outline for a general defense of mistake of law that requires a defendant prove "(1) that he did not know that his act was criminal under the law; (2) that if it was morally wrong according to mores, he did not know that either; and (3) that both beliefs were reasonable on his part." Aside from their objection that the defense would be unworkable because of problems of proof, they argue that allowing ignorance of the law as a defense encourages ignorance.

[36] Hall & Seligman, *Mistake of Law and Mens Rea*, 8 U. Chi. L. Rev. 641, 648 (1941).

[37] O. W. Holmes, The Common Law 48 (reissued 1963).

posed from without. This implication negates the historical justification for the assumption that men know the law.

The defense has been denied in cases where defendants asserted the existence of a custom contrary to the statute violated.[38] A similar result attaches when a statute is violated in the belief that it is unconstitutional and its constitutionality is later upheld.[39] In *Cox v. Louisiana*[40] the Court found that conviction for conduct that had been expressly authorized by police was a form of entrapment. Only in circumstances where the defendant has relied on certain misleading conduct by the state does the defense exist.[41] Thus, in most prosecutions under obsolete statutes, the defense would not be available unless obsolescence were considered implicit permission by the state to perform the prohibited act, and such implicit permission constituted entrapment.

Defense of Absence of Fair Notice

One could legitimately dispute whether this defense exists. It was employed in *Lambert v. California*[42] where the Supreme Court reversed a conviction under a Los Angeles municipal ordinance requiring the registration of all persons previously convicted of a felony. The Court found the conduct involved wholly passive (a mere failure to register), and that this characteristic differentiated the act from those which would "alert the doer to the consequences of his deed."[43] Justice Douglas wrote that the concept of notice was deeply ingrained in the concept of due process, especially in the myriad of situations where a penalty of forfeiture might be suffered for a mere failure to act. He also wrote, "[W]here a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process."[44] This statement seems to imply that in such situations the state would have the burden of proving that the defendant had reason to know of the ordinance. This presumption is contrary to the assumed knowledge of the law found in the mistake of law defense. *Lambert* has been narrowly construed in subsequent cases involving similar facts.[45]

The language in *Lambert*[46] concerning the absence of circumstances which might move a person to inquire whether his conduct is legal remains significant, however. It indicates that there are circumstances in which there is no duty of inquiry, and consequently no legal responsibility. The duty would doubtless be present where the act was of dubious legality, endangered the public, or was so often repeated by the defendant that he could fairly be charged with knowledge of its unlawfulness. It could be argued that violation of an obsolete statute would fall within the *Lambert* ruling, since there probably would be no circumstances to put the defendant on notice that his conduct was illegal.[47]

The Void for Vagueness Defense

Courts have long refused to uphold convictions under penal statutes that are too indefinite to be applied.[48]

Presently, vagueness as to the persons to whom the statute applies, the conduct forbidden, or the punishment which may be imposed can violate fifth

[38] Commonwealth v. Doane, 55 Mass. 5 (1848).

[39] Holdridge v. United States, 282 F.2d 302 (8th Cir. 1960).

[40] 379 U.S. 559 (1965). The defendants were convicted of picketing a state courthouse contrary to a statute prohibiting demonstration "near" a courthouse. Before arriving at the courthouse the demonstrators were advised by the sheriff that if they kept 101 feet from the courthouse they would not be in violation of the statute. After arriving there they were permitted to meet for a few minutes, and then were ordered to disperse because their continued presence beyond the time limit set by the police for the demonstration constituted a violation of the law. The court found that the sheriff had advised the demonstrators that their demonstration was not within the proscription of the statute. The Court quoted Raley v. Ohio, 360 U.S. 423, 426 (1959), to support the holding that the sheriff's conduct was "an indefensible sort of entrapment by the State—convicting a citizen for exercising a privilege which the State had clearly told him was available to him." As to the time limit on the demonstration imposed by the police, the Court found that the statute did not permit such an exercise of unfettered discretion.

[41] Hall & Seligman, *Mistake of Law and Mens Rea*, 8 U. CHI. L. REV. 641, 677–83, (1941), discuss some cases where executive behavior made the enforcement nugatory.

[42] 355 U.S. 225 (1957).

[43] *Id.* at 228.

[44] *Id.* at 229–30.

[45] Reyes v. United States, 258 F.2d 774 (9th Cir. 1958); United States v. Juzwiak, 258 F.2d 844 (2d Cir. 1958). These later cases relied on the distinction between active and passive conduct to uphold the violation of registration statutes when the defendants were entering or leaving the country.

[46] 355 U.S. 225, 229 (1957).

[47] Failure to observe an obsolete statute would seem to come within the *Lambert* notion of "passive" behavior. First, a defendant would not be acting in an extraordinary fashion that might lead him to consider the legality of his actions. Second, if there is total nonenforcement, there would be no reason to know of the existence of the statute.

[48] In United States v. Brewer, 139 U.S. 278 (1891), the Court overturned convictions on vagueness grounds without reference to any particular constitutional theory.

and fourteenth amendment due process.[49] The rationale behind the rule is that all persons are entitled to be informed as to what the statute commands or forbids. Two evils of vagueness become the primary bases for application of the doctrine. These are that a statute "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," [50] and that its vagueness encourages arbitrary and erratic arrests and convictions.[51] The fair notice requirement is not so liberal as its statement would appear. If the scope of the statute is ascertainable with legal advice, sufficient warning might be found to uphold the statute.[52] The fair notice requirement delimits the presumption that every man knows the law. The hazards of arbitrary enforcement of an overvague statute[53] are weighed against the "principle of necessity." [54] If there is no clearer way to phrase the statute, or no better way to formulate enforcement powers, then the court must decide the relative necessity of the statute in its proffered form.[55]

A recent Supreme Court case involving convictions under an archaic vagrancy statute illustrates the application of these principles in an obsolescence situation.[56] The Court found the statute void for vagueness both on the grounds of absence of fair notice and of risk of arbitrary enforcement. The majority opinion pointed out that the poor, minorities, and average householders would not be alerted to the meaning, impact, or even existence of the vagrancy laws. This statement seems to broaden the fair notice requirement considerably, and its language is reminiscent of *Lambert*. Justice Douglas, author of the opinion, also pointed out that a mistake of law (lack of mens rea) defense would not be available here since the statute did not require specific intent.[57] Since the statute contained no standards that could govern the use of the ordinance, the Court found that it provided an opportunity to police to harass those persons whose life-style they found inappropriate.[58] It was pointed out that the archaic terms of the statute were derived from the poor laws of Elizabethan England and had no present meaning or application, nor did they proscribe conduct that was presently constitutionally protected.[59]

The Court's emphasis on this last point leads to the conclusion that the real basis for the opinion was that the statute proscribed conduct neither

[49] Lanzetta v. New Jersey, 306 U.S. 451 (1939). In this case the Court found that a statute proscribing punishment for certain persons judicially declared to be gangsters was void for vagueness. The Court said that,

> [N]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. . . . [A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.

Id. at 453.

[50] United States v. Harriss, 347 U.S. 612, 617 (1954).

[51] Thornhill v. Alabama, 310 U.S. 88, 97 (1940).

[52] N. LaFave & A. Scott, Criminal Law 87 (1972). Ostensibly the test of certainty for a statute as set forth in *Lanzetta*, and in subsequent federal cases, is that a statute must be sufficiently complete and precise to inform reasonable men what conduct is prohibited. Turf Center, Inc. v. United States, 325 F.2d 793, 795 (9th Cir. 1964); United States v. Dellinger, 472 F.2d 340, 355 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973). An interpretation of this standard which limits knowledge to that which the individual defendant possesses would contradict cases that do not permit a mistake of law defense when a defendant acts upon the considered advice of his attorney. In the latter case the law imputes the knowledge, or lack thereof, of the attorney to the client. Sinclair v. United States, 279 U.S. 263 (1929). The policy consideration favoring this view of the fair notice requirement is the same as that which operates to limit the availability of mistake of law defenses in general, that the law should not be formulated to encourage ignorance.

[53] The hazards are related to claims of denial of equal protection in enforcement of the law. There can be a risk that the vagueness of the statute allows too much interpretive discretion on the part of police, Shuttlesworth v. City of Birmingham, 382 U.S. 87 (1965), or that it lends itself to use by police or prosecutors as a tool of discrimination, Thornhill v. Alabama, 310 U.S. 88 (1940), or that it prevents a judge from properly instructing a jury. United States v. L. Cohen Grocery Co., 255 U.S. 81 (1921).

[54] Note, 109 U. Pa. L. Rev. 67, 94–95 (1960).

[55] In exercising this power, courts will consider, the nature of the individual freedom menaced, the probability of its violation, the potential deterrent effect of the risks of irregularity and violation upon its exercise, and the practical power of the Court itself to supervise the scheme's administration.

Id. at 94.

[56] Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).

[57] *Id.* at 163.

[58] *Id.* at 170. The Court did not attempt to rewrite the statute, but merely asserted that any vagrancy statute must fit within fourth and fourteenth amendment standards of probable cause. *Id.* at 169. Although the Court did not specifically treat the question, the absence of administrative controls on the exercise of police discretion under the vagrancy statute made judicial intervention necessary. Most states have statutes requiring police to faithfully enforce the law and thus have not developed concomitant regulations governing choices to arrest or not arrest. K. Davis, Discretionary Justice 83–85 (1971). Whether such guidelines are constitutionally required is not known. Cases like *Papachristou* and those in the selective enforcement area (see next section) seem to imply that the absence of guidelines combined with arbitrary or discriminatory enforcement may cause constitutional infirmity, but they do offer concrete standards for administration by the police.

[59] *Id.* at 164.

offensive nor harmful to society. From this starting point the Court found the statute's intent and language beyond the comprehension of the people who would fall within its scope, and subject to grave abuse by law enforcement authorities. This finding is akin to a finding of desuetude; the social utility of the statute had long since vanished, and new customs and notions of liberty arisen in its place.

Papachristou v. City of Jacksonville is an extreme case; most obsolete[60] statutes do not clearly demonstrate the vagueness risks resulting from their improper use. Many obsolete statutes would have a clear meaning on their face and contain sufficient guidelines for their proper enforcement, but could still be subject to enforcement abuse. Like a statute that is over-vague, a statute that is a forgotten relic deprives citizens of the opportunity to avoid criminal liability. To apply the vagueness doctrine to a greater variety of obsolete statutes would require the development of a test that a statute be found unconstitutionally vague if it were merely so out of keeping with modern practice that no notice could be assumed of its existence. This test would be virtually identical to a broad interpretation of *Lambert*.[61]

Equal Protection in Enforcement Defense

This defense comes into play when a facially constitutional statute is discriminatorily enforced, infringing on the protected rights of the accused. The leading case for the application of equal protection principles to enforcement of a statute is *Yick Wo v. Hopkins*.[62] Here the Court reversed the convictions of a large group of San Francisco Chinese laundry owners who were singled out as violators of a statute requiring laundries to be built of brick or stone.[63] The Court said,

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.[64]

The defense has developed in conformity with a policy against broadening the defense to the point where it would apply whenever all violators of a statute were not prosecuted. Full enforcement is not only an impossibility, it is not even desirable.[65] Therefore, it is not enough to allege that the statute has not been applied against others who have committed the same acts. Some deliberate classification by an unjustifiable standard such as race, religion or wealth must be affirmatively proved by the defendant in order to overcome his conviction.[66] This is an exceedingly heavy burden of proof. Proving the classification might require penetration of the unwritten enforcement policies of a law enforcement agency, at the very least. A recent Seventh Circuit case, *United States v. Falk*,[67] somewhat alleviates this burden by ruling that when a defendant alleges intentional, purposeful discrimination and sufficient facts to raise a reasonable doubt about the prosecutor's purpose, then the presumption of good faith enforcement is overcome. The defendant does not have to show that he was a member of a

[60] 405 U.S. 156 (1972). Recall that the definition of obsolescence is broader than that of desuetude. Desuetude requires non-enforcement, whereas obsolescence does not. *See* note 1 *supra*.

[61] 355 U.S. 225 (1957). The Court in *Lambert* stressed that certain acts would put a defendant on notice of their illegality. This idea has become established in void for vagueness cases as well. If the defendant's conduct was of an inherently evil nature, he could be assumed to realize that it was proscribed, even if he was unaware of his status under a particular statute. Hygrade Provision Co. v. Sherman, 266 U.S. 497 (1925); Miller v. Strahl, 239 U.S. 426 (1915). This implied notice speaks to the fair notice requirement of a penal statute. Another circumstance which would prevent a successful assertion of void for vagueness is where such action appears to be a bad faith effort to evade the law. United States v. Kahringer, 345 U.S. 22 (1953).

[62] 118 U.S. 356 (1886).

[63] *Id.* The Court looked at the administration of the ordinance and concluded that it was discriminatorily applied in this case. The ordinance seemed directed particularly at laundries owned by Chinese. The laundry owners in question were denied permission to operate their laundries, whereas white laundry owners were not, and of the many arrested for noncompliance, only one person was not Chinese.

[64] *Id.* at 373–374. *Cf.* K. DAVIS, DISCRETIONARY JUSTICE ch. 3 (1971), which maintains that partial enforcement, in addition to being illegal, diminishes respect for the law, especially when enforcement is left to the individual discretion of the police. On the defense of selective enforcement, *see generally*, *The Right to Nondiscriminatory Enforcement of State Penal Laws*, 61 COLUM. L. REV. 1103 (1961).

[65] Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543, 587 (1960).

[66] Oyler v. Boles, 368 U.S. 448, 456 (1962).

[67] 479 F.2d 616 (7th Cir. 1973). The defendant, who had been active in the draft resistance movement, was convicted for failure to carry his selective service card. The defendant proved to the court that charges for not carrying cards were usually dropped pursuant to written policy of the Selective Service System, and that the Assistant United States Attorney had singled him out because of his draft counseling activities.

class but merely that he was selected out for discriminatory treatment.[68]

Some writers suggest that the resurrection of a totally unenforced penal statute would clearly violate equal protection principles.[69] This calls into question whether the use of an obsolete statute that was *occasionally enforced*, like the one in *Papachristou*,[70] would also be violative of equal protection. It is more likely that a court would retreat to the view that in the absence of actual proof of discriminatory use of the statute, irregular use alone does not violate equal protection. Sporadic enforcement over a period of time does not necessarily lead to the conclusion that the statute has ceased to serve its purpose, or that it is no longer part of the mores of the community. Moreover, the courts are reluctant to interfere in the discretionary decisions of law enforcement officials and prosecutors unless substantial evidence of abuse appears. Efficient administration is given high priority.[71]

Thus the equal protection defense does not reach a primary danger of obsolete statutes. It is ineffective in the face of long-term sporadic enforcements. This is more a reflection of the exercise of overly broad discretionary powers than is a policy of total non-enforcement. The latter shows a certain degree of prosecutorial integrity, reflecting a willingness of law enforcement officials to recognize social reality, while the former activity assumes the guise of quasi-legislative decision. The decision to prosecute then becomes political.[72]

Utility of the Defenses

It is apparent that all of these defenses are interrelated. At the core of each is a balance of the interests of a particular defendant prosecuted under an obsolete statute against the interest of the state in preserving respect for the law. From the defendant's point of view the question is one of the scope of his penal responsibility; from the prosecution's, it is a mix of consistency and fairness to the particular defendant with the long term need for a coherent, predictable, and efficient system of law enforcement. Both parties can find guidance by examining the social purpose of the statute involved, the present ends served by its enforcement, and its accommodation to present custom. However, none of these considerations alone will serve as acceptable reasons for abrogating the statute, unless some other well-accepted defense can be proved.

The desuetude defense is the one which most directly reaches the real issue at stake. Its effect is to rule that since the statute is no longer in conformity with custom, it is no longer law. However, the concept has not gained acceptance by the Supreme Court or by a significant number of states. It is presently viewed as an usurpation of legislative power. However, as is evident from some cases, courts are not blind to the political reality of later custom effectively repealing earlier statutes.[73] The political reality has just not yet been enshrined in an accepted constitutional doctrine.

The mistake of law defense is limited by policy considerations. One exception to its general unavailability is when an officer of the state in a position to give competent advice on the state of the law, does so, and the defendant relies upon such advice to his detriment.[74] A tacit agreement not to enforce a statute will not enable a person to rely on continued non-enforcement.

The fair notice defense illustrated by *Lambert* has been called a "derelict on the waters of the law."[75] Indeed it now only stands for the proposition that where an affirmative duty is imposed upon a citizen, and violation of the duty requires no affirmative act, an absence of knowledge concerning the duty excuses liability, if the circumstances are such that the citizen had no reason to know of the existence of the duty.[76] If the *Lambert* ruling were more broadly applied, it would dictate that ignorance of an obsolete statute would be an excuse from liability, since no circumstances would exist to alert the

[68] The court imposed the burden of going forward with proof of non-discrimination on the government, and directed that the government must present compelling evidence if the burden were to be met. *Id.* at 624.

[69] *Compare* Rodgers, *supra* note 2, at 10–12 *with* Givelber, *The Application of Equal Protection Principles to Selective Enforcement of the Criminal Law*, 1973 U. ILL. L. FORUM 88, 97 (1973). Rodgers finds the distinction between total non-enforcement and occasional enforcement crucial to a decision on whether the enforcement violates equal protection. Givelber, however, stresses the qualitative differences between penal statutes, and concludes that those involving moral turpitude are more prone to regular and fair enforcement than those which have little, if any, personal effect on unconsenting others.

[70] 405 U.S. 156 (1972).

[71] Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543 (1960).

[72] Bickel, *The Supreme Court—Forward: The Passive Virtues*, 75 HARV. L. REV. 40, 63 (1961).

[73] Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Poe v. Ullman, 367 U.S. 497 (1961).

[74] Cox v. Louisiana, 379 U.S. 559 (1965).

[75] This was J. Frankfurter's prediction in his dissent, 355 U.S. 225, 232 (1957).

[76] Haddad, *The Mental Attitude Requirement in Criminal Law—And Some Exceptions*, 59 J. CRIM. L.C. & P.S. 4, 23 (1968).

defendant to the existence of the prohibition. A person would intend to do the act, but without any awareness of its wrongness, in either the moral or the legal sense. Unfortunately, this intent is enough to bestow criminal liability, unless the common law conception of intent is changed. Presently mere intent to do the act is sufficient; intent to violate the law is not required.[77] This rule is based upon the sound assumption that to require intent to violate the law would open a loophole that would be exploited to the detriment of the public, making broader application of *Lambert* unlikely.

The void for vagueness defense is also confined. It is limited to occasions where the statute is unclear as to the conduct or persons that it regulates. It does not extend to situations where the meaning and scope of the statute have become ambiguous through non-use, or an unwritten state policy of non-enforcement.[78] Many obsolete statutes would be sufficiently precise on their face, but would impose similar problems of lack of fair notice and risk of arbitrary enforcement to unconstitutionally vague statutes. A community would have no awareness of the prohibition, and thus no opportunity to avoid falling within its prohibitions, and law enforcement officials would have a power to single out victims for enforcement that would exceed any power originally granted under the statute by the legislature. They would be utilizing the statute contrary to legislative intent.

The vagueness defense does not really overlap the defense of mistake of law. In the case of a vague statute the latter would be available only when the defendant's ignorance of the law deprived him of the specific intent required to prove the offense under the statute. The former is based on a constitutional guarantee of certainty and disclosure. It comes into effect only when the statute is such that reasonable men would be ignorant of its meaning and scope, even if they read its provisions. Intent to perform acts exists, but because the limits of the prohibition are so unclear, the acts performed may or may not fall within the purview of the statute. The void for vagueness doctrine also stems from the rule of statutory interpretation that forbids the extension of a criminal statute by analogy, and calls for a strict construction of the statute in favor of the defendant.[79]

[77] State v. Downs, 116 N.C. 1064, 21 S.E. 689 (1895).

[78] Vagueness as a result of judicial or quasi-judicial construction of a statute would not result in the abrogation of the statute. This situation could be remedied less drastically by reinterpretation of the statute.

[79] 3 J. G. SUTHERLAND, STATUTORY CONSTRUCTION 5604 (Horack Ed. 1943). Although the rule of statutory construction predates our constitution, it probably had its root in a desire to protect individual liberties and preserve the integrity of the law.

The equal protection in enforcement defense has been limited by the social desire to retain some discretion in the law enforcement process. Its existence acts as a check only on the more extreme cases of abuse of discretion. Furthermore, it places a heavy burden of proof on the defendant.

The principal fault with all of these defenses is that they are too little too late. Aside from the limits of their application, they can only be invoked after prosecution is initiated. The accused is subjected to the panoply of harms accompanying a criminal charge. Furthermore, they focus on the individual defendant rather than upon the social harm caused by an obsolete statute. Successful application of these defenses will not always result in the abrogation of the statute but will merely diminish its effect on the individual before the court. The next section of this comment examines another approach to obsolete statutes: an anticipatory challenge to their constitutionality.

II. JUSTICIABILITY PROBLEMS IN AN ANTICIPATORY PROCEEDING TO CHALLENGE THE CONSTITUTIONALITY OF AN OBSOLETE STATUTE

Justiciability requirements have two bases, one mandatory and the other discretionary.[80] The first, the Article III case or controversy requirement[81] dictates that litigants must allege "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of the issues upon which the court so largely depends for illumination of difficult constitutional questions." [82] The case or controversy limitation is a rule of power. It describes the courts' subject matter jurisdiction. The second basis was well encapsulated in Brandeis' concurring opinion in *Ashwander v. T.V.A.*,[83] where he set forth seven

[80] Barrows v. Jackson, 346 U.S. 249, 255 (1953).

[81] U.S. CONST. art. III.

[82] Baker v. Carr, 369 U.S. 186, 204 (1962).

[83] 297 U.S. 288, 346–48 (1936). The rules are: (1) the Court will not pass upon the constitutionality of legislation in a friendly, non-adversary proceeding. . . . (2) the Court will not anticipate a question of constitutional law in advance of the necessity of deciding it. . . . (3) the Court will not formulate a rule of constitutional law broader than is required by the precise facts to which it is applied. . . . (4) the Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. . . . (5) the Court will not pass upon the validity of a statute upon complaint of one who fails to show

rules of judicial restraint. These rules are distilled from earlier opinions, and represent rules of decision derived from the gloss put on the words "case" and "controversy" in the Constitution.[84] They are applied in cases where the Court has jurisdiction, but where other considerations make the Court reluctant to pass on the merits. These other considerations can be expressed in terms of necessity. The Court balances the relative importance of adjudicating the merits in a particular case, against the policy behind judicial restraint.[85] The Court applies both sets of rules at the threshold of the case, before treating the merits. This statement represents more the ideal than the reality, however. Threshold questions of standing and ripeness often cannot be answered without consideration of the merits.[86]

Satisfaction of these mandatory and discretionary requirements can be particularly difficult when the constitutional validity of an obsolete statute is challenged. Examination of one challenge will reveal the need to adjust the discretionary basis of justiciability. The following portion of this comment will discuss the adjustment of standing and ripeness doctrines to first amendment and public rights cases and show how the discretionary rules evolved in those cases can be fruitfully applied to the anticipatory challenge of an obsolete statute.

The Poe v. Ullman Problem

In *Poe v. Ullman*[87] two married couples and their doctor brought a suit for a declaratory judgment that two Connecticut statutes[88] prohibiting the use of and advice on birth control were unconstitutional. Both couples showed that future pregnancies would be dangerous to their physical and mental health and alleged that the threat posed by the statutes prevented them from obtaining preventive medical advice for the protection of their health. In the companion case, their doctor joined in their claims and alleged that the statutes were depriving him of liberty and property without due process of law. All plaintiffs alleged that the State's Attorney intended to prosecute breaches of state law and that he considered both the giving of advice on contraception, and the use of contraceptives to be contrary to state law. The Supreme Court seized upon the general nature of this last claim and elicited the statute's enforcement history in oral argument,[89] and then dismissed the claim for lack of ripeness. Mr. Justice Frankfurter wrote in the majority opinion,

> The lack of immediacy of the threat described by these allegations might alone raise serious questions of non-justiciability of appellants' claims. . . . We were advised by counsel for appellants that contraceptives were commonly and notoriously sold in Connecticut drug stores. Yet no prosecutions are recorded; and certainly such ubiquitous, open, public sales would more quickly invite the attention of enforcement officials than the conduct in which the appellants wish to engage— . . . What was said in another context is relevant here. "Deeply embedded traditional ways of carrying out state policy . . ." —or not carrying it out— "are often tougher and truer law than the dead words of the written text." [90]

The Court added that the statute's eighty year his-

that he is injured by its operation. . . . (6) the Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits. . . . (7) When the validity of an act of the Congress is drawn in question . . . the Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.

[84] The gloss has been historically derived. Justice Frankfurter wrote that standing and justiciability meant,

> that a court will not decide a question unless the nature of the action challenged, the kind of injury inflicted, and the relationship between the parties are such that judicial determination is consonant with what was, generally speaking, the business of the Colonial courts and the courts of Westminster when the Constitution was framed.

Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 150 (1951).

[85] The policy was explained by Justice Rutledge in Rescue Army v. Municipal Court, 331 U.S. 549 (1947) as follows,

> The policy's ultimate foundations, some if not all of which also sustain the jurisdictional limitation, . . . are found in the delicacy of that function, particularly in view of possible consequences for others stemming also from constitutional roots; the comparative finality of those consequences; the consideration due to the judgment of other repositories of constitutional power concerning the scope of their authority; the necessity, if government is to function constitutionally, for each to keep within its power, including the courts; the inherent limitations of the judicial process, arising especially from its largely negative character and limited resources of enforcement; withal in the paramount importance of constitutional adjudication in our system.

Id. at 571.

[86] For a discussion of this problem see Lewis, *Constitutional Rights and the Misuse of "Standing,"* 14 STAN. L. REV. 433 (1962).

[87] 367 U.S. 497 (1961). Plaintiff Poe was granted the use of a fictitious name by the Court.

[88] CONN. GEN. STAT. §§ 6246, 6562 (1930). The latter section is a general accessory provision.

[89] 29 U.S.L.W. 3260 (1961).

[90] 367 U.S. 497, 501–02 (1961).

tory demonstrated that a tacit agreement existed on the part of the prosecutors not to enforce these statutes.[91]

The view of justiciability expressed in *Poe* is consistent with earlier decisions. The Court found that some specific threat of enforcement was necessary to show ripeness, and that a mere allegation that the State's Attorney stood ready to enforce all laws was not sufficient.[92]

Although the plaintiffs in *Poe* sought declaratory relief, the precedents the Court applied dealt with injunctive relief. The standards for the two are very different. Injunctive relief requires a prior showing of irreparable injury. A mere threat of prosecution is not sufficient to show this injury[93] except in circumstances of harassment by law enforcement officials,[94] or where the statute challenged was self-executing.[95] Early cases under the Declaratory Judgment Act[96] required a showing of irreparable injury[97] even though the remedy was intended to eliminate the necessity of having to act at one's peril, or abandon one's rights because of a fear of incurring damages.[98]

Justice Frankfurter, author of the majority opinion in *Poe*, indicated in *Joint Anti-Fascist Refugee Comm. v. McGrath*[99] that the standard of justiciability applicable would depend upon whether the courts find the issue appropriate for a decision at that time and the hardship of denying judicial relief. Other cases decided about the same

[91] *Id.* at 508.

[92] The Court quoted *Ex parte* La Prade, 289 U.S. 444 (1933), and CIO v. McAdory, 325 U.S. 472 (1945) as authority. The former case considered whether a state attorney general could be substituted for his predecessor in a suit to enjoin enforcement of a statute when it was not specifically alleged that the new state attorney general intended to enforce the statute. This is based on *Ex parte* Young, 209 U.S. 123 (1908) which is the fountainhead of federal injunctions against state prosecutions. It held that such an injunction is justified where state officers threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce an unconstitutional act against the parties affected. *Id.* at 156.

In the latter case the Court declined to rule on the constitutionality of a state statute regulating labor unions since the statute had not been authoritatively construed by the state courts. This is an illustration of the use of the "abstention doctrine." Federal courts will often abstain from considering the constitutionality of a state statute until the state courts have authoritatively construed it. This is in the hope that the state construction will eliminate the necessity of considering the statute's constitutionality. Spector Motor Service, Inc. v. McLaughlin, 323 U.S. 101 (1944). The use of this doctrine shows a decision to abstain to be essentially a determination of justiciability. Comment, *Threat of Enforcement—Prerequisite of a Justiciable Controversy*, 62 COLUM. L. REV. 106, 116 (1962). It added, as dictum, that the case before them would not have been justiciable anyway since the state officials had agreed not to enforce the statute pending a ruling on its validity. CIO v. McAdory, 325 U.S. 472 (1945).

[93] This attitude towards injunctions against enforcement can be illustrated by language from Douglas v. City of Jeanette, 319 U.S. 157 (1943) where the majority said,

> No person is immune from prosecution in good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guarantees, is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction. *Id.* at 163.

[94] Cameron v. Johnson, 390 U.S. 611 (1968); Dombrowski v. Pfister, 380 U.S. 479 (1965).

[95] Pierce v. Society of Sisters, 268 U.S. 510 (1925). In this case the Court invalidated a statute over a year before it was to become effective. The statute required all parents to send their children to public schools. A parochial school and a military academy challenged the statute on first and fourteenth amendment grounds. They were allowed recovery on the basis of the immediate economic injury they would suffer when parents, in anticipation of enforcement of the act, withdrew their children from plaintiffs' schools. *Id.* at 534–35. A similar example of relief granted when the statute is self-enforcing is Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), where a challenge to local zoning ordinances was permitted before administrative remedies had been exhausted because the realty company argued that no cooperating purchaser could be found to aid in seeking administrative remedies.

[96] 28 U.S.C. § 2201 (1970).

[97] An example is United Public Workers v. Mitchell, 330 U.S. 75 (1947), which was one of the principal authorities cited in *Poe*. In this case twelve government employees sought a declaratory judgment that Section 9(a) of the Hatch Act which forbids public employees from taking any part in political management or political campaigns was unconstitutional. They also requested an injunction against its enforcement. Only one of the twelve had violated the act; the others had sworn out affidavits concerning the activities they intended to engage in. These eleven were denied standing by the Court.

> A hypothetical threat is not enough.... It would not accord with judicial responsibility to adjudge, in a matter involving constitutionality, between the freedom of the individual and the requirements of public order except when definite rights appear upon the one side and definite prejudicial interferences upon the other. *Id.* at 90.

The Court said that it could,

> only speculate as to the kinds of political activity the appellants desire to engage in or as to the contents of their proposed public statements or the circumstances of their publication. *Id.*

For more examples, see *Threat of Enforcement—Prerequisite of a Justiciable Controversy*, 62 COLUM. L. REV. 106, 117–24 (1962).

[98] S. Rep. No. 1005, 73rd Cong., 2d Sess. 2 (1934).

[99] 341 U.S. 123, 152–153 (1951). In this case three benevolent associations listed as "Communist" by the Attorney General of the United States, pursuant to executive order, sought declaratory and injunctive relief alleging that their membership had diminished, and that members of the associations had become subject to ridicule and discrimination.

time[100] considered as factors in a decision on justiciability the degree of judicial intervention in state political or judicial process, the existence of authoritative state court construction of a statute, and the existence of irreparable injury. What was considered irreparable injury by the Court in *Poe* seemed confined to loss of property or specific threats of prosecution.[101] This narrow concept of injury in *Poe* has been the source of a great deal of criticism.[102]

Perhaps the Court felt that the statute in *Poe* v. *Ullman* was not of the same self-executing variety as the one found in *Pierce v. Society of Sisters* or *Village of Euclid v. Ambler Realty Co.*[103] because of the evidence before the Court that contraceptives were openly sold in Connecticut drug stores.[104] To draw this distinction between the two cases fails to recognize one of the primary dangers that obsolete statutes imply: that the law can be selectively revitalized through prosecutions for policital purposes or for motives not within the legislative intent. In the case of the Connecticut statute, the prohibition conformed to the command of the Catholic church and was a source of some controversy.[105] Furthermore, the open and blatant violations of the law mentioned by the Court would tend to lead citizens to believe that the law had no vitality, or, at least, that it would not be enforced. A citizen would be uncertain as to the legal status of his conduct. For those citizens who were aware of the statute's existence, and of the possibility of prosecution under it, the existence of the statute might still act as a deterrent against constitutionally protected behavior.[106]

The dilemma of the *Poe* litigants was considerable. They could obey the law and forfeit what was subsequently adjudicated a constitutional right, or disobey it and risk being prosecuted. The Court, by its application of standing doctrines fashioned for injunctions, compelled the choice, by denying a forum to decide the validity of the statute in advance of its enforcement. Prompted by conduct that provoked prosecutorial response and conviction, the Court in *Griswold v. Connecticut*[107] finally reached the merits of the challenge to the Connecticut statute, and declared it unconstitutional as infringing on the zone of privacy created by several constitutional guarantees. The defendants had standing to assert the rights of a married couple because they were convicted under an aiding-and-abetting statute. The Court compared the case with others[108] where a litigant was permitted to assert the rights of others, and ruled that "an accessory should have standing to assert that the offense which he is charged with assisting is not, or cannot constitutionally be, a crime." [109]

Poe. v Ullman is more than twelve years old now, but a recent mention of the case in *Doe v. Bolton*,[110] indicates that the Court is still unaware or unconcerned by the consequences of the *Poe* decision. It stated that there had been no standing in *Poe* because of the lack of a *general* threat of enforcement due to the moribund nature of the statute. If anything, this interpretation only exacerbates the difficulty confronting the future litigant seeking to challenge an obsolete statute.[111]

Standing doctrines developed in other areas of the law should be adapted to this particular problem. Some of these are more liberal, and recognize the need to vindicate public harm in the courts. This adaptation would be in keeping with the present constant re-examination of the requirements of judicial review.[112]

[100] *See, e.g.*, Connecticut Mutual Life Ins. Co. v. Moore, 333 U.S. 541 (1948).

[101] *Id.*; 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 21.05 (1958).

[102] Note, *Supreme Court—Jurisdiction for Declaratory Judgment—No Case or Controversy where State Has Failed to Prosecute under Attacked Statute for Eighty Years*, 24 GA. B.J. 530 (1962); Note, *Threat of Enforcement—Prerequisite of a Justiciable Controversy*, 62 COLUM. L. REV. 106 (1962); Note, *Constitutional Law: Case or Controversy: Judicial Notice of Probable Non-enforcement of a State Anti-Contraceptive Statute. Poe v. Ullman (U.S. 1961)*, 50 CALIF. L. REV. 137 (1962).

[103] 272 U.S. 365 (1926); 268 U.S. 510 (1925). *See also* note 95 *supra*.

[104] 367 U.S. 497, 592 (1961).

[105] Bickel, *The Supreme Court Forward; The Passive Virtues*, 75 HARV. L. REV. 40, 60 (1961).

[106] As long as the Court can indulge in the fiction that every person is presumed to know the law, it would not seem unreasonable for a litigant like Poe to allege that her conduct will be deterred by the mere existence of a statute that is being persistently violated.

[107] 381 U.S. 479 (1965). Dr. Buxton, a litigant in *Poe*, and defendant Griswold opened a public clinic to dispense advice and contraceptives to married couples. Clinics are regulated by the state, so the founding of a clinic for an illegal purpose could not be tolerated by the state.

[108] Barrows v. Jackson, 346 U.S. 249 (1953); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Truax v. Raich, 239 U.S. 33 (1915).

[109] 381 U.S. 479, 481 (1965).

[110] 410 U.S. 179, 188–89 (1973). The Court held that unprosecuted physicians who were consulted by pregnant women, did have standing because the abortion statute had been actively enforced.

[111] Recall that the Court in Poe v. Ullman, 367 U.S. 497 (1961) found a lack of justiciability because of the lack of a *specific* threat of enforcement.

[112] Flast v. Cohen, 392 U.S. 83, 116 (1968) (Harlan, J., dissenting).

Two developments are of special interest. Both are inseparably intertwined, one is the recognition by the Court of a wider scope of injuries that might occur if an issue is not adjudicated by the Court in anticipation of the event, and the other is the notion that a litigant can serve as a representative of the public interest, or of a limited group of third parties not before the Court.[113]

The challenge of statutes alleged to infringe first amendment rights is one area where special standing doctrines have evolved. The policy basis for this is the desire of the Supreme Court to avoid the consequences of the self-enforcing nature of those statutes. Their prohibitions tend to have a "chilling effect" which reduces the likelihood of a challenge to their constitutional validity.

Standing in First Amendment Cases

In the first amendment area, the case which most directly reveals the contrast with *Poe* in standing and justiciability criterion is *Epperson* v. *Arkansas*.[114] There a public school teacher brought an action for declaratory and injunctive relief challenging an Arkansas statute making it unlawful for a teacher in any state-supported school or university to teach or use a textbook that taught evolution. Violation of the statute was a misdemeanor and the violator was liable for dismissal. After the school issued the teacher a biology textbook containing a chapter on evolution, she brought her action in state court alleging that the statute was in contravention of the first amendment and unconstitutionally vague. On appeal from a ruling by the Arkansas supreme court that ignored the first amendment claim and merely stated that the statute was a valid exercise of the State's power to determine the curriculum for its schools, the Court overturned the statute on the ground that it favored the cause of one particular religion in contravention of the establishment clause.[115] The statute was never enforced previously but the Court acknowledged standing without discussion, with only Justice Black in some doubt about the justiciability of the case. He pointed out in his concurring opinion that with a minimum of effort Arkansas could have shown the case to be moot, or alternatively, non-justiciable. He wrote, "the pallid, unenthusiastic, even apologetic defense of the Act presented by the State in this Court indicates that the State would make no attempt to enforce the law should it remain on the books for the next century." [116] The majority opinion also noted that "the statute is presently more of a curiosity than a vital fact of life in these States." [117]

The liberality of the Court's view towards justiciability requirements in this case might have stemmed from the vagueness claim asserted.[118] However, since this claim was ignored in favor of the first amendment claim, the Court's decision to overlook the threshold problems must be attributed to a desire to reach the merits.

First amendment vagueness cases have developed a highly flexible standing doctrine which is well illustrated by *N.A.A.C.P. v. Button*,[119] and *Dombrowski v. Pfister*.[120] In each of these cases[121] statutes passed in southern states directed against civil rights activities were challenged on the grounds that they were unconstitutionally vague and violative of the freedom of expression guaranteed by the first amendment. In the first case, the Court stated that the statute would be invalid if it prohibited privileged exercises of first amendment rights, whether or not the record disclosed that the petitioners showed that they engaged in such conduct.[122] The Court determined that the N.A.A.C.P. had standing to assert its own rights as well as those of its members because the organization was directly engaged in some of the activities the statute would curtail. The effect of these statements is that the parties challenging the enactment could present hypothetical cases where rights might be violated. The Court also found that there was no necessity to defer review of the statute until a prosecution was brought under it. It said,

> The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled

[113] Standing and the use of class actions is not discussed here.

[114] 393 U.S. 97 (1968).

[115] *Id.* at 103. The Court did not base its decision on the vagueness claim.

[116] *Id.* at 109–10.

[117] *Id.* at 102.

[118] Note, 109 U. PA. L. REV. 67, 101–03 (1960), differentiates the tests used by the Court in vagueness claims by whether or not they involve a first amendment claim. If they do not, then the test is whether the litigant is within the scope of statutory indefiniteness, rather than within the scope of constitutional immunity. If they do involve first Amendment claims, then the only burden on the litigant is to show that he belongs to a general class that might suffer discrimination.

[119] 371 U.S. 415 (1963).

[120] 381 U.S. 479 (1965).

[121] In each case the plaintiffs sought both declaratory and injunctive relief.

[122] 371 U.S. 415, 432 (1963).

> delegation of legislative powers,[123] but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. . . . The threat of sanctions may deter . . . almost as potently as the actual application of sanctions.[124]

Dombrowski[125] relied heavily on the language in *N.A.A.C.P. v. Button* to reach a similar, but more far-reaching result. In *Dombrowski* state court prosecutions were pending against several of the petitioners. But the Court set aside the usual rule of abstention in these situations and determined that special circumstances were present. These were, that a prosecution would not be the proper vehicle for the settlement of the issues because it would only determine the vagueness of the statute with regard to the narrow facts of each case, and that a whole series of prosecutions would have to be litigated before the statute would be authoritatively construed. As the Court pointed out, the mere occurrence of these prosecutions would have a chilling effect, regardless of their success or failure.[126] Furthermore, this chilling effect would lessen the probability of the requisite prosecutions occurring. The Court found that the plaintiffs alleged sufficient irreparable injury to warrant the issuance of an injunction because of both the pending prosecutions and past harassment, as well as the self-enforcing nature of the statute.[127] It also added the liberal standing notion that a petitioner in such a first amendment case did not have to show that his conduct could not be regulated by a more specific posing of the statute.[128]

This shows an inclination of the Court to permit the consideration of hypothetical cases under the statute beyond the scope of the particular one before it. This is based on a compulsion to do justice beyond the particular case before the Court, and to settle the issue finally with respect to all persons who might eventually be touched by it.

> We believe that those affected by a statute are entitled to be free of the burdens of defending prosecutions, however expeditious, aimed at hammering out the structure of the statute piecemeal, with no likelihood of obviating similar uncertainty for others.[129]

In short, the litigants in this situation are entitled to assert the rights of others as well as themselves, whether or not they have standing themselves.

Dombrowski was not to remain untouched, however. In *Younger v. Harris*[130] there was an appeal from the grant of an injunction by the district court against the enforcement of the California Syndicalism Act[131] on grounds that it was void for vagueness in violation of the first and fourteenth amendments. The Supreme Court granted the appeal of the State's District Attorney, Younger, that no federal court should give an injunction against the enforcement of a state statute when a prosecution under that statute was currently pending, and when the issue raised in connection with the statute's validity could be treated in the defense to the prosecution. The circumstances where the Court might give an injunction were limited to those where irreparable injury would result.[132] "[T]he cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not by themselves be considered 'irreparable' in the special legal sense of that term."[133] The threat would have to be one that could not be eliminated by the defense of a single prosecution, or there would have to be other extraordinary circumstances, such as bad faith prosecution or continued harassment.[134]

[123] Note that these are tests used in cases where void for vagueness is invoked as a defense to prosecutions under criminal statutes with first amendment overtones. *See* note 118 *supra*.

[124] 371 U.S. 415, 433 (1963).

[125] 380 U.S. 479 (1965).

[126] *Id.* at 487.

[127] *Id.* at 489.

[128] *Id.* at 486. This is the functional equivalent of the statement in N.A.A.C.P. v. Button, 371 U.S. 415, 432 (1963) that the petitioners did not have to show that their activity came within the prohibitions of the statute.

[129] *Id.* at 491.

[130] 401 U.S. 37 (1971). The appellees were Harris, who had been indicted under the act, Dan and Hirsh, who claimed that the prosecution of Harris would inhibit them, as members of the Progressive Labor Party, from peacefully advocating the program of their party, and Broslawsky, an instructor of history who claimed that the prosecution of Harris made him uncertain whether he could teach the doctrines of Karl Marx in his classroom. All claimed that unless the prosecution of Harris were enjoined, they would suffer irreparable injury. The district court found the statute void for vagueness and overbreadth in violation of the first and fourteenth amendments.

[131] CAL. PENAL CODE §§ 11400, 11401 (1970).

[132] Samuels v. Mackell, 401 U.S. 66 (1971), decided the same day, reached the same conclusion where a declaratory judgment was sought while a state prosecution was pending.

[133] Younger v. Harris, 401 U.S. 37 (1971).

[134] The rationale behind this strict notion of irreparable injury is based both on the desire to restrain equity jurisdiction, so as not to erode the role of the jury, and the maintenance of separate state law enforcement functions.

The grounds which would justify interference by the Court in state process are closely related to those seen

The Court limited possible application of *Dombrowski* by saying that the mere existence of a chilling effect was not a sufficient basis for preventing state action, and that the chilling effect of a state statute would not be relieved by an injunction against prosecution because most citizens would still remain uncertain whether their conduct would be criminally sanctioned.[135] The only relief that would accomplish that objective, said the Court, would be an injunction prohibiting all prosecution under a statute pending its rewriting. Except in special circumstances,[136] this would be unacceptable to the Court as an interference in federal-state relations. Whenever the constitutionality of a state penal statute is at issue, the federal courts will not automatically assume control. To do so would imply that state courts could not be depended upon for the correct and impartial consideration of the problem. This is an assumption the Court has steadfastly refused to make.[137] In *Younger v. Harris* the Court stated that it expressed no view as to when federal courts could act when there was no prosecution pending in state courts when federal proceedings began.[138]

In a recent case, *Steffel v. Thompson*,[139] the Court decided that when no state prosecution was pending, federal courts could act consonant with the usual standing and justiciability limitations. The plaintiffs in *Steffel* had not been arrested but were threatened with arrest for the distribution of handbills in a shopping center. They asked for a declaratory judgment that the criminal trespass statute under which they could be prosecuted was being applied in violation of the first and fourteenth amendments. The Court ruled that it was not necessary for the plaintiffs to expose themselves to actual arrest or prosecution in order to claim the infringement of their constitutional rights. On the issue of abstention,[140] the Court declared,

> . . . a refusal on the part of the federal courts to intervene when no state proceeding is pending may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of foregoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding.[141]

In addition, the Court also differentiated between an injunction and a declaratory judgment; finding that to require a showing of irreparable injury for a declaratory judgment would be to defeat the purpose of Congress in legislating the remedy. To the contention that a declaratory judgment would not lie as to a claim that the statute was unconstitutionally applied, the Court replied that such a declaration would be less disruptive of state enforcement policies than a declaration that the statute was unconstitutional *in toto*. This last statement reflects the Court's recognition of multiple applications of the statute which would have no relation to freedom of expression.

The Supreme Court's view of standing in first amendment cases is a special accommodation to the particular problems those cases engender. Not only

in cases like United States v. Falk, 479 F.2d 616 (7th Cir. 1973); *see* note 67 *supra*, where selectivity in prosecution violated the equal protection guarantee. Intentional discrimination in enforcement is a ground for reversal of a conviction. It is interesting to speculate whether it would constitute a bad faith prosecution for the purpose of an injunction restraining further proceedings, as in *Younger*. Whether it would must turn on the availability of a full remedy in state courts. If the remedy in *Falk* were available in state courts, then the Court would rule to abstain from considering the case, because there would be an adequate remedy at law. The only reason that the *Falk* remedy would not be available in state courts would be political, since the fourteenth amendment guarantee of equal protection applies to the states. In such a case, the Court might, on the model of *Dombrowski* and *N.A.A.C.P. v. Button* heed the political pressures in the state, and find that, realistically, the defendant had no adequate remedy other than a federal injunction.

[135] Younger v. Harris, 401 U.S. 37, 50 (1971).

[136] *Id.* at 51.

[137] Perez v. Ledesma, 401 U.S. 82, 121 (1971). The concurring opinion of Justice Brennan points out that state procedings will ordinarily provide a concrete opportunity to secure vindication of constitutional claims, with ultimate review remaining in the Supreme Court.

In certain circumstances, however, the Court will assume the incompetence of states to arrive at fair solutions without federal intervention. One such case was the constitutionality of the death penalty, Furman v. Georgia, 408 U.S. 238 (1972). The unifying factor of the five separate concurring opinions was the recognition that state death penalty statutes, and their discretionary enforcement were discriminatory. The Court seemed to recognize that many states were caught between either abolishing the death penalty or making it mandatory, or leaving it to the discretion of the trial court. While either of the former approaches might be politically inexpedient, the latter was unconstitutional.

[138] Younger v. Harris, 401 U.S. 37, 41 (1971).

[139] 415 U.S. 452 (1974).

[140] The Court of Appeals for the Fifth Circuit had affirmed the district court judgment denying declaratory relief on the ground that the policy of abstention set out in *Younger v. Harris* and *Samuels v. Mackell* applied to this case, and that the plaintiffs had to make a showing of bad faith harassment in order to qualify for relief.

[141] Steffel v. Thompson, 415 U.S. 452 (1974). In oral argument, counsel for the plaintiffs had described the plaintiff's situation as one which had elevated the rule of "watch it, boy" to statutory dignity. 42 U.S.L.W. 3300 (U.S., Nov. 20, 1973) (report of oral argument).

are an individual's interests jeopardized, but also those of unnamed others, whose conduct might be regulated by their uncertainty as to the permissible scope of their conduct. This "chilling effect" diminishes the possibility of litigation challenging a statute which regulates expression. This effect necessitates accelerated review, a relaxation of the discretionary rules on justiciability, and a limited interpretation of the policies against interference in state law enforcement processes.[142]

Comparison of *Epperson*, *Dombrowski*, *Younger*, and *Steffel* reveal how reduced a role rules play in the outcome of these cases, and how important instead are the individual circumstances presented to the Court. The Court in each case considered a mix of policy considerations; whether the statute was susceptible to constitutional applications, how readily the statute could be adequately[143] construed in a single adjudication in a state court, the availability of a state remedy, and the attitude of the state law enforcement officials toward the statute.

Standing to Assert the Rights of Others

The Supreme Court has been consistently reluctant to permit a plaintiff to gain standing by asserting the rights of others. This is not to say that no plaintiff can ever assert those rights, he just may not assert them for the purpose of satisfying the threshold requirements of adverseness. In *Tileston v. Ullman*,[144] a physician sought a declaration that two Connecticut birth control statutes[145] outlawing the use of birth control devices were unconstitutional as applied to a physician. The doctor urged that the lives of some of his patients would be endangered if they obeyed the statute, but he did not assert any personal fourteenth amendment loss of liberty or property. The Court decided that since his patients were not parties to the proceeding, and the Court could find no basis for permitting the doctor to assert the patients' constitutional claims, the suit should be dismissed.

Some writers have found *Pierce v. Society of Sisters*[146] to be irreconcilable with *Tileston*. The difference between the two cases is not only that the plaintiffs in *Pierce* did allege immediate, palpable economic injury, but also the availability of a timely resolution of the case for the third parties whose rights were asserted. In *Tileston*, the patients could sue at any time and no special injury would occur if their doctor was not permitted to assert their rights. In *Pierce*, on the other hand, suits by the parents could not occur until the schools had already suffered irreparable economic injury.

Similar reasoning prevailed in *Barrows v. Jackson*[147] where the Court permitted a Caucasian being sued for breach of a restrictive covenant to assert the rights of non-Caucasian persons who wished to buy homes in spite of such covenants. This was a special situation, the Court said, because it would be difficult, if not impossible, for the persons who would be hurt most by a ruling allowing states to enforce restrictive covenants, to bring their claims before that court or any other court.[148] *Shelley v. Kramer*[149] ruled that restrictive covenants could not be enforced in equity against Black purchasers because that would constitute state action denying them equal protection. Thus, in *Barrows*, the Court had to find a way to permit the White seller to a non-Caucasian to assert the rights of the buyers, or else nullify the result in *Shelley*. White sellers would be deterred from selling their houses to non-Caucasians by the prospect of suits for the breach of the restrictive covenants. The Court resolved this dilemma by deciding that the rule precluding a person from invoking the rights of others was one of the discretionary rules of self-restraint that the Court had developed for its own governance, rather than part of the constitutional requirement of case or controversy. Then the Court ruled that this rule of self-restraint was outweighed by the need to remedy a harmful situation in this case.[150]

A closer analysis of the reasoning and facts in *Barrows* reveals that the Court did not even breach its own rule of self-restraint. The action was for breach of contract, and both parties had standing to be before the Court on that basis. Therefore, the defendant could assert the illegality of the contract as a defense.[151]

The standing issue in *Barrows* is similar to the standing issue in *McGowan v. Maryland*,[152] where a

[142] Comment, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 855–56 (1970).

[143] Recall that a statute must give fair notice as to what it forbids, Lanzetta v. New Jersey, 306 U.S. 451 (1939).

[144] 318 U.S. 44 (1943).

[145] CONN. GEN. STAT. §§ 6246, 6562 (1930). These statutes were the same ones challenged in Poe v. Ullman, 367 U.S. 497 (1961) and Griswold v. Connecticut, 381 U.S. 479 (1968).

[146] 268 U.S. 510 (1925). *See* note 95 *supra*.

[147] 346 U.S. 249 (1953).

[148] *Id.* at 258.

[149] 334 U.S. 1 (1948).

[150] 346 U.S. 249, 255 (1953).

[151] Shelley v. Kramer, 334 U.S. 249 (1953).

[152] 366 U.S. 420 (1961). In *McGowan* the Court did allow the defendants to assert the unconstitutionality of the statute as one "establishing" a religion. The

defendant to a criminal prosecution under a Sunday Closing Law was not permittted to assert the unconstitutionality of the statute on the grounds that it prohibited the free exercise of religion. The Court ruled that since the defendants had only asserted their own economic injury, and not the inhibition of their own religious freedom or that of their customers, they had no standing under either the *Tileston* or *Pierce* doctrines.[153]

In both *Barrows* and *McGowan*, standing to assert the rights of others was based on an evidentiary limitation of relevance. In *Barrows*, the defendant asserted the rights of the non-Caucasian buyers as a defense to the action against him for breach of contract. Since the contract would be unenforceable if contrary to public policy, infringement of the rights of the non-Caucasian buyers was determinative of the defendant's legal status. In *McGowan*, the defendants were limited in their constitutional claims to those which were related directly to the behavior for which they were prosecuted.

Griswold v. Connecticut[154] conferred standing to assert the rights of others in another criminal prosecution. The Court, citing *Barrows*, ruled that the accessory had standing to assert that the offense which he is charged with assisting is not a crime. This is similar to the idea in *Barrows* that one should be able to assert as a defense to a breach of contract that the contract was contrary to public policy because it violated the rights of others. The Court also added that "[t]he rights of husband and wife, pressed here, are likely to be diluted or adversely affected unless those rights are considered in a suit involving those who have this kind of confidential relation to them." [155] This change of position after *Poe v. Ullman*[156] might be attributed to the presence of different Justices on the Court.[157]

Related to the determination of who may have standing to assert the rights of others, is the determination of what harmed or threatened interests suffice to give a dispute the necessary adversity. Some cases under the Administrative Procedure Act[158] illustrate the Court's development of a flexible set of standards that could be utilized in the anticipatory challenge of an obsolete statute.

In *Data Processing Service v. Camp*[159] the Court reviewed earlier definitions of protected interests, and ruled that freedom from competition was an interest that would be protected by the Court.[160] The Court found that "generalizations about standing to sue are largely worthless as such," and that to satisfy the Article III cases or controversy requirement, one only had to show that the case would be presented in an adversary context and in a form historically viewed as capable of judicial resolution.[161] This requirement of injury in fact was satisfied by the showing that the respondent bank was preparing to perform services for one of Data Processing's customers. Beyond that the standing requirements depended upon the kind of suit that was before the Court. The test to be employed in satisfying this latter determination of compliance with the Court's own rules of judicial review is "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." [162] Whether or not the interest was a legal right that had been invaded was not for threshold determination, said the Court. That determination went to

Court said, "[a]ppellants here concededly have suffered direct economic injury, allegedly due to the imposition on them of the tenents of the Christian religion." *Id.* at 430. This decision has been subject to criticism; *see, e.g.*, Davis, *Standing: Taxpayers and Others* 35 U. CHI. L. REV. 601, 630–31 (1968).

[153] 366 U.S. 420, 429–430 (1966).

[154] 381 U.S. 479 (1968). *See* text accompanying note 107 *supra*.

[155] *Id.* at 481.

[156] 367 U.S. 497 (1961).

[157] By 1968, Justice Frankfurter, the author of the majority opinion in *Poe v. Ullman* had left the Court and Justices Fortas, Marshall and White had joined it.

[158] 5 U.S.C. § 702 provides:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

[159] 397 U.S. 150 (1969). Plaintiffs who provided data processing services to businesses appealed a ruling by the Comptroller of the Currency permitting national banks to make data processing services available to other banks and bank customers. They alleged that competition by the banks would cause them injury, and also that the respondent bank was preparing to provide such services for customers who had previously contracted for these services with Data Processing.

[160] In an earlier case, Tennessee Power Co. v. T.V.A., 306 U.S. 118 (1938), the Court ruled that plaintiffs who would be severely injured economically by T.V.A. lacked standing to challenge the statute authorizing T.V.A., because they had no legal right to be free from competition. They stated that a litigant challenging the constitutionality of a statute had to allege the existence and violation of a legal right. *Id.* at 137. The meaning of legal right test in T.V.A. is "one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege." *Id.* For the history and use of the legal right test see 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 22.04 (1958).

[161] 397 U.S. 150, 151–53 (1969).

[162] *Id.* at 153.

the merits.[163] The Court determined that there was an interest to be protected on the basis of the general policy apparent in the statutes conferring authority on the comptroller of the currency.[164]

The more recent case of *Sierra Club v. Morton*[165] delineates the outer limits of standing to assert the rights of others. Although the plaintiff Sierra Club did not have standing to ask for a declaratory judgment in the case, the Court hinted that if their complaint was drafted to allege injury to its members, that would be sufficient to allow proceedings on the merits. The Club had proceeded on the theory that its long-standing concern with matters of conservation, and its expertise in such matters gave it standing to represent the public under the Administrative Procedure Act.[166] The Court did not find this theory sufficient to satisfy constitutional standing requirements. It said that its origin was a misinterpretation of the theory of private attorneys general.[167] A private attorney general is one upon whom Congress has conferred the right to seek judicial review of agency decisions.[168] As interpreted in *Data Processing* and *Sierra Club*, the private attorney general must still show some injury in fact to satisfy the Article III case or controversy requirement. This injury must be more than a harm to a cognizable interest,[169] it must be one that is personal to the litigant himself. The injury need not be unique to the litigant, or even to a small group of people. That it may not be an economic injury, but one that reflects aesthetic, conservational, or recreational values, does not deprive it of appropriateness for protection by the judiciary. The Court mentioned that to allow standing to the Sierra Club on the basis of its "special interest" would be to allow any group, no matter how short-lived to vindicate its own value preferences through the judicial process.[170]

The standing doctrines just examined show the sensitivity of the Court to the need for flexibility in its construction of the Article III case or controversy requirement. In the first amendment area the Court has been solicitous to avoid the chilling effect of an overbroad or vaguely construed statute regulating expression. Such a chilling effect is not confined to first amendment behavior, however. Any penal statute that for reasons of antiquity, non-enforcement, arbitrary enforcement, or vagueness no longer provides citizens with clearly ascertainable prohibitions can have the same chilling effect upon not only permissible, but constitutionally protected behavior.

In seeking a court examination of the validity of an obsolete statute a citizen must allege some violated interest in order to show adversity. In allowing greater latitude in the nature of the interests that will suffice for this function, the Court should keep in mind the policy behind its rulings in cases like *Sierra Club*.[171] There are many interests that need protection that cannot be readily reduced to economic or statutory terms.

Once the citizen can get standing under this expanded notion of interest, he can make his challenge. Even if he never specifically asserts the rights of others, the precedent he creates may benefit future victims of the statute's prohibitions. However, the chilling effect and potential for arbitrary enforcement of an obsolete statute should activate a response from the Court. The mere presence on the code books of the obsolete statute serves to make it self-executing. Not only will the citizen be inhibited from performing the act forbidden, thus reducing the likelihood that the obsolete statute's validity would be reviewed incident to a criminal prosecution, but the non-enforcement behavior of the state can deprive him of even the opportunity of asserting its invalidity as a defense. Therefore, an anticipatory challenge by a citizen would demonstrate the kind of urgency that was apparent in the *Barrows*[172] and *Pierce*[173] cases. No better party to bring the action may be forthcoming. Not only is the litigant seeking to remove a harmful ambiguity, but he is providing a means to check the

[163] *Id.* The Court is saying here that a "zone of interests" is broader than a legal right and may include interests not readily definable as rights.

[164] *Id.* at 157.

[165] 405 U.S. 727 (1972). The Sierra Club, a membership corporation with a "special interest" in wildlife conservation, brought an action for a declaration that the proposed Disney development plan of Mineral King in Sequoia National Forest was contrary to federal laws and regulations governing state parks and game refuges, and for temporary and permanent injunctions against the issuing of construction permits for the project. The Club did not allege any injury to its members or to its own corporate entity.

[166] 5 U.S.C. § 702 (1970).

[167] 405 U.S. 727, 736 (1972). The Court traces the Sierra Club's theory to dictum in Scripps-Howard Radio v. F.C.C., 316 U.S. 414 (1942) to the effect that "these private litigants have standing only as representatives of the public interest."

[168] The right is conferred in the Administrative Procedure Act, 5 U.S.C. § 702 (1970).

[169] 405 U.S. 727, 734 (1972).

[170] *Id.* at 739–40.

[171] Sierra Club v. Morton, 405 U.S. 727 (1972).

[172] Barrows v. Jackson, 346 U.S. 249 (1953).

[173] Pierce v. Society of Sisters, 268 U.S. 510 (1925).

untrammeled rule-making power that an obsolete statute provides to law enforcement officials.

Conclusion

Two approaches to the threats posed by obsolete statutes have been explored. The first, the defense to a criminal prosecution, is dependent upon the "cooperation" of the state. Since the statute must be enforced, it is only available after the defendant has had the injurious experience of being arrested. Furthermore, if the defendant is not successful in challenging the validity of the statute on appeal, he is left with a criminal record, and the slim hope that his prosecution may have provoked sufficient public outrage to bring about legislative repeal.

The second approach, an anticipatory proceeding, is potentially more fruitful. It suffers none of the disabilities of the first. Its use, however, depends upon the application by analogy of justiciability doctrines from other areas of the law to the challenge of an obsolete statute.

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JUDICIAL SUPERVISION OF NON-STATUTORY IMMUNITY

A prosecutor confronted with a witness claiming the privilege against self-incrimination has various options. The most obvious and least appealing one is to forego his attempts to secure the necessary evidence from the witness and try to obtain it from other sources. The other alternatives are more attractive. He may immunize the witness pursuant to the specific statutory authority granting him power to do so, or he may seek an informal arrangement, a non-statutory promise of immunity, whereby the witness, waiving his privilege against self-incrimination, agrees to cooperate with the prosecutor in return for the latter's promise not to prosecute. In making his choice, the prosecutor will have to consider the facts of each case; no specific rules can be stated which are always applicable. The availability of the last option, however, gives him greater flexibility since the terms of these informal agreements could be tailored to meet the requirements of each case, especially where the other alternatives are limited or disadvantageous.

This comment will discuss these informal arrangements. Although its purpose is not to examine the broad issues of constitutionality and statutory interpretation of the statutes authorizing immunities, a subject widely discussed by other commentators, a general background in this area is necessary for an understanding of the subject matter. The comment will then consider the ramifications of informal immunity arrangements, point out their beneficial and detrimental effects, and compare their present judicial treatment with the previous judicial attitude toward these agreements.

Although every witness has a general duty to furnish relevant and truthful testimony, the privilege against self-incrimination permits suppression of facts that might result in criminal prosecution and subsequent punishment.[1] A grant of immunity, however, withdraws this limited privilege. Since the danger of self-incrimination has disappeared, a witness' justification for claiming the privilege no longer exists. He may no longer stand mute; his refusal to testify may result in a finding of contempt.[2] The Supreme Court acknowledged the importance of grants of immunity in law enforcement in a recent decision where this practice was challenged as unconstitutional.[3] The Court said that

[1] U.S. CONST. amend. V:
No person . . . shall be compelled in any criminal case to be a witness against himself. . . .
This privilege has been also extended to the States. Malloy v. Hogan, 378 U.S. 1 (1964).

[2] *See* Fraser v. United States, 452 F.2d 616 (7th Cir. 1971), holding that no showing of probable cause or reasonableness is required to compel the witness to testify after immunity has been granted.

[3] In Kastigar v. United States, 406 U.S. 441 (1972), the Court resolved any prior doubts as to the constitutionality of "use" immunity statutes. The statute involved in *Kastigar* was the Organized Crime Control Act of 1970, 18 U.S.C. §§ 6001–05 [hereinafter cited as Crime Act], which provides in its relevant parts:
6002. Immunity generally.—Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—
(1) a court or grand jury of the United States,
(2) an agency of the United States, or
(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House, and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.
6003. Court and grand jury proceedings.—(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.
(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—
(1) the testimony or other information from such individual may be necessary to the public interest; and
(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.
The use immunity statute of *Kastigar* prohibits only the use of the compelled evidence and its fruits against the defendant; thus, the witness may still be prosecuted

this device is indispensable in certain categories of crimes.[4]

While the ability to grant immunity to prospective witnesses increases the discretionary power of the prosecutor, it also increases the possibility that this power may be abused. First, the evidence secured by the grant of immunity might be subject to attack as unreliable. The witness, hoping for favorable treatment, might testify to anything that is expected of him without necessarily telling the truth.[5] Second, the immunization involves a "social cost;" a person who violated the law is freed in exchange for his questionable testimony.[6] Third, the existence of this power creates a danger that a principal offender might be immunized from prosecution through either the ignorance or the collusion of the prosecutor. Fourth, this broad discretionary authority enables a politically ambitious prosecutor to select targets for prosecution for his own personal reasons.

In summary, the potential for abuse of this power is substantial. Thus, when the legislature grants prosecutors this discretion, it presumably concludes that the need for this prosecutorial authority outweighs its negative aspects. This judgment has never been rejected by any court.

General Considerations

At the outset, the term "non-statutory immunity"[7] is defined as an agreement whereby the witness waives his privilege against self-incrimination and agrees to cooperate with the prosecutor in exchange for a promise of non-prosecution.[8] The difference between this situation and plea bargaining resulting in a guilty plea is small but significant. Where non-statutory immunity is offered, the witness incriminates himself and others, perhaps even testifying as a state's witness against other accomplices, with only the promise by the prosecutor as security from prosecution. As part of the bargain, however, he might plead guilty to other offenses. In plea bargaining in its pure form, the defendant pleads guilty in an open courtroom to reduced charges[9] with a justifiable expectation that the terms of the bargain will be kept by the prosecutor.[10] The crucial distinction between these two

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for crimes referred to in his compelled testimony only if the subsequent prosecution is based on independently obtained testimony. Transactional immunity, on the other hand, precludes prosecution of a witness on any acts that he has testified to. The latter immunity may not be revoked even though the testimony provided was not truthful, but the witness may be prosecuted for perjury resulting from false testimony. For example, CAL. PEN. CODE ANN. 1324 (West, 1970):

> In any felony proceeding or in any investigation or proceeding before a grand jury for any felony offense . . . if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and if the district attorney of the county . . . in writing requests the superior court for that county to order that person to answer the question or produce the evidence, a judge of the superior court shall set a time for hearing and order the person to appear before the court and show cause, if any, why the question should not be answered or the evidence produced, and the court shall order the question answered or the evidence produced . . . unless it finds that to do so would be clearly contrary to the public interest, or could subject the witness to a criminal prosecution in another jurisdiction, and that person shall comply with the order. After complying, and if, but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, that person shall not be prosecuted or subjected to penalty or forfeiture for or on account of any fact or act concerning which, in accordance with the order, he was required to answer or produce evidence. But he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury, false swearing or contempt committed in answering, or failing to answer, or in producing, or failing to produce, evidence in accordance with the order.

For a full treatment of constitutional and statutory questions, see Note, *Witness Immunity Statutes: The Constitutional and Functional Sufficiency of "Use Immunity,"* 51 B.U.L. REV. 616 (1971) [hereinafter cited as Immunity Statutes]; Comment, *The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope*, 72 YALE L.J. 1568 (1963). For an extensive survey of current immunity see 8 WIGMORE, EVIDENCE § 2281, at n.11 (T. McNaughten's rev. 1961).

[4] Kastigar v. United States, 406 U.S. 441, 447 and n.15 (1972). The significance of the immunity grants becomes apparent when one considers the Watergate controversy. Some participants have accepted immunity in exchange for cooperation with the Watergate prosecutors. For an illustration of the bargaining involving the immunity grants, see Chicago Sun Times, Feb. 28, 1974, at 2, col. 1.

[5] People v. Brunner, 32 Cal. App. 3d 908, 913-914, 108 Cal. Rptr. 501, 505 (1973).

[6] *Id.*

[7] This term will be used interchangeably in this comment with non-statutory promise of immunity.

[8] The prosecution of an offender might also be precluded where, for example, the statute of limitations has run or the right to a speedy trial has been violated or where the suspect's other constitutional rights have been violated resulting in impracticability or impossibility of securing a conviction. This comment will not deal with these types of accidental "immunity."

[9] *See generally* Gentile, *Fair Bargains and Accurate Pleas*, 49 B.U.L. REV. 514 (1969); Comment, *Guilty Plea Bargaining: Compromises By Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865 (1969).

[10] *See* Santobello v. New York, 404 U.S. 257 (1971), where the Court said:

> This phase of the process of criminal justice and the adjudicative element inherent in accepting a plea of guilty must be attended by safeguards to insure the defendant what is reasonably due in the

arrangements is a waiver of the privilege against self-incrimination[11] and, to a lesser extent, the degree of judicial participation in these arrangements. Unlike plea bargaining where the admission of guilt takes place in a courtroom, the waiver of the privilege against self-incrimination where non-statutory immunity is offered in return occurs outside the courtroom. In the latter instance, incriminating testimony is given without the court's admonishment of the constitutional privileges available to the witness.[12] Of course, it is possible to have a combination of both arrangements. The defendant can provide the detailed incriminating testimony after his plea of guilty pursuant to a valid and enforcible agreement.[13]

The cases to be discussed in this comment could have been governed by the applicable statutory provisions. The fact that they were not is an indication either that the prosecutor made a conscious choice between the statutory and non-statutory immunities, or that there was unintentional noncompliance with the available statutory procedures.[14] The reasons for the prosecutor's choice will vary with the facts of each case; but one of them, perhaps the most important, is that the prosecutor has a witness who is willing to cooperate. The availability of non-statutory immunity is especially desirable to a prosecutor where the immunity statute grants transactional immunity, an all-or-nothing proposition. The prosecutor faced with a recalcitrant witness will be hesitant to grant transactional immunity thereby precluding further prosecution since he is uncertain that the procured evidence will be helpful or that the witness will in fact testify truthfully.[15] Non-statutory immunity, on the other hand, permits the prosecutor to tailor the breadth of immunity given to the witness. For example, a witness might be willing to "sell" his cooperation for a plea of guilty to reduced charges. The judicial approval of use immunities[16] does not reduce the effectiveness of non-statutory immunities; but, on the contrary, it may stimulate a greater interest in this kind of bargain among prospective defendants. Faced with the limited protection afforded by a compelled use immunity, a witness hoping for a better deal might be more willing to cooperate with law enforcement officials.

Performance Required of Prosecution

The question of the legal effect of non-statutory promises of immunity requires consideration of two distinct issues: 1) the scope of the inherent power of the prosecutor to grant immunity from prosecution, and 2) the enforceability of these promises after incriminating testimony is given in reliance upon them. The first issue deals with the extent of discretion in prosecution. The second calls for a broader consideration of fairness and protection of defendants' constitutional rights.

When faced with the question whether the prosecutor has inherent power to grant immunity, some courts have not separated the two issues. In denying the prosecutor's power they have also concluded that the promise is not binding on the prosecution, even after the defendant has performed his part of the bargain. A recent decision by a Maryland appellate court in *Bowie v. State*[17] is a typical

> circumstances. These circumstances will vary, but a constant factor is that where a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of inducement or consideration, such promise must be fulfilled.

Id. at 262.

See also THE REPORT ON THE PROSECUTION FUNCTION, TENTATIVE DRAFT, ABA PROJECT, MINIMUM STANDARDS OF CRIMINAL JUSTICE which provides:

> 4.3(c) If the prosecutor finds he is unable to fulfill an understanding previously agreed upon in the plea discussions, he should give notice promptly to the defendant and cooperate in securing leave of the court for the defendant to withdraw any pleas and take other steps appropriate to restore the defendant to the position he was in before the understanding was reached or plea made.

[11] A plea of guilty is a waiver of the defendant's privilege against compulsory self-incrimination to the extent that the defendant voluntarily admits his guilt. But the waiver of the privilege in non-statutory immunity cases goes beyond the mere plea of guilty; it involves furnishing detailed testimony which presumably will be used against others.

Furthermore, the waiver of the privilege in the context of non-statutory immunity is more damaging to the defendant than a guilty plea. Where the latter is withdrawn or successfully challenged, the defendant can be restored to the position he was before the plea was made. The same result is not that easily achieved where the defendant has supplied detailed incriminating testimony. *See* note 71–72 and accompanying text *infra* for a more complete discussion of this problem.

[12] *See* Boykin v. Alabama, 395 U.S. 238 (1969), holding that a trial court must determine that a defendant is aware of his constitutional rights and understands the consequences of his plea of guilty. *See also* Rule 402 of the Illinois Supreme Court, ILL. REV. STAT. ch. 110A, § 402 (1969), providing for a detailed procedure to be followed in plea bargaining.

[13] *See* note 10 *supra*

[14] The various immunity statutes impose certain procedural requirements such as a court order approving the application for immunity. Non-compliance will invalidate the immunity grant. *See* Crime Act, *supra* note 3, § 6003.

[15] Once the witness has been given transactional immunity he may be prosecuted only for perjury; the immunity grant is not revocable.

[16] *See* note 3 *supra*.

[17] 14 Md. App. 567, 287 A.2d 782 (1972).

illustration of this approach. The defendant in that case was indicted for drug-related offenses. While the case was placed on the inactive docket, the defendant cooperated with the prosecution in exchange for a promise of immunity.[18] Although the defendant failed, in the court's view, to prove the existence of an agreement,[19] the court stated the controlling law. Since the authority to confer immunity from prosecution requires explicit authorization by the legislature,[20] neither the prosecutor nor the judge has the inherent power to grant immunity. The court reasoned that the legislature decides whether particular conduct is to be deemed criminal and therefore, the prosecutor, in the absence of statutory authorization, should not be able to pervert legislative intent by his actions.[21] Starting with the proposition that the promise of immunity was outside the scope of prosecutorial power, the court concluded that such a promise was not enforcible even where the defendant performed his part of the bargain in good faith. Thus the defendant would be entitled only to an equitable claim of immunity which, however, would not bar prosecution.[22]

Although a purely logical approach to the enforcement of non-statutory promises of immunity would necessitate the conclusion reached by the Maryland court, that conclusion was merely dictum. Similarly, in most of the cases following the *Bowie* approach, the pronouncements that the defendant's performance did not validate otherwise impermissible promises were not essential to the holding against the defendant. In these cases the defendant breached his part of the agreement thereby extinguishing his claim to the enforcement of the agreement,[23] or the prosecutor attempted to *compel* the defendant to accept non-statutory immunity,[24] or the prosecuted accomplice of the witness challenged the validity of the agreement.[25]

The justification for denying the prosecutor the power to immunize witnesses stems from the apprehension, intimated in the opinions, that this power, if available, will be abused.[26] However, the stated reasons for denying that power range from the exclusivity of legislative authority to grant immunity to other less forceful ratiocination of the *Bowie*-type rule. Some cases said that the discretion of the prosecuting attorney is not unlimited, citing as an example the fact that a prosecutor's successor in office may reinstitute proceedings against a witness even when a *nolle prosequi* has been entered by the predecessor, or that a grand jury might, without the consent of the prosecuting attorney, institute such proceedings.[27] These superficial explanations

[18] It was not clear whether the alleged offer of immunity pertained to the offense named in the indictment or involved possible future criminal charges which might have rested on the incriminating testimony to be furnished by the defendant while cooperating with the prosecution.

[19] The defendant had the burden of showing:
(1) precisely what the agreement was,
(2) his own performance in fulfillment of the agreed obligation,
(3) an unjustified breach of the agreement by the prosecution.
Id. at 573, 287 A.2d at 786.

[20] Maryland has no general immunity statute.

[21] The court cited Doyle v. Hofstader, 257 N.Y. 244, 177 N.E. 489 (1928), where Justice Cardozo said:
> The conclusion, we think, is inescapable that a power to suspend the criminal law by the tender of immunity is not an implied or inherent incident of a power to investigate. It may be necessary for fruitful results in a particular instance, but it is not so generally indispensable as to attach itself automatically to the mere power to inquire. Whether the good to be attained by procuring the testimony of criminals is greater or less than the evil to be wrought by exempting them forever from prosecution for their crimes is a question of high policy as to which the law-making department of the government is entitled to be heard.

Id. at 260–61, 177 N.E. at 495.

[22] An equitable claim of immunity is based on the doctrine of approvement as enunciated by the Supreme Court in United States v. Ford, 99 U.S. 594 (1878). In that case the Court held that where an accomplice has cooperated with the prosecution by incriminating himself and others, relying on the promise of immunity, he is entitled only to an equitable claim of immunity which may result in a recommendation for executive pardon or clemency, but does not entitle him to absolute immunity as a matter of course. The federal courts have apparently abandoned this doctrine. King v. United States, 203 F.2d 525 (8th Cir. 1953).

For holdings similar to the *Bowie* approach, see, *e.g.*, Frady v. People, 96 Colo. 43, 40 P.2d 606 (1934); State v. Meyers, 330 Mo. 84, 49 S.W.2d 36 (1932).

[23] *See, e.g.*, United States v. Boulier, 359 F. Supp. 165 (E.D. N.Y. 1972); United States v. Hinz, 35 F. 272 (N.D. Cal. 1888).

[24] *See, e.g.*, Isaacs v. United States, 256 F.2d 654 (8th Cir. 1958); Foot v. Buchanan, 113 F. 156 (N.D. Miss. 1902); *Ex parte* Irvine, 74 F. 954 (S.D. Ohio 1896); State v. Roberts, 4 Conn. Cir. 271, 230 A.2d 239 (1967); People v. Rockola, 339 Ill. 474, 171 N.E. 559 (1930); Apodaca v. Viramontes, 53 N.M. 513, 212 P.2d 425 (1949); Doyle v. Hofstader, 257 N.Y. 244, 177 N.E. 489 (1931); Commonwealth v. Carrera, 424 Pa. 551, 227 A.2d 627 (1967).

[25] *See, e.g.*, State v. Johnson, 77 Wash. 423, 462 P.2d 933 (1969); State v. Crepault, 126 Vt. 338, 229 A.2d 245, *cert. denied*, 389 U.S. 915 (1967).

[26] These fears have been already discussed in the context of the statutory immunity. The dangers of broad discretionary power to grant immunity are applicable to non-statutory immunity as well.

[27] Both of these explanations fail to take into account practical realities in the administration of justice. First, the guarantee of speedy trial precludes a substantial delay between the date of the arrest or indictment and the trial itself. *See* Barker v. Wingo, 407 U.S. 514 (1972); United States v. Marion, 404 U.S.

or even the underlying misgivings suffice only if the question of prosecutorial power to grant immunity is considered in isolation. Where the prosecutor obtains a benefit from the defendant's performance of the bargain and then subsequently breaches his promise, the interest at stake is the fair administration of justice, not merely the liberty of a defendant, or the extent of prosecutorial power.[28]

Some courts have struggled to develop a legal doctrine which would permit the enforcement of non-statutory promises of immunity where the defendant performs his part of the bargain even where the bargain exceeded prosecutorial authority. Enforcements of these agreements either avoid the question whether the promise was within the scope of the prosecutorial authority or implicitly recognize this authority. A 1923 decision of the Illinois supreme court held an agreement to be valid because it involved the honor and dignity of the state, and declared that public policy was best served by holding these inducements enforcible in order that some, if not all, the wrongdoers are punished.[29]

A more recent decision of the New Jersey supreme court in *State v. Ashby*[30] avoided reliance upon the vague and indefinite meaning of "public policy" and "honor" by adopting the contract doctrine of consideration as the basis for enforcing promises of non-statutory immunity. This conceptual approach is technical and evasive; it does not explicitly examine the unfairness of the prosecutor's violation of the agreement after having obtained *quid pro quo* from the defendant. Thus, under this doctrine, the enforceability of the bargain turns upon the consideration supplied by the defendant; this approach necessitates a determination of the adequacy of such consideration. Where the accused becomes a witness for the prosecution, there is a gain to the public interest since the given testimony presumably increases the likelihood of the conviction of the other accomplices. But if no useful evidence is furnished and the defendant merely pleads guilty to a reduced charge in return for the dismissal of other charges, then the promise not to prosecute on the other charges would be invalid, for the "public is not recompensated for forebearing to try the defendant for the highest degree of his offense." [31] The dissent in *Ashby* argued that the outcome should not be controlled by whether the defendant furnished "sufficient" consideration in becoming a witness for the state, but rather should depend on the promise itself—whether it is fair to permit the prosecution to benefit from its own misconduct. If the prosecutor had no authority to make promises, then he should not be able to profit from his violation of the limitations upon his powers. The doctrine of consideration as enunciated in *Ashby* has limited application since it would deny enforcement of non-statutory immunity where the prosecutor, after securing incriminating testimony, decides not to use the defendant as a witness for the state against other accomplices.

The Louisiana supreme court adopted a more expansive view of the consideration doctrine.[32] It said that the agreement should be enforced:

> ... [W]here the accused in reliance on such a pledge, has carried out his part of the agreement and in doing so may have relinquished valuable fundamental rights, such as the constitutional guarantee that he cannot be compelled to give evidence against himself, a trial on the merits, and the possibility of being exonerated if the evidence is weak and insufficient to sustain a conviction.[33]

307 (1971). Second, the statement that the successor is not bound by the prior actions of his predecessor evades the issue altogether; the immunity promise of a prosecutor is not made in his personal capacity but in his capacity as government agent. *See* Spomer v. Littleton, 94 S.Ct. 685 (1974); Giglio v. United States, 405 U.S. 150, 154 (1972). Further, the grand jury system, although initially adopted as a check upon unlimited prosecutorial discretion, has lost its esteemed position because it has become a rubber stamp for the prosecutor. This result follows from the nature of the grand jury itself. Although the jurors may take part in the interrogation of witnesses, they are almost entirely dependent on the prosecutor to guide them and provide them with legal expertise. *See* Note, *Grand Jury: Bulwark of Prosecutorial Immunity*, 3 LOY. UNIV. L.J. 305, 311 (1972).

[28] *See* United States v. Carter, 454 F.2d 426, 428 (4th Cir. 1972) (en banc); United States v. Paiva, 294 F. Supp. 742, 747 (D.D.C. 1969).

[29] People v. Boglowski, 326 Ill. 253, 157 N.E. 181 (1927), where the defendant remained in jail for three years being reassured continuously that he would "get out" as soon as the case was over. *Cf.* People v. Rockola, 339 Ill. 474, 171 N.E. 559 (1930), where the promise by a suspect to give incriminating testimony was not enforcible against him.

[30] State v. Ashby, 81 N.J. Super. 350, 195 A.2d 635 (1963). *See also* Application of Parham, 6 Ariz. App. 191, 431 P.2d 86 (1967) (dictum).

[31] 81 N.J. Super. at 363–64, 195 A.2d at 642. This distinction between considerations in terms of furnishing evidence and "mere" pleas of guilty to reduced charges has been abrogated by the Supreme Court's holding in Santobello v. New York, 404 U.S. 257 (1971), where it was said that if a plea of guilty was induced by a promise, that promise must be kept.

[32] State v. Hingle, 242 La. 844, 139 So. 2d 205 (1962).

[33] *Id.* at 859, 139 So. 2d at 210. *Hingle* was cited approvingly in Austin v. State, 49 Wisc. 2d 727, 183 N.W.2d 56 (1971), where the defendant was convicted of armed robbery upon a plea of guilty entered pursuant

This approach, unlike the *Ashby* rule, emphasizes a waiver of defendant's statutory or constitutional privilege; it does not attempt to weigh public benefits arising from the increased likelihood of convicting accomplices. It would give effect to a plea of guilty to a reduced charge as well as to agreements of non-statutory immunity. Yet, it requires the defendant to waive some of his rights. Thus cooperation with a prosecutor to procure information incriminating others would not constitute sufficient consideration where the procured testimony did not relate to the offense for which the defendant was prosecuted.[34] This distinction between cooperation involving furnishing self-incriminating testimony and supplying evidence to incriminate others concededly makes sense in the context and the purpose of the immunity statutes. The privilege against self-incrimination is a personal privilege; it may not be invoked to protect others.[35]

A California appellate court in *People v. Brunner*[36] used the contractual theory of estoppel to enforce the bargain made by the prosecutor and the defendant. The defendant, a member of the Manson gang, was promised immunity from prosecution by the district attorney if she would provide incriminating testimony as to her involvement in the crime which would also incriminate other members of the gang. The defendant gave her testimony under these circumstances even though the prosecutor who had the authority to grant statutory immunity[37] had failed to obtain it.[38] When the defendant subsequently recanted her testimony and claimed the fifth amendment privilege, she was indicted for participation in the crime. The trial court dismissed the indictment and permanently enjoined the state from prosecuting the defendant.[39] On review, the appellate court upheld the decision of the lower court stating that it would be "anomalous" [40] for the prosecutor to argue that the agreement is void because of non-compliance with the statute where the statute gives the district attorney the sole discretion whether or not to obtain statutory immunity for a reluctant witness.[41] The court's reasoning in *Brunner*, though enforcing the agreement on the basis of the consideration doctrine, does not treat as dispositive the question of whether the prosecutor had the authority to make

to an agreement made with the prosecuting attorney and approved by the court. In exchange for the guilty plea to the offense charged and an agreement that the court could consider for the purpose of sentencing an additional uncharged crime admitted by the defendant, the prosecuting attorney agreed not to prosecute the defendant for the uncharged offense. Subsequently, the defendant sought to have his guilty plea vacated on the grounds that the illegality of the agreement deprived him of his bargained expectations. The court's holding that the agreement was enforcible rested upon due process notions of fairness and decency. This analysis treats the consideration doctrine as interchangeable with notions of fairness.

[34] *See* Hunter v. United States, 405 F.2d 1187 (9th Cir. 1969), where the defendant was promised immunity from prosecution in exchange for cooperation to secure information not related to the pending charge. The court's holding that the agreement was not enforcible rested on two alternative grounds: 1) the prosecutor had no authority to make the promise (the *Bowie v. State* approach, *see* notes 17–22 and accompanying text *supra*); 2) the defendant had not surrendered constitutional or statutory safeguards as consideration for the promise of immunity.

Accord, Application of Parham, 6 Ariz. App. 191, 431 P.2d 86 (1967) where the defendant was promised immunity from pending charges for burglary and theft if he cooperated with the prosecution to apprehend narcotics violators. After the defendant had performed some undercover work for the police, the burglary charges nevertheless were brought against him. The Arizona court held that the promises were not enforcible. Yet, by way of dictum the court said that court approval of the promise not to prosecute (the Arizona practice requires court's approval before pending charges can be dismissed) in exchange for self-incriminating evidence is valid.

[35] *See, e.g.*, Kastigar v. United States, 406 U.S. 441 (1972); Malloy v. Hogan, 378 U.S. 1 (1964).

[36] 32 Cal. App. 3d 908, 108 Cal. Rptr. 501 (1973).

[37] CAL. PEN. CODE ANN. § 1324 (West, 1970). The statute authorizes the district attorney to request the county court to give transactional immunity to a witness who claims the privilege against self-incrimination so that evidence may be secured.

[38] It is not clear whether the failure to obtain the statutory immunity was a result of an intentional choice by the prosecutor based on the general considerations discussed in the text or was a result of inadvertence. Although the following is mere conjecture, it is likely that the prosecutor intentionally chose to seek an informal arrangement with the defendant. Since California grants only transactional immunity, the prosecutor would be totally precluded from prosecuting the witness on the original charges. The only means of insuring that the defendant testified truthfully and fully would be perjury and contempt proceedings. But if an informal bargain were made instead, failure of the defendant to meet the terms of the bargain would relieve the prosecutor from fulfilling his promise.

[39] CAL. PEN. CODE ANN. § 1385 (West, 1970) provides that the trial court may upon its own motion, and "in furtherance of justice," dismiss a pending action.

[40] 32 Cal. App. 3d 908, 915, 108 Cal. Rptr. 501, 506 (1973).

[41] In upholding the agreement, the court rejected the doctrine of approvement (*see* note 22 *supra*) which the prosecution had suggested as the sole remedy available to the defendant. The court also discussed the desirability of putting the agreement in writing to avoid any disputes over the substance of the agreement and to prevent "dishonesty, equivocation and misunderstanding." *Id.* at 914, 108 Cal. Rptr. at 505.

that promise.[42] It was sufficient that the defendant had performed in reliance on the promise. Thus the court's analysis is in direct conflict with *Bowie v. State*,[43] where it was indicated that defendant's good faith compliance with the agreement did not validate an illegal promise.

A federal court decision, *United States v. Paiva*,[44] uses the question of prosecutorial discretion as a starting point for its analysis. In that case the defendant agreed to cooperate with the prosecution in exchange for immunity from prosecution. The agreement, however, did not require the defendant to testify about possible accomplices.[45] Upon the defendant's refusal to provide that information, a refusal justified by the agreement, the prosecutor indicted the defendant for the original offense. The court held the agreement enforcible casting aside the doctrine of approvement which the government had suggested was applicable.[46] The government's contention that enforcement of the bargain would violate the principle of separation of powers provoked a judicial definition of the relationship between prosecutors and the courts. The court said the judiciary, while exercising its supervisory powers over the administration of justice, may require the executive branch to adhere to the standard of fair play. Although the prosecutor has almost unlimited discretion to enforce criminal laws,[47] his conduct may be subject to judicial review where an agreement with the defendant involves "the use of the judicial process." [48] Further, the court said that the judiciary may not avoid the exercise of its responsibility. Failure to act "would create a void leaving the defendant helpless," [49] for the interest at stake is the "public confidence in the fair and honorable administration of justice" [50] which is prerequisite for respect for the rule of law.

The *Paiva* decision appears to concede that the prosecutor has discretionary authority to make promises of non-statutory immunity subject only to standards of fair play. Unlike *Bowie v. State*[51] which denied that authority on the ground that the power to immunize a witness must be explicitly granted by the legislature, the *Paiva* court seems to say that the judiciary will not guard against the prosecutor bargaining away his right and duty to prosecute. The emphasis is no longer on whether the promise is within the permissible authority; it no longer suffices for the prosecutor to argue that he or another government official exceeded his authority. A promise of non-statutory immunity will be enforced even though the resulting expansion of prosecutorial powers might bring about their abuse.

The notion that the prosecutor has the discretionary authority whether or not to prosecute, subject only to a limited judicial check, is espoused by the Court of Appeals for District of Columbia in *United States v. Ammidown*.[52] There the prosecution and the defense reached an agreement whereby the defendant agreed to plead guilty to a reduced charge and cooperate in securing conviction of an accomplice in exchange for a promise that he would not be prosecuted on a more severe charge. The trial judge refused to accept the agreement holding that public interest would be violated if the defendant were allowed to escape from prosecution for the more severe offense. The Court of Appeals said that the prosecutor alone should decide whether to prosecute since he is most aware of

[42] The court said that "we agree with the district attorney that section 1324, the witness immunity act, regulated the grant of immunity from criminal prosecution." *Id.* at 912, 108 Cal. Rptr. at 504. These words may indicate acknowledgement by the court that the prosecutor had no authority to make the promise.

[43] 14 Md. App. 567, 287 A.2d 782 (1972). For complete analysis of that case, *see* notes 17–22 and accompanying text *supra*.

[44] 294 F. Supp. 742 (D.D.C. 1969). *Cf.* Mallon v. State, 49 Wisc. 2d 185, 181 N.W.2d, 364 (1970), where the trial judge, pursuant to the stipulation between the prosecutor and the defendant, heard testimony concerning uncharged crimes during sentencing hearing. The Supreme Court of Wisconsin said by way of dictum that this stipulation precluded the state from prosecuting on these uncharged offenses. In emphasizing the prosecutor's broad discretionary powers, the court implied that the prosecutor had the authority to make the promise in question.

[45] 294 F. Supp. 742, 743 (D.D.C. 1969). The defendant also pleaded guilty to four felonies.

[46] *See* note 22 *supra* explaining the doctrine of approvement. Although the *Paiva* court did not expressly reject the doctrine, it questioned its vitality.

[47] Because this power [to formulate proper standards of law enforcement] stems from and is directed to the judiciary, it is not an infringement on the nearly unlimited discretion of the U.S. Attorney to determine, for instance, whether as here to enter into agreements, how to charge, whether to seek indictment, and in general to prepare his cases for trial. That is the executive function.
294 F. Supp. 742, 747 (footnotes omitted).

[48] *Id.* The mere attempt to prosecute the defendant in violation of the initial agreement involves the "use of the judicial process." *Id.* at 746–747.

[49] *Id.* at 747. The court qualified its broad language, however. It said that the defendant must be prejudiced by the failure of the prosecution to fulfill its part of the agreement. This essential element was present in this case. The defendant, in addition to pleading guilty to four felonies, furnished detailed incriminating testimony.

[50] *Id.* at 746–47, citing Sherman v. United States, 356 U.S. 369, 380 (Frankfurter, J., concurring) (1958).

[51] *See* notes 17–22 and accompanying text *supra*.

[52] 497 F.2d 615 (D.C. Cir. 1973).

government resources and the evidence available to secure a conviction. The courts may interfere with this discretion only upon explicit finding that the action is contrary to the public interest. That interference is justified only when there is overwhelming evidence that the discretion has been abused; a mere disagreement over the conception of public interest is not sufficient.

The rationale of the *Ammidown* decision provides additional support for the proposition that the prosecutor has the power to grant informal immunity. It would be logically inconsistent for the prosecutor to assert that he has broad discretionary powers and then argue that the promise was outside his authority when an attempt is made to enforce it. A court following the *Ammidown* reasoning would presumably conclude that a prosecutor has grossly abused his discretion where he denies the validity of his bargain.

The court of appeals held explicitly that an unauthorized promise to grant non-statutory immunity by a federal prosecutor will be binding upon the government.[53] The defendant alleged that he made an agreement with the prosecutor of one district to cooperate with the prosecution by incriminating himself and others in exchange for a plea of guilty to reduced charges and for dropping pending charges against him in another district.[54] The court recognized that ordinarily immunity in the federal system may be granted only upon compliance with statutory requirements.[55] Nevertheless, where the defendant has provided incriminating testimony, the agreement may be enforced.[56] That the promise was made in one district and breached in another did not invalidate the agreement if the defendant fulfilled his part of it.[57] The court reasoned that since the jurisdiction of the United States extends to all districts and states, promises made by an agent of the United States with apparent authority will be binding upon the United States even though the agent's actions were not authorized and went beyond the ordinary scope of the federal prosecutor's powers.[58]

A recent decision by the Supreme Court in *Santobello v. New York*[59] apparently dispenses with consideration as a prerequisite to the enforcement of a plea bargain. The defendant pleaded guilty to a lesser offense on the condition that other felony charges be dropped and that the prosecutor not make a sentence recommendation. At the sentencing hearing, a *new* prosecutor recommended a particular sentence. The issue before the Court was enforcement of the bargain. The Court concluded that where a plea of guilty is induced by a promise, the defendant may be entitled to enforce the bar-

[53] United States v. Carter, 454 F.2d 426 (4th Cir. 1972) (en banc).

[54] The federal officials in the other district were not a party to the agreement. Thus, the promise was clearly outside the ordinary scope of the prosecutorial discretion.

[55] *See* Crime Act, *supra* note 3, § 6003.

[56] Since the case before the court involved only the defendant's allegations, the court remanded the case to the district court for factual determinations.

[57] The court cited the *Paiva* decision as the controlling law. 454 F.2d 426, 428. This decision goes even further since in *Paiva* the promise was made and breached within the same district.

[58] The dissent argued that federal officials in one district could not by any agreement interfere with the discretion of the federal prosecutor in another district. 454 F.2d 426, 431 (Boreman, J., dissenting). Yet the dissent recognized the injustice to the defendant who makes incriminating statements in reliance upon an unauthorized promise, an injustice which cannot be remedied since the effect of those statements will hound the defendant even though the evidence itself is not admissible. *See* Shotwell Mfg. Co. v. United States, 371 U.S. 341 (1963), which holds that evidence and the fruits of it, obtained as a result of a promise of immunity, is not admissible because it was procured by an improper inducement. The conclusion reached by the majority in *Carter* finds additional support in the Supreme Court's analysis of the scope of the authority of a federal prosecutor in Giglio v. United States, 405 U.S. 150 (1972). There an accomplice was promised immunity from prosecution if he testified against the defendant. At the trial, neither the prosecution nor the accomplice disclosed this promise. The Supreme Court held that neither the authority of the United States attorney to make the promise nor his failure to inform his superiors or associates was controlling. The defense was prejudiced since the jury did not have an opportunity to consider how much credibility should be given to the accomplice's testimony in light of the promise made. The Court said:

> The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government. . . . To the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and insure communication of all relevant information on each case to every lawyer who deals with it.

Id. at 154.

Cf. Roberts v. United States, 472 F.2d 1195 (5th Cir. 1973) (promises that state's charges will be dropped in exchange for plea of guilty to federal charges are permissible) (dictum). *Accord*, Buckles v. U.S. District Court, 488 F.2d 85 (5th Cir. 1973). *But see* United States v. Boulier, 359 F. Supp. 165 (E.D. N.Y. 1972). *See also* People v. Brock, 45 Ill. 2d 292, 259 N.E.2d 12 (1970), where it was held that the district attorney in Illinois had performed his part of the agreement by contacting Tennessee officials requesting them to drop charges pending against the defendant in that state; the latter's refusal did not vitiate the agreement since the Illinois prosecutor had no authority, real or apparent, to dismiss charges pending in another state.

[59] 404 U.S. 257 (1971).

gain as initially proposed by the prosecution.[60] In light of the importance of plea bargaining in the prompt and final disposition of many criminal cases, non-enforcement of bargains would decrease the willingness of a suspect to enter into plea negotiations. To allow a prosecutor to be free of the obligations imposed by an agreement would not only be contrary to the public interest but would also outrage the sense of fairness.[61]

The *Santobello* decision could be extended by analogy to non-statutory promises of immunity. Although the Court did not state explicitly the grounds upon which the bargained plea agreements are to be enforced, its holding is apparently based on notions of fairness as expressed in the due process clause of the fourteenth amendment.[62] Application of these principles would not eliminate important questions of self-incrimination under the fifth amendment in cases of informal immunity, but would provide an additional remedy. Since the suppression of evidence obtained in violation of the privilege against self-incrimination is not a fully restorative cure,[63] insistance that the prosecutor fully comply with the terms of the agreement would provide the necessary protection of this constitutional right.

In summary, it would seem that previous judicial disapproval of promises of non-statutory immunity has given way to more liberal treatment. Regardless of the conceptual bases of these decisions, recent cases enforce informal promises if the defendant has relied upon them to his detriment.[64] The apparent shift is beneficial to all parties concerned. The defendant, knowing that the agreement will be enforced, will be more willing to bargain in hope of favorable treatment. The prosecutor, on the other hand, obtains the benefit of having a cooperative witness—he is no longer restricted to statutory immunities.[65] The court's docket may also be reduced to some extent.[66] The problems that might arise from abuse of these broad discretionary powers could be handled through administrative controls.[67]

Performance Required of Defendant

Once the defendant enters into an agreement with the prosecution, it is essential that he perform fully and in good faith.[68] When the agreement is breached by the defendant, the prosecution is not bound by its own promise and may prosecute him for the original crime.[69] The notion that the defendant's non-compliance with the terms of the agreement releases the prosecutor from his obligations can be rationalized within the framework of every conceptual doctrine used by the courts to analyze the validity of non-statutory immunity. Where the doctrine of consideration is applied, the non-performance or insufficient performance is said to be a failure of consideration. The prosecution, which is the aggrieved party, may repudiate the

[60] The Court remanded the case to the state court to fashion the appropriate remedy: to grant specific performance or vacate the plea of guilty. But the Court said that specific performance may be granted. *See* note 10 *supra*.

[61] 404 U.S. 257, 266 (Douglas, J., concurring) (1971).

[62] *See, e.g.*, Ham v. South Carolina, 409 U.S. 524 (1973), where the court's decision rested on the "essential demands of fairness" contained within the due process clause of the fourteenth amendment.

[63] *See* Shotwell Mfg. Co. v. United States, 371 U.S. 341 (1963), holding that where incriminating testimony is obtained in violation of the privilege against self-incrimination, such testimony is inadmissible against the defendant. For a complete analysis of a situation where this remedy would not correct fully transgression of the defendant's rights, see notes 71–72 and accompanying text *infra*.

[64] The question whether the prosecutor has an inherent power to grant non-statutory immunity loses its importance since the courts are willing to enforce a promise even if no authority for it existed. It would add logical consistency if the authority were granted; but in light of judicial enforcement of these agreements this inconsistency becomes secondary.

[65] The prosecutor will not be able to compel the witness to accept non-statutory immunity. Where the witness cannot be induced to cooperate, the prosecutor will have to rely on the compulsive statutory immunities.

[66] *Cf.* Santobello v. New York, 404 U.S. 257 (1972).

[67] See United States v. Carter, 454 F.2d 426 (4th Cir. 1972) (en banc), where the court said:

> If there be fear that an United States Attorney may unreasonably bargain away the government's right and duty to prosecute, the solution lies in the administrative controls which the Attorney General of the United States may promulgate to regulate and control the conduct of cases by the United States Attorneys and their assistants. The solution does not lie in formalisms about the express, implied or apparent authority of one United States Attorney, or his representative, to bind another United States Attorney and thus to visit a sixteen year sentence on a defendant in violation of a bargain he fully performed.
>
> There is more at stake than just the liberty of this defendant. At stake is the honor of the government, public confidence in the fair administration of justice, and the efficient administration of justice in a federal scheme of government.

Id. at 428.

Cf. Crime Act *supra* note 3, § 6003–05 which requires permission of the Attorney General of the United States before any grant of immunity is made.

[68] *See, e.g.*, United States v. Carter, 454 F.2d 426 (4th Cir. 1972) (en banc); People v. Brunner, 32 Cal. App. 3d 908, 108 Cal. Rptr. 501 (1973).

[69] People v. Brunner, 32 Cal. App. 3d 908, 914–917, 108 Cal. Rptr. 501, 506–07 (1973).

agreement, and as in any other contract, seek to be placed in its original position. Similarly, under the doctrine of fairness the defendant forfeits his grounds for asserting his claim where he, himself, is guilty of bad faith.

At this point, the difference between statutory transactional immunity and the non-statutory promise of immunity becomes significant. Where the former has been granted, bad faith of a witness may only result in a perjury proceeding or contempt charge.[70] But where a non-statutory promise was given, the witness could be prosecuted for the original crime notwithstanding the possibility that he might have incriminated himself, even though the incriminating evidence would be inadmissable against him in a subsequent prosecution.[71] Thus, the defendant must adhere very strictly to the terms of the bargain or otherwise find himself in a worse position than if he had initially refused to cooperate with the prosecution.[72]

The question of what performance by the defendant will be deemed satisfactory cannot be answered simply and fully. One thing seems clear: the courts will not permit the prosecutors to apply their own standard of performance and initiate proceedings against the witness if they are displeased with the latter's consideration.[73] This is especially true when there is a factual dispute as to the terms of the agreements, and charges and countercharges of bad faith by both parties.[74]

The *People v. Brunner*[75] decision which touched upon questions of the permissible terms of an agreement and how strictly the defendant must adhere to them is merely an example of one court's handling of these matters. It nevertheless might be indicative of the judicial conceptualization of the factual dispute and, therefore, deserves a closer examination. The *Brunner* court said that prosecutors may not bargain for conviction of accomplices but only for truthful testimony.[76] Although no justification for that statement was provided, the explanation lies in the role of district attorney and the possible effect of bargains for convictions upon the credibility of a witness-accomplice. As a public official, the prosecutor must secure justice, rather than a conviction based on questionable testimony.[77] There is also a substantial possibility that the jury might view the testimony of the witness-accomplice as "bought" when confronted with the admission that the freedom of the witness depends on whether conviction of other accomplices is obtained.[78]

Moreover, the *Brunner* court used the doctrine of "substantial performance" when faced with the question of the adequacy of the defendant's performance.[79] This pragmatic approach goes to the causal relationship between the bargain made and the result of the witness' cooperation. If the final outcome of the case against other accomplices seems to be what the prosecutor could have rea-

[70] *See* note 3 *supra* for a more detailed explanation of the consequences of granting transactional and use immunities.

[71] *See* Shotwell Mfg. Co. v. United States, 371 U.S. 341 (1963). The overall result of agreement and breach of the agreement is almost equivalent to use immunity. Although it is arguable that use immunity places the witness in the same position as though he had not previously testified, the realities of a criminal trial must be considered. The incriminating testimony, though itself not admissible, does in fact illuminate other available and independently obtainable evidence; especially where the trial court rules on both the admissibility of the evidence and then, as a trier-of-fact determines the guilt or innocence of the defendant.

Furthermore, the incriminating testimony, though not admissible in the case-in-chief, may have an effect upon the defendant's election to take the stand at trial. The prosecutor, knowing the defendant's prior testimony, can formulate questions to reach the facts raised by that testimony without an overt reference to it. Catena v. Elias, 449 F.2d 40, 45 (3d Cir. 1971) (Setz, J., concurring). Thus the defendant loses more than the "mere" benefit of the bargain. *See generally* Harris v. New York, 401 U.S. 222 (1971), holding that incriminating testimony, not admissible in case-in-chief because of the violation of the rule enunciated in Miranda v. Arizona, 384 U.S. 436 (1966), can be used to impeach the defendant if he takes the stand. For an excellent analysis of the question decided in *Harris*, see Cole, *Impeachment With Unconstitutionally Obtained Evidence: Coming to Grips With The Perjurious Defendant*, 62 J. CRIM. L.C. & P.S. 1 (1971). *See also* Comment, *Impeachment, Use Immunity and the Perjurious Defendant*, 77 DICK. L. REV. 23 (1972).

[72] *See* note 71 *supra*.

[73] This follows from the court's role as an examiner of whether the defendant has given consideration or detrimentally relied on a promise.

[74] *See* People v. Brunner, 32 Cal. App. 3d 908, 914, 108 Cal. Rptr. 501, 506 (1973). To prevent this problem, all terms of the agreement should be put down in writing.

[75] 32 Cal. App. 3d 908, 108 Cal. Rptr. 501 (1973). *See* notes 36–42 and accompanying text *supra*.

[76] *Id.* at 916, 108 Cal. Rptr. at 507.

[77] *See* In re Ferguson, 5 Cal. 3d 525, 487 P.2d 1234, 46 Cal. Rptr. 594 (1971); People v. Perez, 58 Cal. 2d 229, 373 P.2d 617, 23 Cal. Rptr. 569 (1962).

[78] Although the promise of immunity in exchange for testimony does not itself make the evidence inadmissible against the other defendants, the possibility of the evidence being false increases substantially where a bargain for conviction of accomplices is made. *Cf.* People v. Brunner, 32 Cal. App. 3d 908, 917, 108 Cal. Rptr. 501, 507 (1971).

[79] . . . [I]n our opinion the People got substantially what they bargained for . . . [W]e conclude, albeit somewhat pragmatically, that enough of the bargain was kept to make it operative.
32 Cal. App. 3d 908, 916, 108 Cal. Rptr. 501, 507 (1973).

sonably expected, and if some of the evidence given by the witness-accomplice is used, then the bargain would be enforced although there was no strict adherence to it by the defendant.[80]

The Court of Appeals for the First Circuit in a post-*Santobello* decision discussed the conduct of a prosecutor in the context of plea bargaining.[81] The norm set down by the court requires, in addition to good faith, a high degree of competence in executing the responsibilities of the office. The court's analysis prohibiting making any promises which are unfulfillable would apply to assurances relating to the actions of other parties. A prosecutor who is chargeable with knowledge of the limitations of third parties may not enter into an agreement which creates an expectation that the third party will act in a particular manner where, in fact, the expected course of action is prohibited to the third party. For example, a promise to recommend a specific sentence, which in itself is a fulfillable promise, would be a misrepresentation or an improper promise where the proposed sentence could not be legally imposed by the court.[82]

The decision also deals implicitly with situations where the defendant is aware that the terms of the agreement exceed the prosecutor's authority. In those circumstances the defendant's reliance upon the promise would seem to be unjustifiable;[83] he would not be entitled to protection from prosecutorial misconduct where he has full knowledge of the underlying facts.[84] Although the leading cases enforcing non-statutory promises of immunity require prejudice to the defendant as an essential factor, bad faith of the defendant in attempting to take advantage of this misbehavior would result in a denial of judicial protection.[85]

Conclusion

As indicated, the main reason for refusing enforcement of non-statutory promises of immunity is the judicial fear that the government's right and duty to prosecute would be bargained away. But this attitude seems to be outmoded and out of touch with practical realities. First, the wide use of statutory immunities shows the acceptance of this device as a proper means of law enforcement. Insofar as the government's right to prosecute is concerned, it is of no consequence whether the immunity was effected through statutory means or through an informal procedure since the same result would follow.[86] In failing to enforce the non-statutory promises of immunity, the courts should not hide behind the statement that the prosecutor has no inherent power to grant immunity and therefore the agreements are not binding. The proper procedure is to adopt administrative controls in the prosecutor's office which would prevent unauthorized actions[87] rather than ride roughshod over the defendant's rights in an attempt to avoid the abuse of prosecutorial discretion.

[80] In *Brunner* the defendant at one point recanted her testimony and also invoked her privilege against self-incrimination. But it may be argued that the doctrine of substantial performance is applicable only where the fact situation is similar to *Brunner:* a factual dispute as to the terms of the agreement, charges and countercharges of bad faith, the seriousness of the potential charges facing the witness in the event that the agreement would not be binding upon the prosecutor, and the importance of the evidence given by the witness.

[81] Correale v. United States, 479 F.2d 944 (1st Cir. 1973). Although the case is not concerned with immunity, the standards enunciated by the court should apply to promises of non-statutory immunity. The defendant in that case pleaded guilty in exchange for a sentence recommendation. Although the terms of the agreement were disputed, it appeared that the minimum understanding of all parties was that the recommendation would suggest a sentence which would be concurrent with the state sentence that the defendant was then serving. However, the proposed sentence could not have been legally imposed.

The court said the prosecutor must make recommendations to both the defendant and the court which are legally permissible as well as consistent with the terms of the agreement. Furthermore, the judicial refusal to follow the recommendation or judicial awareness of the impropriety does not make the failure to fulfill a promise or to make a proper promise a harmless error. Since the defendant bargains for a meaningful promise, a promise to recommend an illegal sentence deprives the defendant from the benefit of the bargain.

[82] *See* note 81 *supra.*

[83] In *Correale,* the defendant knew that sentence recommendations by the prosecutor were not binding on the trial court, but he was not aware of the fact that proposed sentence could not be legally imposed. Although the court implied that the defendant's attorney should be charged with the knowledge of law, the court concluded that the defendant may rightfully assume that the prosecutor, a public official, will only recommend the possible.

[84] Of course, the issue of justifiable reliance under these circumstances will depend on the nature of the prosecutorial misconduct and the sophistication of the defendant. A defendant who has been represented by counsel throughout the whole transaction would have less standing than a defendant dealing with the prosecutor without assistance of counsel to claim good faith reliance.

[85] *See* note 68 *supra.*

[86] Even where the statute requires a court's order, the judiciary performs only a ministerial function. *See* Crime Act, *supra* note 3, § 6003(b).

[87] Santobello v. New York, 404 U.S. 257 (1972).

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THE IMPOSITION OF ADMINISTRATIVE PENALTIES AND THE RIGHT TO TRIAL BY JURY—AN UNHERALDED EXPANSION OF CRIMINAL LAW?

Administrative agencies have long employed various means to achieve compliance with their regulations. Today agencies commonly utilize the imposition of some type of monetary sanction for an alleged violation of an agency rule. In the majority of instances, an individual accused of a violation receives no jury trial to determine guilt or innocence. The agency itself performs this function. Many of these administrative actions take on the character of a criminal proceeding in view of the fact that agencies frequently impose severe sanctions. Through this process, an unannounced expansion of criminal liability has taken place; administrative agencies, instead of the nation's courts, are regularly meting out punishment similar to that formerly imposed only in judicial proceedings. This comment examines the doctrinal roots of traditional agency practice regarding the imposition of penalties in order to determine whether this practice is constitutional. This evaluation requires the examination of the constitutional position of the agency itself in relation to specific constitutional guarantees applied in criminal proceedings.

These are two possible means of imposing penalties as a result of the violation of an administrative regulation. In some situations the legislature itself fixes the penalty for violation of the rule promulgated by the agency, the collection of which occurs within the judicial process; in other cases the legislature delegates to the agency the quasi-judicial power to adjudicate penalties or forfeitures.[1]

Modern statutes tend to use the second method as the primary means of enforcement. The premise that the isolation of the entire administrative enforcement proceeding from judicial control best serves the interests of speed and efficiency may justify this policy. One of the primary purposes of an administrative body is to provide a relatively swift solution to a pressing problem. In order to permit effective problem-solving by administrative agencies, the agencies generally possess significant amounts of authority to insure compliance with their directives. One expert in the field of administrative law illustrated the basic justification for placing effective enforcement powers in the hands of administrative agencies in the following way:

> So much in the way of hope for the regulation of claims to a better livelihood has been made to rest upon the administrative process. To arm it with the means to effectuate those hopes is but to preserve the current of American living. To leave it powerless to achieve its purpose is to imperil too greatly the things that we have learned to hold dear.[2]

In the interests of efficiency and effectiveness, certain constitutional requirements, particularly the right of trial by jury, are being ignored today.

In recent times, the basic nature of administrative sanctions has been changing. New legislation now permits increasingly severe monetary fines.[3]

[1] *See* Note, *Administrative Penalty Regulations*, 43 COLUM. L. REV. 213 (1943). The author takes the position that the second type of penalty would generally be held invalid as a violation of the separation of powers doctrine or as an improper delegation of judicial authority. History obviously has proven this prediction incorrect.

[2] J. LANDIS, THE ADMINISTRATIVE PROCESS, 122 (1938).

[3] As an example of this modern type of administrative statute, consider the Illinois Environmental Protection Act, ILL. REV. STAT. ch. 111½, §§ 1001–1051 (1971). This legislation created a Pollution Control Board, which was delegated both quasi-judicial and quasi-legislative authority. Title 12 of the Act gave the Board the power to assess large monetary fines for violation of its regulations.

> Any person who violates any provision of the Act, or any regulation adopted by the Board, or who violates any determination or order of the Board pursuant to this Act, shall be liable to a penalty of not to exceed $10,000 for said violation and an additional penalty of not to exceed $1,000 for each day during which violation continues, which may be recovered in a civil action, and such person may be enjoined from continuing such violation as hereinafter provided.

The Polution Control Board itself acts as fact finder in any enforcement proceeding; the determination of guilt or innocence is made by that administrative agency alone. No trial by jury is possible and the judiciary does not enter into the proceeding at all unless an appeal is made.

The Board exhibited no reluctance in utilizing the power to penalize. From July of 1970 through December 31, 1973, the Board imposed a total of $1,011,292.51 in penalties. Of this amount $598,800.85 has been collected; the remainder is either receivable or under appeal. The largest single fine levied to date was for $149,000, imposed upon the GAF Corporation for water pollution in Joliet, Illinois. Penalties collected go directly into the state's general revenue fund. Interestingly, this legislation is regarded as one of the

The potential sanctions available arguably exhibit traits traditionally regarded as more criminal than civil in nature. This characterization becomes crucial when one considers that if administrative proceedings actually do possess a primarily criminal nature, they consequently require all of the constitutional protections guaranteed to one accused of a crime.

In general, courts have made little objection to the delegation of judicial functions which enable the administrative agency to levy large fines. The agencies therefore functioned as courts in many instances without offering constitutional protections which a court traditionally must provide to an accused. As a preliminary inquiry, an analysis of the administrative agency's quasi-judicial function is necessary to place the agency in proper constitutional perspective before dealing with specific constitutional provisions possibly relating to administrative action.

Position of the Administrative Agency within its Constitutional Framework

Can the agency constitutionally impose a severe monetary fine? Is it, and should it be, regarded as the equivalent of a "special" trial court which need not provide basic constitutional guarantees?

A legislature, in granting to an agency the power to impose severe sanctions, has delegated an amount of judicial power to that agency. The legislature cannot go past a certain point when making this grant of power; should the delegation be too broad, invalidation of that legislative act will result. Since the emergence of administrative law as a viable force in our legal system, the nation's courts have attempted to draw this line clearly, but with little success. A large amount of precedent offers some aid in the determination of the constitutionality of a given delegation of power.

In general, the delegation to an administrative agency of the authority to determine either guilt or innocence in criminal cases, or to impose criminal sanctions, is void; the primarily judicial nature of those activities demands such a result. In theory, experts regard this rule as settled since the 1930's.[4] But, as a practical matter, courts have experienced difficulty in developing a test which distinguishes purely judicial functions from those characterized as administrative.[5]

Since the 1930's, most courts have been unwilling to delve deeply into the scope of a given delegation of authority and, as a result, the courts rarely invalidate a statute on the grounds of an improper delegation of judicial power to an administrative agency. In upholding delegations, modern courts often hold that the power delegated to an agency is only *quasi*-judicial, that power being simply "incidental to the duty of administering the law."[6] Thus, if the power to punish is only "incidental" to the administrative process, this reasoning validates such delegations. In fact, this logic would seem to validate almost any delegation of authority.[7] However, not all courts accept this reasoning, and

most effective and comprehensive environmental protection statutes devised. *See* E. HASKELL AND V. PRICE, STATE ENVIRONMENTAL MANAGEMENT, ch. 1 (1973). *See also* Comment, *The Illinois Environmental Protection Act—A Comprehensive Program for Pollution Control*, 66 NW. U.L. REV. 345 (1971).

It should be noted that the Illinois statute is not particularly unique in the potential severity of its fines; in fact it is rather typical. *See e.g.*, 42 U.S.C. § 2282 (1970); N.Y. ENVIR. CONSERVATION LAW § 71–2103 (McKinney 1972); UTAH CODE ANN. § 54–7–25 (1954); 10 VT. STAT. ANN. § 1274 (Supp. 1973); WASH. REV. CODE ANN. § 70.94. 431 (Supp. 1972). *Cf.* 15 U.S.C. § 1640 (1970).

[4] *See* K. DAVIS, 1 ADMINISTRATIVE LAW TREATISE, § 2.13 (1958) for a general description of the development of this viewpoint.

[5] *See generally*, Brown, *Administrative Commissions and the Judicial Power*, 19 MINN. L. REV. 261, 275 (1935). The author stated:

> The question whether judicial powers have or have not been validly conferred is determined not by the character of the issues which are referred to the administrative body for decision.

Brown further said that, viewing the situation realistically, there would be little to prevent large measures of the judicial function from being conferred upon administrative bodies. This observation has proven correct in the succeeding four decades.

[6] People *ex rel.* Rice v. Wilson Oil Company, 364 Ill. 406, 410, 4 N.E.2d 847, 850 (1936). The court implies that it was possible to distinguish between administrative and judicial functions. *See also* Montana-Dakota Co. v. Public Service Co., 341 U.S. 246 (1951); United States v. Rock Royal Co-op., Inc., 307 U.S. 533 (1919); Farmer v. United Electrical, Radio and Machine Workers, 110 F. Supp. 220 (D.C. Cir. 1953); Dept. of Finance v. Gandolfi, 375 Ill. 237, 30 N.E.2d 737 (1940); State *ex rel.* Ebert v. Loden, 117 Md. 373, 83 A. 564 (1912); *cf.* Allen v. Grand Central Aircraft Co., 347 U.S. 535 (1954); United States v. Grimaud, 220 U.S. 506 (1911); Wycoff v. Public Service Comm., 13 Utah 123, 369 P.2d 283 (1962).

[7] The New Jersey supreme court, in Jackson v. Concord Co., 54 N.J. 113, 126, 253 A.2d 793, 800 (1969), upheld the delegation of what seemed to be a purely judicial function and made the following statement which is illustrative of the position of many courts today:

> At this advance date in the development of administrative law, we see no Constitutional objection to authorization to an administrative agency to award, as incidental relief in connection with a subject delegated to it, money damages, ultimate judicial review being available.

occasionally, a statutory delegation is overturned.[8] The power to punish either by confinement of the person or by the assessment of fines is traditionally associated with criminal law and carried out only by the courts. Court decisions occasionally recognize the logical inconsistency in permitting an administrative agency to impose penalties which have the effect of punishment.[9] Nevertheless, a court rarely invalidates a delegation on these grounds because, it is reasoned, the agency sanction is not truly punishment, but rather only remedial or compensatory in nature.[10]

The doctrine of separation of powers is closely akin to issues raised in the consideration of the delegation of authority. In theory, the delegation of an inordinately large amount of authority to an administrative body violates the principles embodied in the concept of separation of powers. Arguably, many modern administrative schemes which allow the imposition of serious fines and penalties without formal judicial proceedings violate the doctrine of separation of powers. At least in theory, those statutes vest both judicial and legislative power in the hands of the administrative agency. Early courts tended to accept arguments based upon the separation of powers concept,[11] but this trend later reversed itself.[12] Today, invalidation on these grounds would be unlikely unless a transfer of the *whole* of the power of a particular branch took place.[13]

In theory, the validity of the principle of separation of powers remains unchallenged; even recent cases concede its existence stating that "of course, the [administrative agency] cannot intrude upon or usurp the court's function of adjudication." [14] But in practice, instead of invalidating administrative actions as violative of this concept, courts generally evade its strict application. In essence, only the facade remains.[15] The separation of powers doctrine will not be available to compel trial by jury in the administrative setting.

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[8] *See, e.g.*, Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935); Lipke v. Lederer, 259 U.S. 557 (1922); People v. Swena, 88 Colo. 337, 296 P. 271 (1931); Reid v. Smith, 375 Ill. 147, 30 N.E.2d 908 (1940); Broadhead v. Monaghan, 238 Miss. 293, 117 So.2d 881 (1960); State *ex rel.* Lanier v. Vines, 274 N.C. 486, 164 S.E.2d 161 (1968); Tite v. State Tax Comm., 89 Utah 404, 57 P.2d 734 (1936).

The Court in *Lipke, supra* at 562, warned that the administrative process would be subjected to constitutional restraints; it was said that within this setting "The guarantees of due process of law *and trial by jury* are not to be forgotten or disregarded." (emphasis added)

[9] In People V. Swena, 88 Colo. 337, 339, 296 P. 271, 273 (1931), the California supreme court stated that the power to punish ". . . belongs exclusively to the courts except in cases when the [state] constitution confers such power upon some other body." Certain state constitutions confer the power to punish on other bodies, but the federal Constitution does not. *See also* Tite v. State Tax Comm., 89 Utah 404, 57 P.2d 734 (1936), which invalidated the administrative assessment of tax penalties because of an improper delegation of the power to punish.

[10] The distinction between remedial or compensatory sanctions and punitive sanctions will be discussed *infra*.

[11] Prior to the complete acceptance of the administrative process, statements such as the following, made by the Indiana supreme court in Langenberg v. Decker, 131 Ind. 471, 473, 31 N.E. 190, 193 (1892), were common:

> The encroachment of one of these departments upon the other is watched with jealous care, and is generally promptly resisted, for the observance of this division is essential to the maintenance of a republican form of government.

See also Federal Trade Commission v. Claire Co., 274 U.S. 160 (1925); I.C.C. v. Brimson, 153 U.S. 447 (1894); Kentucky and Indiana Bridge Co. v. Louisville & N.R.R., 37 F. 567 (D. Ky. 1889).

[12] An implicit willingness to accept the fact that administrative agencies do violate the concept of separation of powers can be seen in more recent opinions. *See, e.g.*, Chairman of United States Maritime Commission v. California Eastern Line, Inc., 204 F.2d 398 (D.C. Cir. 1952); Atcheson, T. & S.F. Ry. v. United States, 231 F. Supp. 422 (N.D. Ill. 1964); *In re* Larsen 44 Cal. 2d 642, 283 P.2d 1043 (1955).

[13] This more moderate position is well illustrated by the following quotation from the Illinois supreme court in People v. Franklin, 352 Ill. 528, 534, 186 N.E. 137, 145 (1933):

> It [the doctrine of separation of powers] does not mean that the legislative, executive and judicial powers should be kept so entirely separate and distinct as to have no connection or dependence the one upon the other, but its true meaning, both in theory and in practice, is that the whole power of two or more of these departments shall not be lodged in the same hands. . . . [T]here is a theoretical or practical recognition of this maxim and at the same time a blending and admixture of different powers. This admixture . . . is considered by the wisest statesmen as essential in a free government as a separation.

[14] United States v. Morton Salt Co., 338 U.S. 632, 641 (1950).

[15] A curious anomaly developed with respect to court interpretation of the vitality of the concepts of delegation of authority and separation of powers as applied to the Illinois Environmental Protection Act, *supra* note 3. Evidently prompted by the large fines set by the Polution Control Board, three appellate districts found an invalid delegation of judicial authority and violations of the separation of powers concept. *See* Cobin v. Pollution Control Board, 16 Ill. App. 3d 958, 307 N.E.2d 191 (1974); Southern Illinois Asphalt Co. v. Environmental Protection Agency, 15 Ill. App. 3d 66, 303 N.E.2d 606 (1973); City of Waukegan v. Pollution Control Board, 11 Ill. App. 3d 189, 296 N.E.2d 102 (1973). Two other appellate courts came to the opposite conclusion. *See* Incinerator, Inc. v. Pollution Control Board, 15 Ill. App. 3d 514, 305 N.E.2d 35 (1973); Ford v. Environmental Protection Agency, 9 Ill. App. 3d 711, 292 N.E.2d 540 (1973).

In imposing a fine or penalty for an alleged violation of an administrative regulation, the agency must afford the accused basic due process of law. Flexibility is the keynote characterizing due process.[16] With this flexibility in mind, the question becomes what requirements due process imposes on an administrative agency attempting to levy a $100,000 fine for a violation of its regulations. Does due process require all the constitutional protections traditionally afforded to a party accused of a crime or will less rigid protections be adequate? In particular, must the issue of guilt or innocence be determined by a jury or can the administrative agency itself perform this function without violating due process of law? These issues are at the heart of the problems examined in this comment.

Beyond specific constitutional requirements such as the sixth and seventh amendments, (which may or may not be applicable in the administrative setting), some type of basic due process must be accorded everyone brought before an administrative agency.[17] Precedent establishes this precept firmly, although in somewhat vague and ill-defined terms.[18] A lack of due process in an administrative proceeding will void the action taken by that agency.[19]

Courts recognize the special nature of the quasi-judicial proceedings conducted by administrative agencies and consequently limit the formal due process requirements necessary in more traditional judicial hearings. The New York Court of Appeals stated that:

> [I]t is the instinct of our jurisprudence to extend court principles to administrative or *quasi*-judicial hearings *insofar as they may be adapted* to such procedures.[20]

In "adapting" conventional due process requirements to the administrative realm, many courts exhibit a tendency to modify or abandon the constitutional protections offered in a true criminal proceeding.[21] The justification for these relaxed procedural requirements is usually necessity and expediency, coupled with the fact that some form of judicial review is generally available. Undoubtedly an administrative proceeding would proceed at a generally faster pace if, for example, the agency

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The Illinois supreme court resolved the matter in City of Waukegan v. Pollution Control Board, 57 Ill. 2d 170, 311 N.E.2d 146 (1974) by upholding the delegation to the Pollution Control Board. The court did not even consider whether the penalty imposed was criminal; evidently this issue was not raised by the parties before the court. The court said:

> It is not disputed that there is before us only the question of the imposition of civil penalties. There is no contention that the penalties concerned here were designed to be or are considered criminal sanctions.

It is regrettable that this crucial issue was not even reached by the court.

[16] Mr. Justice Frankfurter characterized the flexibility of due process in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 162–63 (1950), as follows:

> . . . [D]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. . . . 'Due process' cannot be imprisoned within the treacherous limits of any formula. . . . 'Due process' is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.

[17] *See generally* Gellhorn, *Administrative Prescription and Imposition of Penalties*, 1970 WASH. U.L. REV. 265, Note, *Administrative Law—Due Process Implications in Agency Proceedings*, 13 B.C. IND. & COM. L. REV. 184 (1972).

[18] *See, e.g.*, Morgan v. United States, 304 U.S. 1, 14–15 (1937), in which Mr. Chief Justice Stone said: ". . . [I]n administrative proceedings of a *quasi*-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. *See also* Southern R. Co. v. Virginia, 290 U.S. 190 (1933).

[19] When a court does determine that due process is lacking, the response is usually simple and straightforward. For example, consider this statement of the Sixth Circuit in N.L.R.B. v. Newberry Lumber & Chemical Co., 123 F.2d 831, 838 (6th Cir. 1942):

> This court would unhesitatingly refuse to enforce an order of an administrative board or agency, if issued pursuant to an unfair hearing or without due process of law. The requirement of fair trial and fair play is binding on administrative agencies as well as on courts.

Cf. N.L.R.B. v. Prettyman, 117 F.2d 786, 792 (6th Cir. 1941), which held: "Even if the order of the Board were justified by the facts, . . . the necessity of according due process of law to the respondent is not obviated. No order is justified if obtained without due process of law. . . ." *See also* Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197 (1938); Voight v. Webb, 47 F. Supp. 743 (E.D. Wash. 1942).

[20] Evans v. Monaghan, 306 N.Y. 312, 320, 118 N.E.2d 452, 458 (1954) (emphasis added).

[21] *See, e.g., In re* Groban, 164 Ohio St. 26, 128 N.E.2d 106, *aff'd*, 352 U.S. 330 (1957), which held that due process did not require that the right to counsel be honored at an administrative hearing. *See also* Yakus v. United States, 321 U.S. 414 (1944), which upheld the validity of a material allocation suspension order issued under the authority of the Price Control Act during World War II. The Court found no violation of due process. *See also* Lockerty v. Phillips, 319 U.S. 182 (1943), in which the Court upheld the validity of a section of the Price Control Act which denied the power of the district court to enjoin enforcement of the Act. *But see* Note, *Right to Counsel—The Right to Assistance of Counsel in Administrative Proceedings*, 34 NOTRE DAME LAW. 90 (1958), which was critical of the majority decision in *Groban*. The vigorous dissent of Mr. Justice Douglas was discussed at length.

did not need to prove to a jury that the individual was guilty beyond a reasonable doubt.

The courts have developed few generalized statements dealing with the issue of due process in the administrative setting; rather, they tend to examine the specific circumstances surrounding each individual proceeding to determine if an individual received due process. As a result of this case-by-case approach, few general guidelines have emerged. Instead, rulings have developed which are restricted to their own facts.[22]

Due process in the administrative setting also includes the requirements of the specific constitutional guarantees contained in the sixth and seventh amendments. However, the extent of their applicability in this area of the law is unclear. The determination of whether due process of law demands a trial by jury in certain non-judicial proceedings must be made in light of precedent construing those two provisions of the Constitution.

Specific Constitutional Provisions

The Constitution outlines the requirements of trial by jury in three separate locations: section 3 of article III, the sixth amendment, and the seventh amendment. These provisions, of course, apply to traditional court proceedings but their applicability in the administrative realm is less certain. The advent of administrative law has forced the courts to attempt to reconcile the principles set forth in the Constitution with an adjudicatory process not envisioned by the framers of that document.

Our system of jurisprudence places a high value on the institution of trial by jury.[23] However, the right to a jury determination of factual issues is not unlimited. Some courts hold that administrative determination of factual issues does not violate due process requirements; due process does not always imply that all factual determinations be made by a jury.[24] Following this generally restrictive viewpoint, a number of state and federal courts have further refined this position. For example, restrictive interpretations of a jury's right to review the validity of an administrative order are common.[25] Similar restrictions have developed with respect to emergency situations which require immediate remedial action on the part of the administrative agency. Where immediate need is shown, courts have tended to be less demanding when determining whether due process of law requires trial by jury in a given situation.[26]

The seventh amendment states that:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.[27]

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[22] *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970) (administrative suspension of welfare benefits); Barsky v. Board of Regents, 347 U.S. 442 (1954) (administrative suspension of driver's license); Estep v. United States, 327 U.S. 114 (1946) (Selective Service order); West Ohio Gas Co. v. Public Utilities Commission, 294 U.S. 63 (1935) (state utilities commission); French v. Civil Aeronautics Board, 378 F.2d 468 (10th Cir. 1967) (administrative suspension of aircraft inspector's license); Williams v. Mulcahey, 250 F.2d 127 (6th Cir. 1955) (deportation order); Unglesby v. Zimny, 250 F. Supp. 714 (N.D. Cal. 1965) (Navy discharge board).

[23] *See, e.g.*, Bailey v. Central Vt. Ry., 319 U.S. 350, 353–54, (1943), where the Court, in discussing the right to a jury trial under the Federal Employers Liability Act, stated:

> The debatable quality of an issue, the fact that fair-minded men might reach different conclusions, emphasize the appropriateness of leaving the question to the jury. . . . The jury is the tribunal under our legal system to decide that type of issue, as well as all issues involving controverted evidence. . . . The right to trial by jury is a basic and fundamental feature of our system of federal jurisprudence.

For a discussion of this statute (45 U.S.C. § 51 *et seq.*) (1970), and its effect upon the right to trial by jury see Comment, *The Federal Employers Liability Act and Trial by Jury*, 21 OHIO ST. L.J. 422 (1960). Further elaboration upon the right to trial by jury is found in Galloway v. United States, 319 U.S. 372, 397 (1943), in which Mr. Justice Black dissented. He stated:

> The founders of our government thought that trial of fact by juries . . . was an essential bulwark of civil liberty. For this reason, among others, they adopted Article III, section 2 of the Constitution and the Sixth and Seventh Amendment.

See also Morrison Hotel v. Kirsner, 245 Ill. 431, 92 N.E. 285 (1910).

[24] *See, e.g.*, Unemployment Compensation Commission v. Willis, 219 N.C. 709, 713, 15 S.E.2d 4, 7 (1941).

[25] "The Constitutional right to trial by jury does not include the right to have that body pass on the validity of an administrative order." United States v. Heikkinen, 240 F.2d 94, 99 (7th Cir. 1957). The court of appeals relied principally on Yakus v. United States, 321 U.S. 414 (1944). *But cf.* United States v. Hindman, 179 F. Supp. 926 (D. N.J. 1960).

[26] *See, e.g.*, Block v. Hirsh, 256 U.S. 135, 158 (1921), in which Mr. Justice Holmes stated:

> A part of the exigency is to secure a speedy and summary administration of the law and we are not prepared to say that the suspension of ordinary remedies was not a reasonable provision of a statute reasonable in its aim and intent.

Accord, Taylor v. Brown, 137 F.2d 654 (1943), *cert. denied*, 320 U.S. 787 (1944). *Cf.* Yakus v. United States, 321 U.S. 414 (1944); North American Cold Storage Co. v. Chicago, 211 U.S. 306 (1908).

[27] U.S. CONST. amend. VII.

This Constitutional provision is of little use to one seeking to obtain a jury trial in the administrative setting. As the wording of the amendment indicates, it guarantees the right to trial by jury *in suits at common law* and does not apply to criminal actions.[28] History itself places limits on the use of the seventh amendment and a historical approach determines the scope of that provision's applicability.[29]

The most significant limitation on the seventh amendment, from the stand-point of administrative law, is the fact that administrative proceedings themselves were unknown to the common law. They were modern inventions obviously not in existence in 1791, when the amendment was adopted. Consequently, courts (primarily during the 1930's, when the administrative agency was being fit into the Constitutional framework) have interpreted the seventh amendment in a manner rendering it inapplicable to administrative proceedings.

[28] The distinction between civil and criminal actions is crucial in the determination of whether one brought before an agency and threatened with a significant fine or penalty is entitled to a jury trial under the sixth amendment. It will be discussed at length *infra*.

[29] *See, e.g.*, Dimick v. Scheindt, 293 U.S. 474, 476 (1935), where the Court outlined the proper interpretation of the seventh amendment in the following manner:

> In order to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of common law established at the time of the adoption of that Constitutional provision in 1791.

See also Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935), in which the Court stated: "The right to trial by jury thus preserved is the right which existed under the English common law when the Amendment was adopted."

For an examination of the historical developments relating to the seventh amendment, see Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289 (1966). *See also* Capital Tractor Co. v. Hof, 174 U.S. 1 (1898).

No right to trial by jury exists in equity under the seventh amendment. *See* Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962); Beacon Theaters, Inc. v. Westover, 359 U.S. 500 (1958). *See also* Comment, *The Seventh Amendment and Civil Rights Statutes: History Adrift in a Maelstrom*, 68 NW. U.L. REV. 503 (1973); Note, *Constitutional Provision for Nonjury Trial Under the Seventh Amendment*, 83 YALE L.J. 401 (1973). In a summary proceeding, there is no right to jury trial. *See, e.g.*, Bank of Columbia v. Ohely, 17 U.S. (4 Wheat.) 235 (1819); Bowman v. Virginia State Entomologist, 128 Va. 351, 105 S.E. 141 (1920). *Cf.* Murray's Lessee v. Hoboken Land and Improvement Co., 59 U.S. (18 How.) 272 (1855). There is also no right to a jury trial in a condemnation proceeding. *See, e.g.*, United States v. 243.22 acres of Land, 129 F.2d 678 (2d Cir. 1942), *cert. denied*, 317 U.S. 698 (1943). Nor is there a right to a jury trial in a suit against the sovereign. *See, e.g.*, Glidden Co. v. Zdanok, 370 U.S. 530 (1962).

Chief Justice Hughes clearly enunciated this position in *N.L.R.B. v. Jones & Laughlin Steel Co.*[30] He stated:

> The Amendment thus preserves the right which existed under the common law when the Amendment was adopted. . . . Thus it has no application to cases where recovery of money damages is an incident to the equitable relief even though damages might have been recovered in an action at law. . . . It does not apply where the proceeding is not in the nature of a suit at common law.[31]

The Court further stated that the administrative proceedings instituted under the National Labor Relations Act were statutory in nature and, hence, were not suits at common law.[32] A more recent interpretation yielded substantially the same thoughts: "If the historical analogue was tried to a jury at English common law in 1791, then it is triable by right to a jury trial today in contemplation of the Seventh Amendment." [33] Obviously, there was no historical analogue to the modern administrative process in 1791.

Generally, the courts continue to allow a legislature to provide an alternative means of adjudication in certain administrative settings. With respect to the administrative collection of taxes, the Supreme Court stated: "It is within the undoubted power of Congress to provide any reasonable system for the collection of taxes and recovery of them, when illegal, without a jury trial." [34] In situations where neither statute nor the Constitution demands a jury trial, courts have tended to deny this procedure.[35] Thus, without express statutory authorization, the right to trial by jury will generally be lost in the administrative setting.[36] As a conse-

[30] 301 U.S. 1 (1937).

[31] *Id.* at 48.

[32] The court in Simmons v. United States, 29 F. Supp. 285, 286 (W.D. Ky. 1939), further elaborated on this point by saying: "It [the right to trial by jury] is not applicable to causes arising in equity or to civil cases of admiralty or maritime jurisdiction, or *to remedies subsequently provided for by statute and which did not previously exist.*" (emphasis added). *See also* People v. Keith, 38 Ill. 2d 405, 231 N.E.2d 387 (1967).

[33] Ochoa v. American Oil Co., 338 F. Supp. 914 (S.D. Tex. 1972).

[34] Wichwire v. Reinecke, 275 U.S. 101 (1927).

[35] *See, e.g.*, Wirtz v. District Congress #21, Brotherhood of Painters, 211 F. Supp. 253 (E.D. Pa. 1962). The court there stated:

> Where Congress has intended trial by jury under circumstances where the right was not Constitutionally guaranteed, it has *expressly* so provided.

Id. at 255.

[36] However, it should be noted that, in some circum-

quence of firmly established precedent, the seventh amendment is plainly inapplicable within the administrative setting, but the same cannot be said with absolute certainty for the sixth amendment and article III.

Article III and the Sixth Amendment

Article III[37] and the sixth amendment[38] provide for trial by jury in all criminal situations. These provisions require trial by jury in a *criminal* proceeding, as distinguished from the seventh amendment, which deals only with civil proceedings. This distinction requires the classification of a proceeding as civil or criminal in nature; this classification, in turn, will determine which constitutional sections govern. The distinction between a civil and a criminal proceeding blurs upon the consideration of modern administrative sanctions.[39] The determination as to whether the proceeding and the sanction imposed by the agency are indeed criminal in nature is a difficult one; yet, it is central to all issues concerning trial by jury.[40]

Historical construction of article III recognizes the fact that not all criminal actions received jury trials at common law.[41] Courts have similarly construed the sixth amendment. Decisions recognize that any definition of the terms utilized in article III or the sixth amendment must refer to the historical meanings of these terms.[42] The relationship between article III and the sixth amendment is relatively simple; the scope and nature of the right protected in each is identical and one does not enlarge the rights guaranteed by the other.[43] Also, the provisions of the sixth amendment now apply fully to the states as well as the federal government.[44]

In order to maintain some semblance of the concept of separation of powers, an administrative agency may not act as a court and pass judgement on a purely criminal matter. As a result of this accepted doctrine, legislatures attempt to avoid any improper delegations of judicial authority to the agency by labelling both the proceeding and the sanctions to be imposed as *civil*.[45] By utilizing such language, a legislature indicates its intention that the agency be regarded as a mere creditor. In the event that a party refuses to pay a fine assessed by the agency, that agency can then go into a court and proceed in the form of a civil action for the

stances, this right has been guaranteed by express statutory provision. *See, e.g.*, 11 U.S.C. § 42 (1970) (bankruptcy proceedings); 28 U.S.C. § 1873 (1970) (admiralty claims). *See also* Ochoa v. American Oil Co., 338 F. Supp. 914 (S.D. Tex. 1972); Beaty v. Massey-Hite Grocery Co., 211 S.C. 242, 44 S.E.2d 535 (1947).

[37] Article III, section three reads as follows:

> The trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

[38] The sixth amendment contains the following provisions:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; and to have the Assistance of Counsel for his defence.

[39] Confusion results and speculation often occurs as to when a trial by jury is called for. *See* Comment, *Constitutional Law—Right to Jury Trial in Indirect Criminal Contempt in Federal Courts*, 57 MICH. L. REV. 258, 260-61 (1958), where the author stated:

> It is clear that deprivation of jury trial was a principal grievance against the King. But evaluation of the extent of 'jury trial' as written into the Constitution invites a great deal of inference and guess-work.

[40] Speaking directly to this point, one commentator stated:

> However, the basic difficulty of this seemingly simple doctrine is the complexity of distinguishing civil monetary penalties from criminal monetary penalties. . . . Whatever the practical difficulties, it is clear that even the theoretical necessity for making distinctions between civil and criminal penalties has been questioned under the press of modern problems calling for decisive legal action.

Polelle, *The Illinois Environmental Protection Act: Constitutional Twilight Zone of Criminal and Civil Law*, 61 ILL. B.J. 514, 584 (1973).

[41] *See, e.g.*, District of Columbia v. Colts, 282 U.S. 63 (1930); Callan v. Wilson, 127 U.S. 540 (1888). The most important of these common law limitations removes the right to trial by jury in *petty* criminal situations. This distinction will be discussed at length, *infra*.

[42] *See, e.g.*, Patton v. United States, 281 U.S. 276 (1930), in which the Court made the following statement:

> It must be consequently taken that the word 'jury' and the words 'trial by jury' were placed in the Constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument.

[43] *See, e.g., Ex parte* Quirin, 317 U.S. 1 (1942). *See also* Kaye, *Petty Offenders Have No Peers!*, 26 U. CHI. L. REV. 245, 260 (1959).

[44] Duncan v. Louisiana, 391 U.S. 145 (1965), was the first case to so hold.

[45] *See, e.g.*, section 1042 of the Illinois Environmental Protection Act, *supra*, note 3, which states:

> Any person who violates any provisions of this act or any regulation adopted by the Board . . . shall be liable to a penalty of not to exceed $10,000 for said violation and an additional penalty of not to exceed $1,000 for each day during which violation continues, which may be recovered in a civil action. . . .

recovery of a debt.[46] This labelling also lessens the burden of proof; civil proceedings do not require that a violation of agency regulations be proven beyond a reasonable doubt.[47] However, the words of the statute alone will not end all court inquiry into the true nature of the administrative proceeding under a given statute.[48]

The courts have analyzed several factors in determining whether an administrative action is civil or criminal. The courts study such elements as the nature of the offense itself, the overall character of the entire proceeding and the nature of the penalty to be imposed. Through the application of these criteria, courts have drawn a very hazy line of demarcation between criminal and civil law. In fact, some may choose to characterize this distinction as more of a *non-distinction*; decisions show very little logical consistency in this area.

In order to determine whether the sixth amendment and article III apply in a particular administrative context, it is first necessary to define the word "crime" as it is used within the Constitution. Crime may be broadly defined as an offense against social order or morality.[49] Examination of the offense prosecuted before the administrative agency will act as a starting point for consideration of the true nature of the administrative proceeding. Courts often view the nature of the offense itself as a mandatory consideration.[50] A court should not be expected to end its inquiry into the nature of the proceeding simply because the legislature has chosen to insert the term "civil" into the statute being examined. The administrative agencies deal with many offenses which are plainly "crimes" in the broadest sense of that term (e.g., unfair labor practices, environmental pollution, consumer problems, etc.). They are offenses against the public to which the state has attached certain sanctions to be recovered in a proceeding prosecuted in the name of the state.

Consideration of the nature of the offense gives the courts an opportunity to look carefully into the overall nature of the proceeding. A court must, in essence, consider the purposes of the statute and determine whether it may be characterized as civil or criminal. Most courts tend to view administrative proceedings as civil in nature, perhaps because the legislature has characterized the given proceeding as civil rather than criminal. Although courts do, at least in theory, look beyond the legislative classification, results would indicate that more often than not, they conduct only a superficial inquiry, relying instead upon the legislature characterization.[51]

[46] In the system established in Illinois, for example, the appellate court is the first judicial body which deals with any sanction assessed. The circuit (trial) courts of Illinois do not enter into the process of environmental control. Of course, there are no juries provided at the appellate level. Even if an agency decision to levy a fine were first appealable to the lowest-level court, established principles of administrative law would not allow a trial *de novo* at that point; there could be no reconsideration of the agency's findings as long as the record of the agency's proceedings provided substantial evidence to affirm the conclusions reached. *Cf.* N.L.R.B. v. Universal Camera Corp., 340 U.S. 747 (1951).

[47] *See, e.g.,* United States v. Regan, 232 U.S. 37 (1914). *But see* Wycoff Co. v. Public Service Commission, 13 Utah 123, 369 P.2d 283 (1962), in which at least clear and convincing evidence of guilt was required for the imposition of a fine.

[48] It should be noted that not all administrative statutes attempt to characterize their sanctions as civil. The Harbors and Rivers Act of 1899, 33 U.S.C. §§ 401 *et seq.*, is an example of a statute which clearly imposes criminal punishments for violations of its provisions with the result that a jury trial is available. *See generally* Bass Angler Sportsman Society v. United States Steel, 324 F. Supp. 412 (S.D. Ala. 1971); Comment, *Criminal Liability Under the Refuse Act Permit Program*, 63 J. CRIM. L.C. & P.S. 306 (1972). In addition to civil penalties provided, some administrative law statutes provide alternate criminal penalties to be imposed only after proper criminal proceedings. *See*, for example, section 1044 of the Illinois Environmental Protection Act, *supra* note 3, which makes it a misdemeanor to violate any regulations of the Pollution Control Board.

[49] Mr. Justice Harlan developed that concept in Callan v. Wilson, 127 U.S. 540, 549 (1888). He stated:

> The word crime, in its more extended sense, comprehends every violation of public law; in a limited sense, it embraces offenses of a serious or atrocious character.

Another court defined the term in this manner:

> A crime is an offense against the state directly or indirectly affecting the public, to which the state has annexed certain punishments and penalties and which it prosecutes in its own name in what is called a criminal proceeding.

State v. Thomas, 318 Mo. 605, 608, 300 S.W. 823, 826 (1927).

[50] *See, e.g.,* Schick v. United States, 195 U.S. 65, 68 (1904), where the Court stated:

> The truth is, the nature of the offense and the amount of the punishment prescribed rather than its place in the statutes determine whether it is to be classed . . . among crimes or misdemeanors.

See also District of Columbia v. Colts, 282 U.S. 63 (1930); United States v. Bishop, 261 F. Supp. 969 (N.D. Cal. 1966), which restated this basic position.

[51] *See generally* Hepner v. United States, 213 U.S. 103, 108 (1909), in which the Court upheld an action for collection of a penalty for a violation of an immigration law. The Court stated:

> It must be taken as settled law that a certain sum, or a sum which can readily be reduced to a certainty, prescribed in a statute as a penalty for the violation of a law, may be recovered by a civil action, even if it may also be recovered in a proceeding which is technically criminal.

The landmark case of *Helvering v. Mitchell*[52] illustrated this reliance upon legislative intent. In that decision, the Court upheld a 50 per cent "reassessment" of taxes imposed upon fraudulent taxpayers. The majority reasoned that this was not a criminal penalty requiring formal criminal procedures; only a civil action was necessary to collect the penalty imposed. The main issue, in the eyes of the Court, was whether the Congress intended to create a criminal proceeding by enacting the enabling legislation. The Court said simply: "That question is one of statutory construction." [53] By such reasoning, the Court left itself open to criticism that it abdicated its judicial function by allowing the legislature to make the final determination between civil and criminal proceedings. To act in this manner would encourage wholesale evasions of Constitutional rights guaranteed to those charged with criminal acts.[54]

A civil proceeding is characterized as remedial or compensatory in nature, as distinguished from a criminal proceeding, which is penal (i.e., its main objective being punishment).[55] Over one hundred years ago, the Supreme Court, in discussing a proceeding which led to the administrative imposition of a sanction for the violation of certain import laws stated that one must:

> . . . [C]onsider the nature and the purposes of the statute. . . . Is it strictly punitive or is it remedial? . . . [T]he amount here receivable is in the proportion to the value of the goods abstracted . . . not at all in proportion to the degree of criminality. . . . It therefore must be considered remedial, as providing indemnity for loss.[56]

Thus, the idea of compensation rather than punishment is a key element in the distinction between a civil or remedial proceeding and one characterized as criminal. A remedial proceeding does not seek to punish but only to protect the public from improper conduct.[57] If a statute measures and defines the damages due from a causally connected loss, courts will generally view it as remedial.[58] Applying this type of test, many modern administrative proceedings and their sanctions are punitive or criminal rather than remedial or civil in nature. However, contemporary courts rarely engage in such analysis.

The distinctions between a civil and a criminal proceeding are exceedingly fine; if a court wishes it can take advantage of established precedent and hold that almost any proceeding is primarily civil in nature.[59] This wealth of precedent covers a variety of administrative proceedings.[60] In proceedings characterized as civil, frequently only a monetary loss was at stake, unlike the more conventional criminal proceeding, which might subject a defendant to more serious consequences such as a loss of personal liberty.[61] As the New York court of

[52] 303 U.S. 391 (1938).

[53] *Id.* at 399. *See also* Stockwell v. United States, 80 U.S. 531, 546 (1871).

[54] But not all courts will accept a legislative relabeling to avoid constitutional protections. *See, e.g.*, State *ex rel.* Wilcox v. Gilbert, 126 Minn. 95, 147 N.W. 953 (1914).

[55] One commentator explained the dichotomy between penal and nonpenal regulations in the following manner:

> . . . Penal regulations are designed to deter violations of other regulations. . . . [I]n the case of remedial regulations, obedience of the regulation will itself improve the situation even if the deterent effect, which may be present, fails to operate.

See Note, *Administrative Penalty Regulations*, 43 COLUM. L. REV. 213, 217 (1943).

[56] Stockwell v. United States, 80 U.S. 531, 546–47 (1871). *See also* N.L.R.B. v. Kohler, 351 F.2d 798 (D.C. Cir. 1965); N.L.R.B. v. Reed & Prince Mfg. Co., 130 F.2d 765 (1st Cir. 1942). *But see* Stout v. State *ex rel.* Cauldwell, 36 Okla. 744, 130 P. 553 (1913).

[57] *See, e.g.*, N.L.R.B. v. Thompson Products, Inc., 130 F.2d 363 (6th Cir. 1942). *Cf.* Virginia *ex rel.* Shifflett v. Cook, 333 F. Supp. 718 (W.D.Va. 1971); Sears Roebuck & Co. v. Federal Trade Commission, 258 F. 307 (7th Cir. 1919).

[58] *See, e.g.*, Sherman & Sons Co. v. Bitting, 26 Ga. App. 299, 105 S.E. 848 (1921).

[59] The result of such a determination would, of course, be that the protections provided by the sixth amendment and Article III would be lost. *See, e.g.*, United States v. Zucker, 161 U.S. 475 (1896).

[60] *See, e.g.*, Hannah v. Larche, 363 U.S. 420, *rehearing denied*, 364 U.S. 855 (1960) (proceedings of Civil Rights Commission); *In re* Debs, 158 U.S. 564 (1895) (contempt proceeding); *Ex parte* Tom Tong, 108 U.S. 556 (1883) (habeus corpus proceeding); Wood v. State, 440 F.2d 1348 (5th Cir. 1971) (parole hearing); Purex Corp. Ltd. v. Proctor & Gamble Co., 308 F. Supp. 584 (C.D. Cal. 1970) (Federal Trade Commission proceeding); United States v. Schneider, 139 F. Supp. 826 (S.D. N.Y. 1953), *aff'd.*, 347 U.S. 284 (1954) (Federal Communications Commission proceeding); Howell v. Collector, Internal Revenue, 175 F.2d 240 (6th Cir. 1949) (Internal Revenue proceeding); United States v. Lee Huen, 118 F. 442 (N.D. N.Y. 1902) (deportation hearing); *In re* Application of William Clark, 65 Conn. 17, 31 A. 552 (1894) (grand jury proceeding); Varholy v. Sweat, 153 Fla. 571, 15 So. 2d 267 (1943) (quarantine order); People v. Stout, 74 Ill. App. 2d 87, 242 N.E.2d 264 (1968) (municipal ordinance violation); *In re* Fox's Estate, 162 Mich. 531, 127 N.W. 668 (1910) (inheritance tax proceeding); State *ex rel.* Wilcox v. Gilbert, 126 Minn. 95, 149 N.W. 953 (1914) (nuisance abatement proceeding); Commonwealth v. Mahoningtown Men's Club, 140 Pa. Super. 413, 14 A.2d 356 (1940) (license revocation proceeding); Johnson v. Nelms, 171 Tenn. 54, 100 S.W.2d 648 (1937) (lunacy hearing).

[61] However, it is possible that a simple monetary fine can have severely adverse effects upon an individual or corporate entity. This is particularly true with respect to marginal business operations, which may not

appeals stated: "The effect of the recovery is merely to charge the defendant with a pecuniary liability, while a criminal prosecution is had for the purpose of punishment of the accused." [62] It is doubtful whether this logic holds up in light of modern administrative penalties which can be extremely onerous. Yet courts continue to apply this reasoning.

Courts have occasionally characterized administrative proceedings as criminal rather than civil in nature.[63] Should a court determine that the proceeding is criminal in nature, an administrative body loses its authority to adjudicate the matter. A criminal proceeding demands the presence of the judiciary and not merely that of an administrative body.[64] If a court characterizes a proceeding as criminal, it is implicitly willing to go beyond the mere form of the proceeding and view its substance in detail.[65]

Although courts show a reluctance to recognize the criminal nature of some administrative proceedings, this is not the case with contempt proceedings, where the distinction between civil and criminal is also very significant.[66] Courts could draw from the precedent in this area of the law when dealing with administrative proceedings. *Bloom v. Illinois*[67] recently indicated that the distinction between civil and criminal contempt is a viable one. In this case, the Supreme Court applied the provisions of the sixth amendment to criminal contempt proceedings. After dismissing arguments that the interests of efficiency and prompt administration of justice demanded juryless adjudication in all contempt proceedings,[68] the Court held that the sixth amendment required a trial by jury in criminal contempt proceedings. This case is significant because it evidences a willingness on the part of the Court to re-examine the true nature of these proceedings, and where necessary, to apply basic constitutional protections. Such expansions of the applicability of the sixth amendment may help to allay criticism of the fact that the Court has, over the years, shown a tendency to define criminal proceedings in a rather restrictive way and thereby to limit the scope and applicability of article III and the sixth amendment.[69]

When determining the overall nature of the administrative proceeding, the courts also study the character of the sanction to be imposed. Older precedent, which tended to construe penalties as civil in nature, is of questionable value today in light of modern administrative statutes with their increased penalty potential.

The basic divisions between civil and criminal sanctions are identical to those set by the courts when examining the nature of administrative proceedings.[70] The purpose of a civil sanction can be defined as remedial (as providing an indemnity for a loss) while a criminal sanction has as its primary goal deterrence or punishment. Again, the intent of the legislature controls the decisions of some courts.[71] But under the better view, held by many

be able to bear such a loss. Recent precedent, which recognizes that sanctions not involving a loss of liberty may, nevertheless, be criminal, will be discussed in this context, *infra*.

[62] People v. Briggs, 114 N.Y. 56, 65, 20 N.E. 820, 823 (1889).

[63] *See, e.g.*, United States v. La Franca, 282 U.S. 568 (1931); Boyd v. United States, 116 U.S. 616 (1885); United States v. Claflin, 97 U.S. 546 (1878); Highland Supply Corp. v. Reynolds Metals Co., 221 F. Supp. 15 (E.D. Mo. 1963). *Cf.* Singer v. United States, 380 U.S. 24 (1964).

[64] *See, e.g.*, Highland Supply Corp. v. Reynolds Metals Co., 221 F. Supp. 15 (E.D. Mo. 1963).

[65] In Boyd v. United States, 116 U.S. 616, 634-35, (1885), the Court performed this type of detailed analysis with the following results:

> We are . . . clearly of the opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reasons committed by him, though they may be civil in form, are in their nature criminal.

The Court illustrated well the possible harms which could come about if such practices were allowed to continue:

> If the government prosecutor elects to waive an indictment and to file a civil information against the claimants—that is, civil in form—can he by this device take from the proceeding its criminal aspect and deprive the claimants of their immunities as citizens? . . . This cannot be. The information, though technically a civil proceeding, is in substance and effect a criminal one.

See also United States v. Claflin, 97 U.S. 546 (1878); *cf.* Singer v. United States, 380 U.S. 24 (1964).

[66] *See, e.g., Ex parte* Grossman, 267 U.S. 87 (1925); People *ex rel.* Environmental Protection Agency v. Illinois C. R.R., 12 Ill. App. 3d 549, 298 N.E.2d 737 (1973).

[67] 391 U.S. 194 (1968).

[68] Speaking to this point, Mr. Justice White said:

> . . . [C]onsiderations of efficiency must give way to the more fundamental interest of insuring even-handed exercise of judicial power. Perhaps to some extent we sacrifice efficiency, expedition and economy, but the choice in favor of jury trials has been made, and retained, in the Constitution. *Id.* at 209.

[69] *See, e.g.*, Note, *When Is a Criminal Trial not a Criminal Trial—The Case Against Jury Trials in Juvenile Court*, 46 ST. JOHN'S L. REV. 26 (1971); Comment, *Constitutional Law—Michigan Criminal Sexual Psychopath Act—Confinement in State Prison Under Act Denies Right to Trial By Jury*, 35 U. DET. L.J. 527 (1959).

[70] *See* p. 351 *supra*.

[71] *See* United States v. Regan, 232 U.S. 37 (1914); South Carolina Highway Dept. v. Southern P. Ry., 239 S.C. 227, 122 S.E.2d 422 (1961); Zarnott v. Timkin-Detroit Axle Co., 244 Wis. 596, 13 N.W.2d 53 (1944);

courts, the statutory phraseology no longer constitutes the *only* factor to be examined.

Rather, many courts today use a "primary nature" test; that is, a court examines the practical implications of the sanction and passes judgment as to the sanction's primary nature, taking into consideration statutory language. If the sanction is primarily regulatory or remedial, the court views it as civil in nature;[72] if it is punitive or penal, the court labels it criminal.[73] Again, the case of *Helvering v. Mitchell*[74] is instructive; as already noted the Court there upheld the administrative imposition of a $360,000 "re-assessment" of taxes. The Court professed to apply a primary nature analysis when considering the sanction imposed. The majority reached the conclusion that the sanction was remedial in nature and that Congressional intent was not to punish but rather to safeguard revenue sources.[75] In most areas, the Court has recently[76] emphasized a primary nature test placing somewhat less weight upon legislative intent.[77]

Plainly, some administrative agency sanctions are purely remedial. For example, the National Labor Relations Board regularly reinstates employees dismissed from employment unfairly and courts routinely uphold such action as remedial in nature.[78] This sanction is designed to make whole those damaged by improper actions of the employer.[79] A significant amount of case law recognizes the remedial nature of certain sanctions.[80]

cf. Commonwealth v. State Loan Corp., 116 Pa. Super. 365, 176 A. 516 (1935).

The court in Madonna v. State, 151 Cal. App. 2d 836, 840, 312 P.2d 257, 260 (1957), illustrated its dependence upon legislative characterization in this manner:

> The fact that the statute provides that the penalty shall be recovered by a civil action has been regarded as conclusive of the nature of the action.

Is not the court abdicating a certain amount of judicial responsibility by taking such a position?

[72] *See, e.g.*, United States v. Stockwell, 80 U.S. (13 Wall.) 531, 547 (1871), where the Court said that because the Congress had labeled a sanction as civil, it "... must therefore be considered as remedial, as providing indemnity for loss."

[73] A discussion of criminal sanctions appears *infra*.

[74] 303 U.S. 391 (1938).

[75] At 303 U.S. 391, 402, the majority stated:

> That the Congress provided a distinctly civil procedure for the collection of the additional fifty per cent indicates clearly that it intended a civil, not a criminal, sanction.... Civil procedure is incompatible with accepted rules and Constitutional guarantees governing the trial of criminal prosecutions and where civil procedure is prescribed for enforcement of remedial sanctions, those rules and guarantees do not apply.... Thus the determination of facts upon which liability is based may be made by an administrative agency instead of by a jury.

See also Sunshine Coal Co. v. Adkins, 310 U.S. 381 (1940); *cf.* District of Columbia v. Clawans, 300 U.S. 617 (1937); United States v. Bishop, 261 F. Supp. 969 (N.D. Cal. 1966).

Yet using a primary nature test would seem to lead to a different result than was obtained in *Mitchell*. Perhaps the Court placed more reliance on legislative intent than it acknowledged.

[76] An exception to this general rule appears in cases dealing with the Congressional power to regulate immigration. Courts have always reasoned that, since the Congress possessed plenary powers to control this area, its intent should be given greater consideration; if that body wished to provide for administrative imposition of penalties for violation of such statutes, it could do so because of the plenary powers Congress possessed in this field. In Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909), the Court upheld this type of statute and said:

> In accordance with settled judicial construction, the legislation of Congress... has proceeded on the conception that it was within the competency of Congress when legislating as to matters exclusively within its controls, to impose appropriate obligations and sanction their enforcement by reasonable money penalties, giving to executive officers the power to enforce such penalties without the necessity of invoking the judicial power.

See also Elting v. North German Lloyd, 287 U.S. 324 (1932); Lloyd Sabaudo Societa v. Elting, 287 U.S. 329 (1932). *But see* 1 DAVIS, ADMINISTRATIVE LAW TREATISE 2.13 (1958). Professor Davis suggested that the Court's reasoning in its line of precedent was incorrect because such a broad interpretation of Congressional authority could, in effect, allow the Congress to impose criminal penalties without criminal proceedings in almost all situations through the utilization of the Commerce Clause of the Constitution.

[77] *See, e.g.*, Rex Trailer Co., Inc. v. United States, 350 U.S. 148 (1956); United States *ex rel.* Marcus v. Hess, 317 U.S. 537 (1943). *See generally* Polelle, *supra* note 40.

[78] *See, e.g.*, N.L.R.B. v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939); *cf.* International Ladies' Garment Workers Union v. N.L.R.B., 366 U.S. 731 (1961).

[79] Although the Court generally declares that sanctions must be remedial rather than punitive, the Court has upheld the practice of not reducing back pay by unemployment compensation payments. *See* N.L.R.B. v. Gullet Gin Co., 340 U.S. 361 (1951). The employee is made more than whole, thus violating the concept of indemnity intertwined in the remedial sanction.

[80] *See, e.g.*, Steuart v. Bowles, 322 U.S. 398 (1944) (material allocation suspension during World War II); Brown v. Wilemon, 139 F.2d 730 (5th Cir.), *cert. denied*, 322 U.S. 748 (1944) (suspension order); Wright v. S.E.C., 112 F.2d 89 (2d Cir. 1940) (expulsion order of S.E.C.); United States v. Oregon Short Line Ry., 180 F. 483 (D.C. Ida. 1908) (sanction for violation of safety statutes); Southern Ry. v. Melton, 56 Fla. 617, 47 So. 969 (1909) (railroad commission sanction); Vissering Mercantile Co. v. Annunzio, 1 Ill. 2d 108, 115 N.E.2d 306 (1953) (state minimum wage act); Prawdzik v. City of Grand Rapids, 313 Mich. 376, 21 N.W.2d 168 (1946) (state license revocation); Wycoff Co. v. Public Service Comm., 13 Utah 123, 369 P.2d 283 (1962) (sanction for violation of commission order); *cf.* United States v. United Mine Workers of America, 330 U.S. 258 (1947) ($700,000 sanction for contempt of court). *But cf.* Regal Drug Corp. v. Wardell, 260 U.S. 386 (1922); Union Insurance Co. v. United States, 73 U.S. 759 (1867).

A number of court decisions have invalidated sanctions considered to be penal or criminal because they were imposed without proper process. This was particularly true in the tax area prior to the decision in *Helvering v. Mitchell*.[81] These decisions reasoned that additional "taxes" assessed for violations of various statutes were not taxes at all but really penalties which could not be imposed summarily. Their purpose was punishment rather than any remedial effect. *Mitchell* and its progeny reduced the significance of these early cases, but the tax/penalty dichotomy is still relevant to the distinction between civil and criminal administrative sanctions. Both share many common factors and it is disappointing to see them almost totally ignored by modern courts.

The agency may impose a sanction either to inflict a punishment or to obtain a desired result.[82] If a court believes that the penal aspects outweigh the remedial, it will permit only judicial imposition of that sanction. In certain situations, such as cases of imprisonment, the penal aspects of the sanction are obvious. In *Wong Wing v. United States*,[83] the Supreme Court invalidated a sixty-day jail sentence imposed by an administrative agency upon an alien who entered the country illegally. The Court pointed out that brief "administrative detention" prior to deportation would be permissible, but not an actual jail sentence, which was viewed as punitive in nature.[84] The court also held that the order of deportation was not itself punishment.

Difficulties arise since it is not always clear that the sanction itself has punishment and deterrence as its primary goals. In situations short of actual detention, it is difficult to determine exactly when a penalty becomes primarily criminal. This is particularly true with respect to those monetary sanctions which have increased dramatically in size during the past two decades.

The Court has dealt with the concept of penal sanctions in two relatively recent decisions, which may indicate a trend for the future. In *Trop v. Dulles*[85] the Court characterized as penal a statute depriving one of his citizenship because of desertion from the Armed Forces in time of war. The court voided the statute because it was considered penal in nature and failed to provide for a judicial determination of guilt or innocence. Chief Justice Warren applied a primary nature test in reaching the conclusion that punishment was the statute's goal.[86]

Thus, the Court recognized that that statute was criminal in nature and the sanction could not be applied outside of the judicial process.[87]

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[81] *See, e.g.*, United States v. La Franca, 282 U.S. 568 (1931); Lipke v. Lederer, 59 U.S. 557 (1922); Regal Drug Co. v. Wardell, 260 U.S. 386 (1922); Dukich v. Blair, 3 F.2d 302, 305 (E.D. Wash. 1925), *appeal dismissed*, 270 U.S. 670 (1926). The district court judge reflected the viewpoint prevailing prior to *Helvering* when he stated:

> Neither do the settled usages or methods of proceeding existing in the common or statutory law . . . lend any support to the establishment of summary administrative procedure for the infliction of punishment for the violation of penal laws. Whoever heard of penalties imposed as punishment for crime being collected or enforced by distraint proceedings?
>
> Such a method is neither suitable nor appropriate to the nature of such a case, and is clearly not sanctioned by established usages or customs, either in this or in the mother country.

This is an excellent example of the primary nature test, the better reasoned approach toward examination of the sanction imposed, but the one which the Court rejected in *Mitchell*.

[82] Root v. MacDonald, 260 Mass. 344, 157 N.E. 684 (1927). *Cf.* Lewis v. Anderson, 72 F. Supp. 119 (S.D. Cal. 1947).

[83] 163 U.S. 228 (1896).

[84] The Court considered trial by jury a mandatory requirement in this type of situation:

> . . . [B]ut when Congress sees fit to further promote such a policy by subjecting the persons of such aliens to infamous punishment at hard labor or by confiscating their property . . . we think such legislation, to be valid, must provide for a judicial trial to establish the guilt of the accused.

Id. at 237.

[85] 356 U.S. 86 (1958).

[86] Chief Justice Warren set out the guidelines for this test in these words:

> In deciding whether or not a law is penal, this Court has generally based its determination upon the purpose of the statute. If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc.—it has been considered penal. . . . The controlling nature of such statutes normally depends on the evident purpose of the legislation.

In view of the Court's definition of the purposes of punishment (to reprimand and deter), the Chairman of the Illinois Pollution Control Board recently made an interesting statement concerning the reasons for the imposition of large fines under the Illinois Environmental Protection Act, *supra*, note 3. Mr. Jacob Dumelle, the Board Chairman, stated that the large fines were levied to "deter offenders and would-be offenders from violations." These sentiments were confirmed by the *Pollution Control Board Newsletter* #80, dated February 1, 1974. In the *Newsletter*, it was stated that one of the reasons for the imposition of penalties was to act as a deterrence to the polluter and others so that potential violators would weigh the financial hazards of violations.

By relying strongly on the element of deterrence, the Board would seem to be classifying its sanctions as penal in nature, in light of the Court's definition of that concept.

[87] It should be noted that the Court still viewed legislative intent as a significant, although not controlling, factor in their decision. *See* the discussion of *Helvering v. Mitchell*, p. 353 *supra*.

Perhaps even more significant was *Kennedy v. Mendoza-Martinez*.[83] This case held that the sixth amendment required a jury trial when a person was threatened with loss of citizenship for having fled the country in wartime to avoid the draft. In this statute the Congress employed a criminal sanction without affording the accused the protections of the sixth amendment during the denaturalization proceeding. The Court voided the legislation by simply saying:

> If the sanction these sections impose is punishment, and it plainly is, the procedural safeguards required as incidents of a criminal prosecution are lacking. We need go no further.[89]

The Court further provided insights into the factors to be considered in determining whether a sanction was remedial or punitive in nature. The majority recognized that the factors involved, such as the nature of the offense, the character of the proceeding, and the nature of the sanction imposed, all tended to blend together and yield one result.[90] The Court additionally found that manifestations of Congressional purpose indicated that it was the intent of that body to punish through the statute in question.

These two cases marked the first instance in which the Court recognized the fact that an individual could suffer deprivation as serious as imprisonment without actually being incarcerated. By so holding, the concept of penal sanctions was significantly expanded to include at least one type of penalty which did not involve any possible jail term. Thus, the Court went beyond precedent and recognized that loss of citizenship was indeed a criminal sanction. The prior and somewhat more restrictive view of criminal punishment encompassed only those sanctions which involved loss of liberty.

This necessary broadening of the concept of penal sanctions lends itself to application in the field of administrative sanctions. Yet the last decade has shown no further expansion of this position.[91]

After *Mendoza-Martinez*, it seemed possible that the Court would re-assess its position on the scope of the rights provided by the sixth amendment and, in the process, perhaps extend those guarantees into the administrative realm.[92] But for unknown reasons, such an extension has not yet occurred. Perhaps the most recent administrative statutes, which often grant an agency the authority to impose heavy monetary sanctions, will provide the impetus to guide the nation's courts in this direction. Logic would seem to dictate this course of action. It is possible that more courts will come to the recognition that, even if an act is not formally labeled as a crime, the proceeding has become primarily criminal in nature if true punishment has been imposed.[93]

[83] 372 U.S. 144 (1963).

[89] *Id.* at 167. For a general discussion of *Kennedy*, see Comment, *The Concept of Punitive Legislation and the Sixth Amendment: A New Look at Kennedy v. Mendoza-Martinez*, 32 U. CHI. L. REV. 290 (1965).

[90] The following statement illustrates the application of these factors:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment... whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions.

Id. at 168, 169.

[91] The only exception to this statement was contained in a brief statement within the concurring opinion of Mr. Justice Harlan in Oesterlich v. Selective Service System Board No. 11, 393 U.S. 233, 243 (1968), where he hinted that the concept of penal sanctions may also include delinquency reclassifications by the Selective Service Board. Harlan stated that the Court did not presently have to decide that issue but, indications were that at least Harlan would have been sympathetic to such an argument. He said:

> The problem is exacerbated by petitioner's *non-frivolous* argument that induction pursuant to the delinquency reclassification procedure constitutes 'punishment' for violation of collateral regulations, without jury trial, right to counsel, and other constitutional requirements.... This would, at the very least, cut against the grain of much that is fundamental to our constitutional tradition. (emphasis added).

Harlan cited *Mendoza-Martinez* in his discussion.

[92] *See* Comment, *The Availability of Criminal Jury Trials Under the 6th Amendment*, 32 U. CHI. L. REV. 311, 323 (1965). The author had high hopes that *Mendoza-Martinez* signified only a beginning in the Court's move toward a recognization of the truly criminal nature of certain sanctions which had been designated as civil:

> The decision in *Mendoza* confirms the impression that the Court is moving away from the traditional understanding of the Sixth Amendment.... Since the Mendoza Court held that a denaturalization now required a jury trial, juries for other non-criminal sanctions may logically be re-considered. In light of the Court's high regard for jury trials, it seems likely that the expansion will be dramatic.

We are still awaiting that dramatic expansion and it is currently nowhere in sight.

[93] Some courts do recognize this fact. *See, e.g.*, United States v. Krapf, 180 F. Supp. 886 (D.N.J. 1960), *aff'd.*, 285 F.2d 647 (3d Cir. 1961).

Even if the proceeding and the sanction in question were primarily criminal in nature, and so recognized by a court, a jury trial would not be required if the sanction imposed were "petty" in nature. On the other hand, should the potential sanction be "serious," the right to trial by jury would then exist. Consequently, the individual must also show the serious nature of the threatened penalty before the sixth amendment comes into play.

Courts recognized the distinction between petty and serious offenses and sanctions in historical times.[94] These early decisions exhibit a tendency to define the nature of petty offenses and sanctions rather broadly, thereby restricting the right to trial by jury.[95] Most often, the court examines two key elements when making this determination: 1) the severity of the potential penalty and 2) the moral quality of the act.[96] As a result of almost constant re-litigation of these matters, the line differentiating between petty and serious sanctions has shifted a great deal during this century.

Duncan v. Louisiana[97] shows an increased willingness on the part of the Court to recognize the fact that the sanction alone may, if severe enough, require a trial by jury. In *Duncan*, the Court hinted that a sanction of more than six months in jail and/or a fine of $500 might be serious and therefore require a trial by jury. However, the majority refused to establish any hard and fast line at the time. Acceptance of the six month limit took place two years later in *Baldwin v. New York*[98] and precedent does indicate that $500 may be the second part of the threshold currently favored by the Court.[99]

Unquestionably, these decisions indicate an expansion of the coverage of the sixth amendment[100] into areas not previously regarded as necessitating jury trials. But the line between petty and serious sanctions still lacks complete clarity. One cannot yet be sure at which point a monetary fine moves from the petty into the serious category, and thus activates the sixth amendment. Precedent in this area is confusing.[101] Even if it were possible to void an administrative agency's imposition of a fine by convincing the court that the overall proceeding was criminal in nature (i.e., for the purpose of punishment), the individual could still easily lose the right to a jury trial because of the further limitation on the applicability of the sixth amendment imposed by the petty sanction exception.

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[94] *See* Frankfurter & Corcoran, *Petty Federal Offenders and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917 (1926), for a thorough historical analysis of the distinction between petty and serious offenses. *But see* Kaye, *Petty Offenders Have No Peers!*, 26 U. CHI. L. REV. 245 (1959), for an intense criticism of the view taken by Frankfurter and Corcoran.

[95] A broad test for making this distinction was stated in Shick v. United States, 195 U.S. 65, 68 (1904):

> The truth is, the nature of the offense and the amount of punishment prescribed, rather than its place among the statutes determine whether it is to be classed among serious or petty offenses.

See also Frank v. United States, 395 U.S. 147 (1969); Smith v. United States, 128 F.2d 990 (5th Cir. 1942).

[96] *See, e.g.*, District of Columbia v. Clawans, 300 U.S. 617 (1937); United States v. Bishop, 261 F. Supp. 969 (N.D. Cal. 1966). *Cf.* Baker v. City of Fairbanks, 471 P.2d 386, 393 (Alaska 1970), in which the court established the following test to determine whether a jury trial was required:

> Not only must the maximum possible punishment be considered, but one must also look at the social and moral opprobrium which attaches to the offense, the degree to which it may be regarded as anti-social behavior, the possible consequences to the defendant in terms of loss of livelihood and whether the offense is one traditionally regarded as a crime. . . . It is then necessary to balance the consequences to the defendant against the considerations of social and governmental expediency.

[97] 391 U.S. 145 (1968). The Court stated:

> . . . [T]he penalty authorized for a particular crime is of major significance in determining whether it is serious or not and may in itself, if severe enough, subject the trial to the mandates of the Sixth Amendment.

Id. at 154. *See generally* Comment, *The Petty Offender's Constitutional Right to a Jury Trial: The Denial in Duncan v. Louisana*, 36 TENN. L. REV. 763 (1969); Comment, *Jury Trials in Louisiana—The Implications of Duncan*, 29 LA. L. REV. 118 (1968).

[98] 399 U.S. 66 (1970). *See also* Comment, *Jury Trials for Misdemeanants in New York City: The Effects of Baldwin*, 7 COLUM. J.L. & SOC. PROB. 173 (1971).

[99] *See* Cheff v. Schnackenberg, 384 U.S. 373 (1966). Recent precedent also declared criminal contempt proceedings to be serious and not petty, thus requiring trial by jury. *See* Bloom v. Illinois, 391 U.S. 194 (1968).

[100] Perhaps the furthest expansion of this doctrine occurred in United States v. Polk, 438 F.2d 377 (6th Cir. 1971), in which the court held that a $35,000 fine for contempt of court required a jury trial. There was no possibility of incarceration of the defendant corporation in this action, but nevertheless, the court applied the reasoning of several recent Supreme Court decisions (mostly notably *Cheff* and *Bloom*) by analogy. *Accord*, County of McLean v. Kickapoo Creek, Inc., 51 Ill. 2d 353, 282 N.E.2d 720 (1972). *But see* United States v. United Mine Workers of America, 330 U.S. 258 (1947), which had upheld a $700,000 fine for criminal contempt imposed without a trial by jury. *Cf. In re* Jersey City Educational Association, 115 N.J. Super. 42, 278 A.2d 206 (1971).

[101] The court, in City Court of City of Tuscon v. Lee, 16 Ariz. 449, 494 P.2d 54 (1972), vented its frustration in this manner:

> . . . [O]ne looking to the past will find a jumble of offenses with no coherent rational principle by which one can determine the line between which is petty and serious. . . .

Conclusion

Through the increasing use of severe administrative sanctions, we are witnessing a gradual incursion by the administrative process into areas of the law heretofore regarded as criminal. Constitutional protections such as the right to trial by jury are lost for those subjected to these proceedings. Restrictive interpretations of select Constitutional provisions presage such a result. Yet the nation's courts refuse to ameliorate the situation.

Historical analysis and significant precedent indicates that the seventh amendment is inapplicable to agency functions. The sixth amendment, however, is more absolute in its terms than is the seventh; the wording states that *all* criminal prosecutions fall under its purview. The nature of modern administrative proceedings and the significant monetary sanctions imposed force the conclusion that these proceedings are indeed penal in purpose and character and that consequently, the sixth amendment should operate to guarantee a jury consideration of guilt or innocence.

The restrictive limitations placed upon the sixth amendment are "an unwarranted abrogation by the federal government of a Constitutional right," [102] and yet they continue. These limitations implicitly disregard the absolute nature of the wording of that amendment.[103] However, vigorous dissent has often chastised the Court for looking past the precise wording of the amendment.[104] If the courts were to interpret the sixth amendment and article III more broadly, as the wording of these provisions would seem to require, an individual seeking a judicial determination of guilt or innocence would only have to show that the administrative prosecution intended was primarily criminal in nature. Modern administrative proceedings, which offer the possibility of significant monetary penalties, evidence such a criminal nature. Applying recent precedent, the penal character of many of these sanctions becomes clear; punishment is indeed their goal.

A number of indications during the past fifteen years point to a trend expanding the right to trial by jury. The seventh amendment has shed some of its previous technical limitations and has been applied more broadly,[105] while the narrow and somewhat restrictive meaning given to the sixth amendment in earlier times has broadened to a degree. The limitations imposed by the petty/serious distinction have also diminished in significance[106] and a trend toward the recognition of the primary criminal nature of contempt proceedings is apparent.[107] Similar advances were made with regard to denaturalization proceedings.[108] These movements indicate a pattern expanding the right to trial by jury in a variety of situations and they logically foreshadow the extension of this constitutional protection into the administrative realm where agencies in effect punish those who violate their regulations. These decisions lay a solid foundation for the extension of the right to trial by jury into certain segments of administrative law. Such an extension would definitely sacrifice some efficiency. However, a loss of efficiency is preferable to the continued abrogation of constitutional protective devices. By upholding the view that the administrative process is purely civil in nature in all situations, courts may be encouraging wholesale evasions of constitutional protections by indirectly indicating to the legislatures that they need simply

[102] Kaye, *Petty Offenders Have No Peers!*, 26 U. CHI. L. REV. 245, 246 (1959).

[103] The Court stated:

> The great minds of the country have differed on the correct interpretation to be given to various provisions of the Federal Constitution . . . but until recently no one ever doubted that the right of trial by jury was fortified in the power of attack. It is now assailed; but if ideas can be expressed in words, and language has any meaning, *this right*—one of the most valuable in a free country—is preserved to every one accused of crime. . . .

Cf. Ex parte Quirin, 317 U.S. 1 (1942); United States v. English, 347 F.2d 425 (7th Cir. 1965).

[104] For example, the first Mr. Justice Harlan dissenting in Schick v. United States, 195 U.S. 65, 99 (1903) complained bitterly about the way in which the absolute nature of the sixth amendment was ignored:

> . . . [U]nder the principles now announced, an offense punishable by a fine of five or ten thousand dollars may be regarded—if the court so wills—as a petty offense, triable without a jury. I cannot understand where the judiciary derives its authority to prescribe any rule on the subject, in the face of the *absolute* Constitutional requirement that *all* crimes . . . shall be tried by a jury. (emphasis added).

See also Baldwin v. New York, 399 U.S. 66 (1970), in which Mr. Justice Black, in a separate concurring opinion, stated that the sixth amendment applied to all crimes and not just those of a serious nature. This sentiment was again echoed by Black, joined by Chief Justice Warren and Justice Douglas, in Frank v. United States, 395 U.S. 147 (1969).

[105] *See, e.g.*, Ross v. Bernhard, 396 U.S. 531 (1969); Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962); Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959). *See also* the discussion of the seventh amendment p. 349 *supra*.

[106] *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968) and discussion p. 358 *supra*.

[107] *See, e.g.*, Bloom v. Illinois, 391 U.S. 194 (1968), discussion p. 354 *supra*.

[108] *See, e.g.*, Trop v. Dulles, 356 U.S. 86 (1958) and discussion p. 356 *supra*.

to re-label the action as a part of the administrative process.[109] Indeed, it has been suggested that public pressure might one day demand such legislative action in certain fields.[110] This is plainly undesirable, from both a legal and a policy standpoint.

It can be argued that such occurrences have already presented themselves. As penalties increase in severity, the proceedings in which the agency imposes them become more and more criminal in nature; yet, constitutional protections are not available. Ignoring the principle that constitutional provisions designed to protect personal rights and property should be construed liberally,[111] many decisions restrict the scope of those constitutional provisions dealing with the right to trial by jury. Bearing in mind the increased penalty potential of modern administrative statutes, a total re-evaluation of this field of the law is necessary.

It is possible that the courts will decide the questions posed in this area on policy grounds. They may weigh the efficiency and convenience of the administrative process against the more cumbersome procedure established in the Constitution. Undoubtedly, it is more efficient to bring certain offenders before an agency to determine guilt or innocence and to allow agency imposition of a severe sanction; yet, the Constitution demands consideration of these issues by a judge and jury in some administrative contexts. Blackstone commented on these competing interests several centuries ago:

> And, however *convenient* these [summary criminal proceedings without a trial by jury] may appear at first (as doubtless all arbitrary powers well executed, are the most convenient) yet let it be again remembered, that delays and little inconveniences in the forms of justice are the price that all free nations must pay for their liberty . . . that these inroads upon this sacred bulwark . . . are fundamentally opposite to the spirit of our Constitution; and that though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the momentous concern.[112]

Although made hundreds of years ago in another country, Blackstone's logic is equally relevant to the administrative process today.

Should the courts void the administrative imposition of severe sanctions, fundamental changes would occur in the administrative process. To impose large sanctions defined as criminal, the agency would go into a court as an advocate and prosecute the alleged violator, thereby preserving the right to trial by jury. The agency would still impose lesser criminal sanctions itself, perhaps utilizing the precedent distinguishing petty from serious sanctions as a guideline.

Cease and desist orders and other purely remedial sanctions still would not demand the presence of a jury and no interference with administrative imposition of these sanctions is necessary. The efficiency and effectiveness of the administrative process will not decline as long as these non-criminal and petty criminal sanctions remain available for agency imposition. Whatever small inconveniences result from requiring the agency to go before a judge and a jury must be endured. The framers of the Constitution chose this method and it is time that the nation's courts respected their selection.

[109] If a court believes that such a re-labeling is occurring, it can be expected to react with hostility. Ashley v. Wait, 228 Mass. 63, 70, 116 N.E. 961, 966 (1917), illustrates this:

> Of course, the legislature cannot by a mere change of name or form convert that which is in its nature a prosecution for a crime into a civil proceeding and thus deprive parties of their rights to a trial by jury. The Constitution cannot thus be trifled with.

The problem has been that most courts have not detected any of the more subtle shifts which have occurred, particularly in the administrative realm. *Cf.* State *ex rel.* Wilcox v. Gilbert, 126 Minn. 95, 147 N.W. 953 (1914).

[110] *See* Polelle, *supra* note 40 at 588.

[111] *See, e.g.*, Boyd v. United States, 116 U.S. 616, 635 (1885), in which the Court issued the following warning:

> . . . but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance.

See also Morrison Hotel v. Kirsner, 245 Ill. 431, 92 N.E. 285 (1910).

[112] Schick v. United States, 195 U.S. 65, 99 (1903) (Harlan, J., dissenting).

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PERJURY: THE FORGOTTEN OFFENSE

It is undenied that perjury is both a frequent and substantial threat to the effective administration of justice. In 1968, the President's Commission on Law Enforcement and Administration of Justice noted that perjury has always been widespread and that there must be more effective deterrents against perjury in order to ensure the integrity of trials.[1] A commentator stated that "Few crimes except fornication are more prevalent or carried off with greater impunity." [2] In *United States v. Norris*,[3] the Supreme Court observed that "Perjury is an obstruction of justice; its perpetration may well affect the dearest concerns of the parties before the tribunal." [4] More recently, the Second Circuit noted that perjury is punished for the harm perpetrated upon the courts and the administration of justice.[5]

Nevertheless, prosecutions for perjury are rare. The total number of criminal cases commenced in all United States district courts for perjury in the fiscal years 1966 through 1970 was 335.[6] This total was two-tenths of one per cent of the 162,664 cases commenced in the same courts during the same time period.[7] Of the 21,478 sentenced prisoners in federal institutions as of June 30, 1966, only eleven were sentenced for perjury.[8] In 1972, Pennsylvania reported only twenty-four cases of perjury from a total of 72,138 defendants processed.[9] There were only six reported convictions for perjury from a total of 38,964 convicted defendants.[10] In California during the same period, there were fifty-three charges of perjury from a total of 88,291 felony defendants prosecuted.[11] There were only twenty-two convictions for perjury from a total of 49,060 convicted defendants.[12]

This comment will examine the elements and evils of perjury and determine the reasons for the failure to enforce perjury statutes. It will further examine the problems which may arise because of the failure to prosecute in cases where perjury occurs.

Historical Development of Perjury as a Criminal Offense

Until the fifteenth century[13] the only form of perjury punished by common law was perjury by

[1] REPORT OF THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 347 (1968).

[2] Whitman, *A Proposed Solution to the Problem of Perjury in Our Courts*, 59 DICK. L. REV. 127 (1955). Another commentator estimated that perjury occurs in fifty per cent of contested civil actions, seventy-five per cent of criminal cases and ninety per cent of divorces. Hibschman, *"You Do Solemnly Swear!" or That Perjury Problem*, 24 J. CRIM. L.C. & P.S. 901 (1934). *See also* Note, *Problems of Successful Perjury*, 78 SOL. J. 423 (1934).

[3] 300 U.S. 564 (1937).

[4] *Id.* at 574.

[5] United States v. Manfredonia, 414 F.2d 760, 764 (2d Cir. 1969).

[6] DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS ANN. REP., Table D 2 (1970).

[7] These figures vary only slightly from those previously recorded. In 1937, of 50,279 cases of major offenses reported by 28 states and the District of Columbia, only 187 or 3.7 of one per cent were prosecutions for perjury. UNITED STATES DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, JUDICIAL CRIMINAL STATISTICS FOR 1937 cited in McClintock, *What Happens to Perjurers*, 24 MINN. L. REV. 727, 729 (1940).

[8] FEDERAL BUREAU OF PRISONS, A REPORT OF THE WORK OF THE FEDERAL BUREAU OF PRISONS, Table A 7 (1966).

[9] PENNSYLVANIA CRIMINAL COURT DISPOSITIONS 4 (1972) and letter from the Pennsylvania Bureau of Criminal Justice Statistics to author (January 24, 1974). Letter on file in the editorial offices of the *Journal of Criminal Law and Criminology*.

[10] PENNSYLVANIA CRIMINAL COURT DISPOSITIONS 4 (1972) and letter from the Pennsylvania Bureau of Criminal Justice Statistics to author (January 24, 1974). Letter on file in the editorial offices of the *Journal of Criminal Law and Criminology*.

[11] CRIME AND DELINQUENCY IN CALIFORNIA: ADULT PROSECUTIONS 1–8 (1972) and letter from the California Department of Justice to author (March 28, 1974). Letter on file in the editorial offices of the *Journal of Criminal Law and Criminology*.

[12] Twenty-two of the original fifty-three defendants were convicted of offenses other than perjury. CRIME AND DELINQUENCY IN CALIFORNIA: ADULT PROSECUTIONS 1–8 (1972) and letter from the California Department of Justice to author (March 28, 1974). Letter on file in the editorial offices of the *Journal of Criminal Law and Criminology*. It is difficult to obtain statistics on perjury from all states, since most states include perjury in the categories of "miscellaneous crimes" or "other categories." The results of inquiries addressed to states which do not keep separate statistics on perjury are on file in the editorial offices of the *Journal of Criminal Law and Criminology*. For the statistics from Minnesota, see note 83 *infra*.

[13] The concept of giving false testimony is not a modern one. References to false testimony are found in the Bible and in Cicero: "You shall not bear false witness against your neighbor." *Exod.* 20:16; "[A]nd if the witness is a false witness and has accused his brother falsely, then you shall purge the evil from the midst of you." *Deut.* 20:19; "He who has once deviated from the truth, usually commits perjury with as little

a jury. After the Norman conquest jurors were picked from men of the locality who were expected to know the facts and circumstances of the case. The jurors were not regarded solely as witnesses, but rather as arbiters of the facts known to them who were under a legal duty to render a proper verdict.[14] The writ of attaint punished jurors who violated this duty and gave a demonstrably false verdict. In the process of attaint a subsequent verdict of twenty-four jurors could annul the first verdict and punish the original jurors by imprisonment for a year, loss of chattel and by accounting them infamous.[15]

The writ of attaint differed from later perjury statutes in one important aspect. Attaint was intended as a method to control the jury, while perjury statutes are intended as a method to control the testimony of witnesses. Attaint was rarely used, however, because subsequent jurors did not want to slander their neighbors who sat as the original jurors in the case.[16] The subsequent shift in the function of jurors furthered this nonenforcement. As courts shifted to the use of witnesses, the jurors' function of examining their own knowledge changed to an examination of the evidence placed before them.[17] Thus, attaint with its intent to control jurors became an anachronism and a new method had to be devised to control witnesses who might present false testimony.

In response to the increasing problem of perjured oral evidence, the Star Chamber in 1487 assumed jurisdiction to punish perjury.[18] Subsequently, in 1540 subornation of perjury[19] was included with a number of other punishable offenses connected with litigation.[20] Twenty-two years later one comprehensive statute punished both perjury and subornation of perjury.[21] Finally, the Star Chamber resolved in 1613 that perjury by a witness was punishable at common law.[22]

Despite the confusion between the punishment of perjury by common law and statute, in 1628 Sir Edward Coke defined perjury in a manner similar to most modern statutes:

> Perjury is a crime committed, when a lawful oath is administered by any that hath authority to any person, in any judicial proceeding, who sweareth absolutely and falsely in a matter material to the issue or cause in question by their own act or by the subordination of others.[23]

The modern elements of perjury, whether in a federal or state court, are essentially the same: the willful giving of false testimony, on a material point to the issue or inquiry, in a judicial proceeding, by a person to whom a lawful oath has been administered.[24] The only apparent difference between the two definitions is Coke's requirement that the witness should have sworn "absolutely." Coke believed that perjury could not exist on matters of opinion, belief or recollection.[25] Modern courts, on

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scruple as he would tell a lie." CICERO, ORATIO PRO QUINTO ROSCIO COMAEDO, XX.

The word "perjury" is derived from the Latin word *perjurium*. *Perjurium*, however, was regarded as a sin and not a public wrong. It consisted of invoking a god to bear witness to the truth of the statement although the speaker knew the statement was false. It could be committed anywhere and not just at a judicial proceeding. Nevertheless, Roman law did provide for an offense similar to the modern concept of perjury. A witness who had taken an oath (*jusjurandum*) in a judicial proceeding and then testified falsely or withheld the truth was upon conviction deported if he were a person of rank, or put to death if one of the common people. 1 W. BURDICK, LAW OF CRIME § 319 (1946).

[14] T. PLUCKNETT, CONCISE HISTORY OF THE COMMON LAW 131 (5th ed. 1956).

[15] 1 W. HOLDSWORTH, HISTORY OF ENGLISH LAWS 337 (3d ed. 1922).

[16] In 1565, Sir Thomas Smith, Queen Elizabeth's Secretary of State, wrote:

> Attaints be very seldom put in use, partly because the gentlemen will not meet to slander and deface the honest yeoman, their neighbors; so that of long time they had rather pay a mean fine than to appear and make the inquest.

Id. at 342.

[17] PLUCKNETT, *supra* note 14, at 132. Because the function of American juries has always been to examine the evidence placed before them, the writ of attaint has never been used in the United States to punish jurors and reverse verdicts.

[18] 3 Hen. 7 c. 1 (1487).

[19] For a definition and discussion of subornation of perjury, see notes 92–94 *infra* and accompanying text.

[20] 32 Hen. 8 c. 9 (1540). The statute imposed a fine of ten pounds for subornation of perjury in actions to determine the title to lands. BURDICK, *supra* note 13, at § 324.

[21] 5 Eliz. c. 9 (1562). Perjury was punished "with six months imprisonment, perpetual infamy and a fine of 20 pounds or to have both ears nailed to the pillory." Subornation of perjury was punished by the penalty "of perpetual infamy and a fine of 20 pounds on the suborner and in default of payment, imprisonment for six months and to stand with both ears nailed to the pillory." 4 BLACKSTONE, COMMENTARIES § 138.

[22] 3 COKE, INSTITUTES § 164.

[23] *Id.*

[24] *See, e.g.*, United States v. Hvass, 355 U.S. 570 (1958); United States v. Stone, 429 F.2d 138 (2d Cir. 1970); People v. Darcy, 59 Cal. App. 2d 342, 139 P.2d 118 (1943); Hirsch v. State, 279 So. 2d 866 (Fla. 1973); State v. Deets, 195 N.W.2d 118 (Iowa 1972); Gatewood v. State, 15 Md. App. 314, 290 A.2d 551 (1972); State v. Sullivan, 24 N.J. 18, 130 A.2d 610, *cert. denied*, 355 U.S. 840 (1957); Walther v. O'Connell, 72 Misc. 2d 316, 339 N.Y.S.2d 386 (1972); State v. Heyes, 44 Wash. 2d 579, 269 P.2d 577 (1954); State v. Crowder, 146 W.Va. 810, 123 S.E.2d 42 (1961).

[25] 3 COKE, *supra* note 22, at § 166.

the other hand, punish perjury in such instances if the witness intended to mislead the factfinder.[26]

Perjury became an American crime in 1790[27] and the American statutes and courts have substantially adopted common law perjury requirements. Besides defining the offense in a manner similar to Coke's definition, American courts have traditionally adhered to the common law rules of evidence for perjury, including the two witness rule. Although the common law generally permitted the guilt of the accused to be proven by one witness alone, in perjury cases the common law required that guilt be established by the testimony of two witnesses or of one witness plus corroborating circumstances.[28] This "quantitative" or two witness rule was intended to prevent convictions where there is an oath against an oath. An example of this situation is the case where the only evidence of perjury is the oath of a single witness balanced against the oath of the accused. In this situation the common law required more evidence of guilt—either another witness or corroborating circumstances.[29]

Although the United States adopted most common law requirements for perjury, the American courts did not adopt the common law requirements for drafting a perjury indictment. At common law the drafting of a perjury indictment was a maze of technicalities. The indictment had to explicitly allege every fact and circumstance necessary to prove the offense, including the organization of the court where the crime was committed and the entire proceeding therein.[30] The pleader also had to allege the conclusions that the court had jurisdiction, the officer had the authority to administer the oath, and the testimony was material and willfully and corruptly given.[31] Further, the pleader had to allege the true facts with respect to the alleged false testimony.[32]

Fortunately, American courts adopted a modified form of the common law charge provided for in a later English statute. In *Markham v. United States*,[33] the Supreme Court stated that a perjury indictment was sufficient if it identified the officer before whom the alleged false oath was taken; averred he was competent to administer an oath; set forth the statement alleged to have been willfully and corruptly given; and charged that the statement was both false and material to an issue or pending inquiry.[34]

Effects of Perjury

An important factor in the development of perjury as a criminal offense has been the recognition of its effects. For centuries, perjury has been characterized as an offense against the effective administration of justice.[35] The offense rests on at least two levels. On the first level, perjury interferes with the *particular* judicial dispute between individuals and on the second level, it impedes the effective administration of the judicial system *as a whole*. A possible third level is the moral level, since giving a false statement offends the moral code of mankind.[36] This was the original conception of perjury and modern courts have sometimes alluded to it when dealing with the offense.[37]

Perjury interferes in the specific dispute between two parties by injecting false testimony into the case. Thus, it may unjustly enrich one party while unfairly depriving the other. The obvious example

[26] United States v. Rivera, 448 F.2d 757 (7th Cir. 1971). *But see* Bronston v. United States, 409 U.S. 352 (1973).

[27] Act of April 30, 1790, ch. 9, § 18, 1 STAT. 116. The present federal statutes are 18 U.S.C. § 1621 (1966) (Perjury), § 1622 (1966) (Subornation of Perjury) and § 1623 (1970) (False Declaration before a Grand Jury or Court).

[28] WIGMORE, EVIDENCE, §§ 2040–41 (3d ed. 1940). The two witness rule maintains its vitality in most American juridictions. *See, e.g.*, Wells v. State, 270 So. 2d 399 (Fla. 1972); Commonwealth v. Field, 223 Pa. Super. 258, 298 A.2d 908 (1972). *See also* note 77 *infra* and accompanying text.

[29] The rule requiring two witnesses to prove a charge of treason was statutory and not a common law rule. England adopted this rule in the sixteenth century and it was later incorporated into the United States Constitution. "No person shall be convicted of Treason unless on the Testimony of two Witnesses to the overt Act, or on Confession in open Court." U.S. CONST. art. III, § 3. WIGMORE, *supra* note 28, at § 2036–39.

[30] McClintock, *supra* note 7, at 733.

[31] *Id.*

[32] *Id.*

[33] 160 U.S. 319 (1895).

[34] *Id.* at 324. Without mentioning it, the Court substantially relied on 23 Geo. 2, c. 25 (1728). This statute loosened the indictment requirements for perjury in order to more effectively deter persons from committing perjury. BURDICK, *supra* note 13, at § 324.

[35] *See, e.g.*, United States v. Manfredonia, 414 F.2d 760 (2d Cir. 1969); United States v. Otto, 54 F.2d 277 (2d Cir. 1931); United States v. Hall, 44 F. 864 (S.D. Ga. 1890); Rex v. Rowland ap Eliza, 12 Coke 101, 77 Eng. Rep. 1377 (1613); Onslowe's Case, 2 Dyer 242b, 73 Eng. Rep. 537 (1566).

[36] *See* note 13 *supra*.

[37] In United States v. Carollo, 30 F. Supp. 3 (W.D. Mo. 1939), the court noted that for centuries perjury had been an offense involving moral turpitude. Moral turpitude is described as an act which offends the moral code of mankind even in the absence of a prohibitive statute. *Id.* at 6. Perjury has also been described as an "[U]nnatural and heinous crime, because of its tendency to jeopardize person and property and even life." State v. Courtright, 60 Ohio St. 35, 41, 63 N.E. 590, 591 (1902).

would be the tort case where the plaintiff introduces false testimony about personal injuries and recovers from the defendant.[38] Perjury also tarnishes the integrity of the judicial system as a whole by diminishing the respect necessary to maintain that system. A judicial system requires respect or it cannot fairly determine the rights of parties which may appear before it. Courts require respect if they are to reach the goal of ascertaining the truth in a particular case. If individuals believe that perjury is the norm and not the exception in the courts, then they will either introduce false testimony for their own benefit or avoid the courts and settle disputes in their own manner.

Perjury further interferes with the function of the jury in a trial. If one of the goals of a trial is to ascertain the truth by presenting the facts to a jury, then perjury impedes reaching this goal by presenting false evidence to the jury. In determining the truth of conflicting evidence at a trial, the jury has no simple formula of weights and measures upon which to rely.[39] The jury must rely on the credibility of the witnesses and the trustworthiness of the testimony. Perjury destroys both credibility and trustworthiness and thus upsets the means by which a jury reaches a decision. It hinders the jury in its determination of truth and, therefore, may result in incorrect findings and decisions.

Closely related to perjury's detrimental effect upon the judicial system in general is perjury's effect upon the value of the oath as a means to insure trustworthy testimony.[40] By definition perjury can only occur in a judicial proceeding in which a proper oath has been administered. Thus, unpunished perjury subverts respect for the solemn oath and undermines a safeguard intended to compel trustworthy testimony.[41]

[38] It may be argued that perjury does little damage in civil actions where the defeated party has insurance. The insurance company absorbs the loss, not the defeated party. This argument overlooks possible damage to the defeated litigant and the public in the form of higher insurance rates and the inestimable damage to the effective administration of justice.

[39] Weiler v. United States, 323 U.S. 606, 609 (1945).

[40] *See* United States v. Hall, 44 F. 864 (S.D. Ga. 1890).

[41] It may be argued, nonetheless, that the solemn oath was only effective in societies which viewed perjury as a moral offense punishable by a Deity and that it was never effective in societies which viewed perjury as a public offense. In such societies, it was necessary to enact perjury statutes to ensure trustworthy oral evidence in judicial proceedings. Hence, unpunished perjury does not destroy respect for a solemn oath since there was never any deep respect anyway. For a discussion of the related developments of oaths and perjury, see Silving, *The Oath: I*, 68 YALE L.J. 1329, 1381–89 (1959).

The concern with perjury as a potential disrupter in the legal system can be seen not only in court comments,[42] but also in the number of proceedings in which an oath is administered with the intention of preventing perjury. The judicial proceedings are varied and include: divorce actions,[43] civil[44] or criminal trials,[45] congressional hearings[46] and grand jury,[47] bankruptcy[48] or ex parte proceedings.[49] Yet, perjury statutes are rarely enforced in any of these situations. To prevent the spread of perjury to other situations, there is also the separate offense of giving a false statement.[50] The distinction between the two offenses is that to be subject to criminal conviction for perjury, the perjurious statement must be given under oath and before a competent tribunal. On the other hand, a false statement which may be prosecuted under false swearing statutes need not be given before a tribunal nor under oath.[51]

Reasons for the Failure to Enforce Perjury Statutes

In the face of these recognized evils of perjury, the question remains why there are so few indictments and convictions for perjury. Most commentators attribute the absence of indictments and convictions for perjury to the highly technical nature of the offense. They point to problems in drafting indictments,[52] in proving materiality of the alleged false testimony[53] and in meeting the stringent evidentiary rules.[54] Another theory is that the present rules are suffiicently liberal to support

[42] "We all know that this crime [perjury] is one of the most serious and that its effects are far-reaching, obstructive and destructive." United States v. Otto, 54 F.2d 277, 279 (2d Cir. 1931). *See also* notes 3, 5 and 37, *supra*.

[43] People v. Teal, 196 N.Y. 372, 89 N.E. 1086 (1909).

[44] Walther v. O'Connell, 72 Misc. 2d 316, 339 N.Y.S.2d 386 (1972).

[45] Weiler v. United States, 323 U.S. 606 (1945).

[46] United States v. Debrow, 346 U.S. 374 (1953).

[47] United States v. Harris, 311 U.S. 292 (1940).

[48] Bronston v. United States, 409 U.S. 352 (1973).

[49] United States v. Hvass, 355 U.S. 570 (1958).

[50] *See, e.g.*, 18 U.S.C. § 1001 (1966); GA. CODE ANN. § 26-2402 (1971); N.J. CODE ANN. § 2A: 131-4 (1969); PA. STAT. ANN. ch. 18, § 4904 (1973).

[51] United States v. Waters, 457 F.2d 805 (3d Cir. 1972) (Falsification of records directed to the Urban League of Philadelphia, a contractor with the Department of Labor, was within the federal false swearing statute); Plummer v. State, 90 Ga. App. 773, 84 S.E.2d 202 (1954) (False statement before Deputy Director of the State Board of Workmen's Compensation was false swearing and not perjury).

[52] *See* note 56 *infra* and accompanying text.

[53] *See* note 66 *infra* and accompanying text.

[54] *See* note 77 *infra* and accompanying text.

most perjury charges and that the failure to enforce perjury statutes is basically a policy decision.[55]

One theory to explain the dearth of perjury prosecutions is the belief that the technical nature of perjury indictments prevents simple prosecutions.[56] This theory compares perjury indictments with indictments for other offenses and concludes that the difference in the forms of the indictments explains the difference in rates of prosecutions. One significant difference in perjury indictments is the requirement that a valid perjury indictment set forth, either in substance or verbatim, the words of the alleged false statement.[57]

In criticizing such a requirement, however, the theory overlooks the differences in the manner in which perjury and other crimes are committed. In perjury the words are the means by which the offense is committed, as distinguished from other felonies not dependent on the particular manner in which the offense is committed.[58] Hence, a perjury indictment must fail if it just sets forth the words of the criminal statute, since this does not inform the accused of the elements of his alleged offense. It is a fundamental constitutional right guaranteed by the sixth amendment that the accused receive sufficient and adequate notice of his alleged offense.[59]

This theory further overlooks the test to determine the sufficiency of a perjury charge and the trend of the courts toward liberal construction of perjury indictments.[60] Although a perjury charge may seem more complicated than the usual criminal indictment, the test of the sufficiency of a perjury charge is the basic sixth amendment test of whether the indictment clearly informs the defendant of his alleged offense to enable him to prepare an adequate defense.[61] The trend toward liberal construction of perjury charges can be seen in the upholding of charges which failed to allege the name and authority of the person administering the oath[62] and which failed to allege what the truth was in regard to the false statements.[63] Courts have also found indictments not defective when they did not specifically charge that the false testimony was given "feloniously" and "corruptly" [64] and did not set forth every matter in order to allege the materiality of the false statement.[65]

Another theory for the absence of perjury indictments is the difficulty in proving materiality of the false statement.[66] In order to constitute perjury, a false statement must be material to an issue or point of inquiry.[67] Materiality of the false state-

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[55] *See* note 89 *infra* and accompanying text.

[56] *See* Black, *A Report on Perjury*, 49 ILL. B.J. 574 (1961); McClintock, *supra* note 7.

[57] United States v. Markham, 160 U.S. 319, 324 (1895).

[58] In People v. Aud, 52 Ill. 2d 368, 288 N.E.2d 453 (1972), the court distinguished perjury indictments from indictments for other crimes like burglary on the theory that the validity of a burglary indictment does not depend on whether the unlawful entry was through a door or a window. Thus, burglary can be adequately charged by an indictment that simply uses the language of the criminal statute. A perjury indictment, however, must set forth the alleged false statement since the false statement was the means by which the offense was committed. *Id.* at 390–91, 288 N.E.2d at 454–55.

[59] "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation. . . ." U.S. CONST. amend. VI.

[60] The most recent federal perjury statute, 18 U.S.C. § 1623 (1970), is an example of the liberal trend in perjury indictments. In this statute Congress avoided the common law requirement of alleging the truth with respect to the false testimony. The statute provides that a perjury indictment which alleges that the defendant under oath knowlingly made two or more inconsistent statements to the degree that one of them was necessarily false, need not specify which declaration was false if:

[(1)] each declaration was material to the point in question and (2) each declaration was made within the period of the statute of limitations for the offense charges under the section.

Id. at § 1623(c).

[61] United States v. Debrow, 346 U.S. 374 (1953); People v. McGreal, 4 Ill. App. 3d 312, 278 N.E.2d 504 (1971).

[62] United States v. Debrow, 346 U.S. 374 (1953); United States v. Neff, 212 F.2d 297 (3d Cir. 1954). *Contra*, State v. Burtchett, 475 S.W.2d 14 (Mo. 1972).

[63] Stassi v. United States, 401 F.2d 259 (5th Cir. 1968), *vacated on other grounds*, 394 U.S. 310 (1969); People v. Campbell, 48 Misc. 2d 144, 264 N.Y.S.2d 262 (1965).

[64] United States v. Johnson, 414 F.2d 22 (6th Cir. 1969), *cert. denied*, 397 U.S. 991, *rehearing denied*, 397 U.S. 1071 (1970); State v. Harris, 145 N.C. 456, 59 S.E. 115 (1907). *Contra*, People v. Taylor, 6 Ill. App. 3d 961, 286 N.E.2d 122 (1972).

[65] Markham v. United States, 160 U.S. 319 (1895); United States v. Edmondson, 410 F.2d 670 (5th Cir. 1969), *cert. denied*, 396 U.S. 966 (1970).

[66] *See* Hibschman, *supra* note 2, at 905. For a discussion of the theory that the ordinary meaning of materiality is being expanded to the point where it may be eliminated from perjury statutes, see Lillich, *The Element of Materiality in Federal Crimes of Perjury*, 35 IND. L.J. 1 (1959).

[67] The materiality requirement for perjury existed in common law and has been adopted by modern statutes and the courts. Coke believed that false testimony must be material to the issue or cause in question because if it does not concern a point in the suit it is extrajudicial. COKE, *supra* note 22, at § 164. Blackstone noted that immaterial false statements were no more penal than voluntary extrajudicial oaths. BLACKSTONE, *supra* note 21, at § 137.

Materiality is a question of law for the court and not a question of fact for the jury. The court determines whether the alleged false statement was material to an issue in the prior case and the jury determines whether the defendant committed perjury. United States v. Rivera, 448 F.2d 757 (7th Cir. 1971); Wolfe v. State,

ment must be alleged in the indictment and must be proven in order to convict.[68] The justification for the materiality requirement is that an individual should not be convicted for statements which were incapable of influencing the court or jury on the basic issue. The objection to this requirement is that it injects another element of proof into the already difficult task of prosecuting for perjury. Critics of the requirement believe that any false statement, whether material or immaterial, should be punished as violations of both the moral code and criminal statutes.[69]

This criticism disregards the sufficiently broad tests of materiality and the expansive application of these tests. The most common tests of materiality are whether the false testimony was capable of influencing the tribunal on the issue before it[70] and whether it would have the natural effect or tendency to impede, influence or dissuade the grand jury from pursuing its investigation.[71] It should be noted that although the tests differ in the language describing them, they are essentially the same and have been used interchangeably by the courts. In *United States v. Lococo*,[72] the Ninth Circuit cited these tests and further observed that the false testimony need not be directed to the primary subject of the investigation. The testimony is material if it is relevant to any subsidiary issue under consideration by the tribunal.[73] In *Lococo*, where the grand jury was investigating interstate gambling activities, the court found material the defendant's denial of a telephone conversation with a named person. Although the testimony was not directly related to the primary purpose of the investigation, it may have supplied a link between the named person and an alleged gambler, thus bearing on the interstate gambling activities that the grand jury was investigating.

New York has created a three-degree structure of perjury in which even immaterial false statements may be punished as perjury. Perjury, whether material or immaterial to an issue, is considered a pernicious offense so that materiality is considered only a factor of aggravation of the offense.[74] Thus, perjury in the first and second degree requires materiality while perjury in the third degree does not.[75] Nevertheless, there is no available statistical evidence to prove that the statutes punishing both material and immaterial false statements have resulted in more convictions for perjury in New York than in other jurisdictions which retain the materiality requirement.[76]

Most critics blame the absence of perjury indict-

271 So. 2d 132 (Fla. 1972); State v. Deets, 195 N.W.2d 118 (Iowa 1972).

Examples of material statements in perjury prosecutions include: United States v. Winter, 348 F.2d 204 (2d Cir.), *cert. denied*, 382 U.S. 955 (1965) (Defendant's perjured testimony that he had not accepted bribes was material to an investigation into corrupt practices of Federal Housing Administration employees); Dolan v. United States, 218 F.2d 454 (8th Cir.), *cert. denied*, 349 U.S. 923 (1955) (Officer's alleged false testimony as to the handling of ransom money was material to grand jury investigation of kidnapping-murder and disposition of the ransom money); People v. Giacomo, 193 Cal. App. 2d 688, 14 Cal. Rptr. 574 (1961) (Defendant's testimony that he had not signed the name which appeared as the endorsement on the check was material in connection with the trial for grand theft and forgery). *But see* United States v. Freedman, 445 F.2d 1220 (2d Cir. 1971) (Defendant's denial that he received gifts from customers was not material to a Securities Exchange Commission investigation of three corporations and their directors in connection with stock manipulations); Wolfe v. State, 271 So. 2d 132 (Fla. 1972) (Defendant's statement of what he did with the checks was immaterial in the prosecution of the defendant for larceny and conspiracy to commit larceny).

[68] United States v. Gremillion, 464 F.2d 901 (5th Cir.), *cert. denied*, 409 U.S. 1085 (1972); United States v. Freedman, 445 F.2d 1220 (2d Cir. 1971).

[69] In emphasizing the moral aspects of false statements, these critics apply the original conception of perjury. *See* notes 13, 37 *supra*.

[70] United States v. Rivera, 448 F.2d 757 (7th Cir. 1971) (Defendant's denial that he sold heroin was material since if the jury believed his denial, he would be found innocent in a trial for selling heroin).

[71] LaRocca v. United States, 337 F.2d 39 (8th Cir. 1964) (False testimony as to the purchase of a revolver found near a government witness was material since it thwarted the grand jury's effort to determine the link between ownership and possession of the weapon and an assault on the government witness). Other tests of materiality in perjury prosecutions include: whether the jury would have believed the accused's false statement and would have acquitted, United States v. Paris, 448 F.2d 1277 (8th Cir. 1971), and whether the false statement would have the tendency to prove or disprove a relevant fact irrespective of the main issue, State v. Deets, 195 N.W.2d 118 (Iowa 1972).

[72] 450 F.2d 1196 (9th Cir.), *cert. denied*, 406 U.S. 945 (1971).

[73] *Id.* at 1199.

[74] People v. Dunleavy, 41 App. Div. 2d 717, 341 N.Y.S.2d 500 (1973); N.Y. PENAL LAW, PRACTICE COMMENTARY to § 210.05 (McKinney 1967).

[75] First degree perjury covers testimonial perjury and is a Class D felony (maximum of seven years imprisonment). N.Y. PENAL LAW § 210.15 (McKinney 1967). Second degree perjury deals with written instruments and is a Class E felony (maximum of four years imprisonment). *Id.* at § 210.10. Finally, third degree perjury covers both testimonial perjury and written instruments and is a Class A misdemeanor (maximum of one year imprisonment). *Id.* at § 210.05.

[76] New York does not maintain separate statistics on perjury indictments and convictions. Letter from the New York Attorney General to author (February 25, 1974). Letter on file in the editorial offices of the *Journal of Criminal Law and Criminology*.

ments and convictions on the stringent evidence rules which must be met in order to convict.[77] As noted earlier, in most jurisdictions the falsity of testimony can only be established by the testimony of two witnesses or of one witness plus corraborating circumstances.[78] One critic of this rule argued that this evidentiary distinction between perjury and other crimes is senseless and arbitrary since it makes it more difficult to convict for perjury than for murder.[79] Another stated that the rule may even be a stimulus to perjury in that it makes the offense so difficult to prove.[80] On the other hand, some believe the rule is necessary to protect honest witnesses from hasty and spiteful retaliation in the form of unfounded perjury prosecutions by defeated and disappointed litigants.[81] Also, there may be less harm in the escape of guilty perjurers than in the escape of other criminals.[82]

At the basis of this criticism is the belief that the removal of the two witness rule will result in a higher rate of perjury prosecutions. Nevertheless, the critics of the quantitative rule have not shown that there is a higher rate of indictments and convictions for perjury in Minnesota where the rule was abandoned in 1922.[83] Also, there is insufficient evidence at the present time to show a higher rate of prosecutions for perjury in federal courts since Congress abolished the two witness rule in 1970.[84]

Another difficulty encountered in prosecutions for perjury is that the testimony from the original proceeding may be unclear and ambiguous. In *Bronston v. United States*,[85] the Court confronted the question whether a witness may be convicted of perjury for an answer, under oath, that is literally true, but not responsive to the question asked and arguably misleading by negative implications.[86] The Court held that the federal perjury statutes do not provide for a perjury conviction for either an intent to mislead the examiner or for unresponsive answers which are untrue only by negative implication.[87] Juries should not be permitted to engage in conjecture whether an unresponsive, but literally true, answer was intended to mislead the jury. If the answer is unresponsive or unclear, the questioner should either press another question or reframe the initial question with greater precision. It is the duty of the questioner in the original proceeding to make the questions and answers unam-

[77] *See, e.g.*, Whitman, *supra* note 2; Note, *Perjury—Quantitative Evidence Rule Rejected*, 28 GEO. WASH. L. REV. 786 (1960); Comment, *Proof of Perjury: The Two-Witness Requirement*, 35 S. CAL. L. REV. 86 (1961).

[78] *See* note 28 *supra* and accompanying text.

[79] Whitman, *supra* note 2.

[80] Note, *Kind and Degree of Evidence Necessary to Convict of Perjury or Subornation*, 10 U. FLA. L. REV. 77 (1957).

[81] Weiler v. United States, 323 U.S. 606 (1945). The Court noted that the two witness rule protects witnesses in the same manner as immunity from libel suits protects witnesses who testify in open court.

[82] WIGMORE, *supra* note 28, at § 2041.

[83] In State v. Storey, 148 Minn. 398, 182 N.W. 613 (1921), the court held that perjury could be established by circumstantial evidence and not just by two witnesses if guilt could be established beyond a reasonable doubt. The court believed that perjury was not more heinous than murder so that one charged with perjury should have greater immunity than one charged with murder. Of the 19,512 defendants processed in district courts in Minnesota from 1965 to 1971, only 17 were processed for perjury. JUDICIAL CRIMINAL STATISTICS FOR MINNESOTA 1965–71 and letter from the Minnesota Bureau of Criminal Apprehension to author (February 11, 1974). Letter on file in the editorial offices of the *Journal of Criminal Law and Criminology*. These figures are even lower than those recorded in courts where the two witness rule was in effect. *See* notes 6–12 *supra* and accompanying text for the statistics from Pennsylvania, California and the federal district courts where the two witness rule was used.

[84] Although the two witness rule was eliminated in federal courts in 1970, it has still been used in recent federal decisions. *See, e.g.*, United States v. Weiner, 479 F.2d 923 (2d Cir. 1973) (Perjury occurred in 1966 and the indictment was in 1969); United States v. DeLeon, 474 F.2d 790 (5th Cir. 1973) (Accused was indicted in September, 1971).

The most recent federal perjury statute provides that:

> Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

18 U.S.C. § 1623(e) (1970).

The constitutionality of this statute has been upheld on the rationale that the two witness rule was never constitutionally mandated. United States v. Ruggerio, 472 F.2d 599 (2d Cir. 1973); United States v. Ceccerelli, 350 F. Supp. 475 (W.D. Pa. 1972). In Weiler v. United States, 323 U.S. 606 (1945), the Supreme Court earlier had adhered to the quantitative rule since Congress had not shown any legislative intent to abandon it. In *Ceccerelli*, however, the court noted that recent legislative history showed congressional intent to abolish the rule. *See also* S. REP. No. 91–617, 91st Cong., 1st Sess. 33 (1969); H.R. REP. No. 91–1549 quoted in U.S. CODE CONG. & ADMIN. NEWS, 91st Cong., 2d Sess. 4008 (1970).

[85] 409 U.S. 352 (1973).

[86] In *Bronston*, the defendant was asked whether he had a Swiss bank account. He replied that his company had an account in Zurich. Thus, the defendant told the literal truth, but not the whole truth. He gave the impression that he never had a personal account in a Swiss bank, although he had an account for five years. The questioner failed to follow up his inquiry and the Court held that the defendant could not be convicted of perjury by negative implication. *Id.* at 354.

[87] *Id.* at 359.

biguously specific.[88] Nevertheless, this requirement should not present a barrier to subsequent prosecution for perjury where the original questioner has competently examined a witness and has elicited precise and specific answers.

If the technicalities of the offense do not provide an answer to the question of the failure to enforce perjury statutes, then perhaps the answer lies in a policy decision of nonenforcement. In both civil and criminal cases, prosecutors may consider the individuals, interests and issues involved and choose nonenforcement of perjury statutes. Essentially, this involves a balancing test in which the benefits of a strict enforcement policy are weighed against the detriments of nonenforcement. Also included in this balancing are considerations of the technicalities of the offense and problems of proof.

The relative nonenforcement of perjury statutes in civil cases may result from the attitude of some prosecutors and judges that the judicial machinery should not be expended on civil actions where only a few individuals are involved. Although perjury is recognized as both widespread and destructive of the judicial system, if a relatively small number of individuals are affected by the alleged perjurious statement, then why should the state become involved by prosecuting for perjury. Prosecutors might have to devote a substantial amount of their limited time and resources in investigating the civil case and alleged false statement even before they decide to indict one of the parties.

In civil cases, prosecutors may believe that economies of both prosecutorial and judicial administration outweigh the benefits of a possible perjury conviction. Even if a prosecutor does review the civil case, the fact that the case is *de minimis* and the fact that there is only slight evidence of perjury will most likely result in nonenforcement of the criminal statute.[89] Yet, it may be argued that the roots of the perjury problem lie even in the *de minimis* civil case. If prosecutors and judges truly believe that perjury injures parties in all judicial proceedings and also impedes the effective administration of justice, then they should strictly enforce perjury statutes in all cases. Moreover, if witnesses believe that perjury will be prosecuted, then a deterrent effect may reasonably be expected.

In criminal trials, there may be a sense of frustration as a result of the frequency of perjury that prevents prosecutors from filing charges in every case in which perjury occurs.[90] Most prosecutors are faced with a multitude of different duties so that it is impossible to examine every case for possible perjury. Further, prosecutors may accept the theory that defendants are expected to do anything possible, even perjure themselves, to avoid conviction.

As in civil cases, the decision to prosecute for perjury following a criminal trial involves a balancing of the damage which the perjury caused and the benefit of a conviction for false testimony. Prosecutors may believe that in the particular case the perjury resulted in only negligible damage since the defendant was convicted of the major offense alleged by the prosecution. A subsequent prosecution for perjury may be only collateral to the overall issue of the case. In addition, the burden of another trial on the judicial system may outweigh the benefit of convicting the defendant of another crime. Economies of judicial administration may outweigh the benefit of the additional sentence which a perjury conviction may impose.[91] Yet, it may be argued that administrative inconvenience should not prevent prosecution of perjury in a particular civil or criminal case. The first and most obvious reason is that perjurers should be punished for their offense. Secondly, a strict enforcement policy and the perception of this policy by the public may act as a deterrent to future perjury.

The danger of a policy of nonenforcement is that it encourages perjury in future cases, since the defendant and other witnesses may realize that their false testimony will remain unpunished. Parties to a proceeding may also be encouraged to commit the separate offense of subornation of perjury. Subornation of perjury consists of procuring or instigating another to commit perjury. There are two essential elements of the offense. First, the testimony of the suborned witness must be false and known to be false by the witness. Second, the suborner must know or believe the testimony about to be given will be false and must know or intend that the witness will give the testimony corruptly

[88] *Id.* at 362.

[89] Default divorces, small claims or auto accidents in which both parties are insured are examples of civil cases in which perjury will probably remain unprosecuted.

[90] In defense of this nonenforcement, prosecutors could argue that they lacked sufficient evidence and the requisite knowledge with which to proceed against the alleged offender. *See* Oyler v. Boles, 368 U.S. 448 (1962).

[91] For examples of typical sentences for perjury, see note 121 *infra*.

or with knowledge of its falsity.[92] Both parties and nonparties to a case may procure or induce false testimony if they believe that perjury and subornation of perjury statutes will not be strictly enforced. Although subornation of perjury is an obvious breach of legal ethics,[93] attorneys are especially prone to indictment for violating subornation statutes.[94] A recogniton of the nonenforcement of perjury statutes and an unwavering belief in his client and his client's position may lead an attorney to induce a witness to give false testimony.

In situations where perjury is alleged, it is often the only criminal violation charged. Prosecutors may feel that a perjury charge is warranted following a criminal trial or grand jury proceeding[95] because of the substantial investment of time and resources by the prosecution in investigation and litigation. If the jury fails to convict the defendant in the original criminal trial, a subsequent perjury charge may be used to obtain a conviction. Perjury charges may also be employed following a grand jury proceeding if no other grounds for criminal charges were discovered during the proceeding. Perjury, along with obstruction of justice,[96] is a means to obtain an indictment or conviction when it is impossible to allege or prove a more serious offense.[97]

The situations in which perjury charges have been used in this manner include cases involving political or official corruption,[98] organized crime,[99] and the Watergate incident.[100] This selective enforcement of perjury raises the the issue of prosecutorial discrimination.[101] If perjury occurs in most judicial proceedings, may the state properly select one individual for prosecution? In *United States v. Falk*,[102] the Seventh Circuit confronted the question of prosecutorial discrimination and observed that there is a presumption "that a prosecution for violation of a criminal law is undertaken in good faith and in nondiscriminatory fashion for the purpose of fulfilling a duty to bring violators to justice." [103] Nevertheless, if the defendant alleges intentional and purposeful discrimination and presents facts sufficient to raise a reasonable doubt about the prosecutions' purpose, the burden of go-

[92] *See, e.g.*, Petite v. United States, 262 F.2d 788 (4th Cir.), *remanded on other grounds*, 361 U.S. 529 (1959); Gordon v. State, 104 So. 2d 524 (Fla. 1958); State v. Potts, 154 Me. 114, 144 A.2d 261 (1958); State v. Devers, 260 Md. 360, 272 A.2d 794 (1971); State v. Clawans, 38 N.J. 162, 183 A.2d 77 (1962); State v. McBride, 15 N.C. App. 742, 190 S.E.2d 658 (1972); Commonwealth v. Billingsley, 357 Pa. 378, 54 A.2d 705 (1947).

[93] The Canons of the Code of Professional Responsibility provide that a lawyer should represent his client zealously within the bounds of the law. ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON 7. The Ethical Considerations prohibit the use of fraudulent, false or perjured testimony and subject to discipline any lawyer who knowingly participates in or introduces such testimony. *Id.* at EC 7-26. The Disciplinary Rules prohibit a lawyer from knowingly using perjured testimony or false evidence. *Id.* at DR 7-102(A)(4).

[94] *See, e.g.*, United States v. Root, 366 F.2d 377 (9th Cir.), *cert. denied*, 386 U.S. 912 (1966) (Attorney induced a witness to commit perjury); Burns v. Clayton, 273 S.C. 316, 117 S.E.2d 300 (1960) (Attorney paid a witness to make a false statement); State *ex. rel.* Milwaukee Bar Ass'n. v. Aderman, 11 Wis. 2d 319, 105 N.W.2d 284 (1960) (Attorney encouraged a client to give false testimony).

[95] The Eighth Circuit noted that one reason for the more liberal evidence rules in 18 U.S.C. § 1623 (1970) may be Congress' feeling that perjury before the grand jury is especially damaging. United States v. Koonce, 485 F.2d 374 (8th Cir. 1973). Analogously, prosecutors may believe that false testimony during a grand jury proceeding is more destructive of the judicial system than perjury in a civil case.

[96] For a discussion of the relationship between perjury and obstruction of justice, see note 124 *infra* and accompanying text.

[97] A perjury charge could also be used as an "insurance" charge following a grand jury proceeding. In addition to alleging other offenses, a perjury count could be added in order to obtain conviction on at least one ground. For a discussion of the use of perjury charges in police corruption cases, see Beigel, *The Investigation and Prosecution of Police Corruption*, 65 J. CRIM. L. & C. 135, 141–43 (1974).

[98] United States v. Gill, 490 F.2d 233 (7th Cir. 1973). (Police officers charged with perjury before the grand jury in a case dealing with extortion in violation of the Hobbs Act).

[99] United States v. Andrews, 370 F. Supp. 365 (D. Conn. 1974). (Perjury charges were the result of a grand jury inquiry into defendant's alleged gambling activities).

[100] United States v. Krogh, 366 F. Supp. 1255 (D.D.C. 1973). (A federal official was charged with perjury in sworn deposition taken by Assistant Attorney General in a proceeding ancillary to the Watergate Grand Jury inquiry).

[101] It also raises the issue of the use of charges of alleged perjury to harass those suspected of criminal offenses. Although the evidence of perjury may be weak following a trial or grand jury investigation, a perjury count could be used as a harassment technique. The Court has noted, however, that a defendant may be charged with a petty crime, even if most others are not prosecuted. Nevertheless, the defendant must be suspected of committing other crimes and not unpopular legal acts. Cox v. Louisiana, 379 U.S. 536, 557–58 (1965). An example of the valid use of a smaller charge is United States v. Sacco, 448 F.2d 264 (9th Cir. 1970). In *Sacco* the defendant was suspected of being involved in organized crime, but was convicted of the lesser offense of violating alien registration laws.

[102] 479 F.2d 616 (7th Cir. 1973). For a discussion of the development of the theory of prosecutorial discrimination, see Comment, *The Ramifications of United States v. Falk on Equal Protection from Prosecutorial Discrimination*, 65 J. CRIM L. & C. 62 (1974).

[103] 479 F.2d 616, 620.

ing forward with proof of nondiscrimination will then rest on the government.[104] A defendant in a perjury case could possibly cite the *Falk* rationale and argue that the prosecution in the particular case violated the equal protection clause of the fourteenth amendment since other perjurers were not being prosecuted.[105]

In defense of their selective enforcement of perjury, prosecutors may argue that the means of selectivity were reasonable because they lacked sufficient evidence or knowledge of other crimes with which to charge the defendant.[106] In addition, it has been held that prosecutors may conserve law enforcement resources by selecting individuals at random.[107] This reasoning may be utilized to argue that it is not improper discrimination to prosecute someone who is highly visible to the public and whose conviction would have a strong deterrent effect.[108] Hence, a sound enforcement technique might include the prosecution of a highly visible offender for perjury in order to achieve general compliance.[109] Nevertheless, this rationale assumes that the public will be aware of the selective prosecution and that this will affect their future actions as witnesses.

Remedies

Legislatures, courts and commentators have presented various solutions to the problem of perjury in judicial proceedings. For example, Kentucky and Pennsylvania have statutory sanctions which disqualify convicted perjurers from being witnesses in future litigation.[110] This sanction is limited, however, since the perjurer may testify on his own behalf in criminal prosecutions and is only estopped from testifying against others or on his own behalf in civil cases.[111] The prospective perjurer is unlikely to think of these consequences before he gives false testimony,[112] and therefore, the sanctions have little or no prospective deterrent effect.

Maine grants a cause of action to a party defeated by the introduction of perjury by the adverse party at a trial.[113] The cause of action requires a judgment obtained against a party, by perjury of a witness introduced at trial by the adverse party, resulting in damage to the party.[114] The statute is an exception to the common law rule that there is no civil remedy in favor of a defeated litigant against a witness who committed perjury.[115] Public policy has denied civil remedies in perjury cases in order to protect the proper functioning of courts by enabling witnesses to make full and complete disclosures without fear of subsequent tort cases due to alleged false statements.[116] Further, subsequent tort cases for alleged perjury may create endless litigation.[117] Because of the dearth of cases using this cause of action in Maine and the fact that the remedy is only available after the perjury occurs, it may be assumed that this remedy also has little prospective deterrent effect.

A frequent recommendation is treating perjury

[104] *Id.* at 624. In support of an argument that the selective enforcement of the perjury statute violated the equal protection clause, the defendant may not merely allege purposeful discrimination. He must also show that the selective enforcement was based upon an unjustifiable standard such as race, religion or other arbitrary classification. Oyler v. Boles, 368 U.S. 448, 456 (1962).

[105] Cases which have found prosecutorial discrimination include: United States v. Falk, 479 F.2d 616 (7th Cir. 1973) (25,000 others handed in their draft cards, but were not prosecuted); United States v. Steele, 461 F.2d 1148 (9th Cir. 1972) (Six others committed the same federal census violation, but were not prosecuted); United States v. Crowthers, 456 F.2d 1074 (4th Cir. 1972). (Similar disruptive acts were committed on sixteen other occasions, but no prosecutions resulted in those instances). The defendant alleging prosecutorial discrimination in a perjury case would have to show a particular class (for example, divorces or small claims) where perjury statutes were not enforced.

[106] Oyler v. Boles, 368 U.S. 448 (1962).

[107] People v. Utica Daw's Drug Co., 16 App. Div. 2d 12, 225 N.Y.S.2d 128 (1962).

[108] United States v. Falk, 479 F.2d 616, 634 (7th Cir. 1973) (dissenting opinion).

[109] *Id.* This would essentially involve a balancing of the issues and parties involved in the proceeding.

[110] KY. REV. STAT. § 421.090 (1971); PA. STAT. ANN. ch. 28, § 253 (1958).

[111] Howard v. Commonwealth, 395 S.W.2d 355, (Ky.), *cert. denied*, 384 U.S. 995 (1965). *See also* Commonwealth v. Bartel, 184 Pa. Super. 528, 136 A.2d 166 (1953).

[112] The New York statute, N.Y. PENAL LAW § 210.05 (McKinney 1967), which establishes penalties for even immaterial statements suffers from the same defect. Witnesses will not fear conviction for immaterial false statements unless they know that the statute is being enforced.

[113] MAINE REV. STAT. Tit. 14, § 870 (1964).

[114] Cole v. Chellis, 122 Me. 262, 119 A. 623 (1923).

[115] Agnew v. Parks, 172 Cal. App. 2d 756, 343 P.2d 118 (1959); Morgan v. Morgan, 129 Misc. 212, 221 N.Y.S. 117 (1927). *But see* Morgan v. Graham, 228 F.2d 625 (10th Cir. 1956) (A defeated litigant cannot recover damages due to perjured testimony, but may recover damages for false and fradulent acts and conduct); Robinson v. Missouri Pacific Transp. Co., 85 F. Supp. 235 (W.D. Ark. 1949) (There is no cause of action for subornation of perjury, but there is civil redress if a party is damaged by the successful execution of a conspiracy).

[116] Robinson v. Missouri Transp. Co., 85 F. Supp. 235 (W.D. Ark. 1949).

[117] Kantor v. Kessler, 132 N.J.L. 336, 40 A.2d 670 (1945).

as contempt of court.[118] The Supreme Court has held, however, that the crime of perjury alone does not permit summary contempt proceedings.[119] There must also be the additional element of the obstruction of the court in the performance of its duties.[120] Thus, this remedy would be limited to cases where it was proved that the witness testified falsely with the intent to obstruct the court.

A further proposal is to increase the penalties for committing perjury.[121] This could be achieved by increasing the statutory penalties for perjury and through the application of the additional statutes for the offense of obstruction of justice in perjury cases. Obstruction of justice is defined as the specific intent to do an act which tends to impede, influence or obstruct the administration of justice.[122] The purposes of obstruction of justice statutes are to protect participants in the specific proceeding and to prevent the miscarriage of justice.[123] Because these are also the goals of perjury statutes, both perjury and subornation of perjury have been construed as acts which obstruct the administration of justice.[124] Hence, a perjurer may be convicted not only for perjury, but also for the separate offense of obstruction of justice if the court finds that the false statement impeded the court in its inquiry.[125] Increasing the penalties for perjury, however, does not answer the fundamental problem of the failure to enforce perjury statutes. Stiffer penalties do not act as deterrents to perjury unless perjurers are indicted and convicted.

Another proposal is the use of scientific means to discover perjured testimony.[126] Polygraph tests could be administered to witnesses to discover the truth or falsity of their testimony in court. Theoretically, the threat of a polygraph test would compel witnesses to give truthful testimony. However, the results of polygraph tests have traditionally been held inadmissible.[127] Nevertheless, prosecutors could possibly use polygraph tests in investigations to determine whether to file perjury charges. A frequent problem facing prosecutors is whether there is sufficient evidence with which to charge the defendant with perjury. Polygraph tests which indicated that a witness gave false testimony might give prosecutors the impetus to prosecute for perjury. Although the polygraph evidence of perjury would be inadmissible, it might give the prosecutor the incentive to search for additional evidence.

In sum, various remedies have been proposed for the problem of perjury in the courts, but none have provided an adequate answer. The fundamental defect of these remedies is that they usually involve sanctions which are imposed only after the perjury occurs. In most cases the sanctions involve further punishment of the defendant after he has already been convicted of perjury. However, the fundamental problem of perjury is that perjury statutes are rarely enforced. The additional sanctions can only be effective as further deterrents of perjury if perjury statutes are enforced and prospective perjurers know of this enforcement.

Conclusions

It is undenied by courts, prosecutors and commentators that perjury is a frequent and substantial threat to the effective administration of

[118] *See, e.g.*, Black, *supra* note 56; Comment, *Proof o Perjury, supra* note 77.

[119] *In re* Micheal, 326 U.S. 224 (1945).

[120] *Id.*

[121] The older federal perjury statutes punish perjury and subornation of perjury by fines of not more than $2,000 or imprisonment of not more than five years or both. 18 U.S.C. §§ 1621, 1622 (1966). The most recent statute expands the maximum fine to $10,000 and imprisonment to five years. 18 U.S.C. § 1623 (1970). New York determines the penalty according to the degree of the offense. *See* note 75 *supra*. Minnesota punishes false statements in felony trials by imprisonment of not more than five years or a fine of not more than $5,000 or both. In all other cases the maximum prison term is three years and the maximum fine is $3,000. MINN. STAT. § 609.48 (1971). These penalties are substantially lighter than those provided for in early perjury statutes. *See* note 21 *supra*.

[122] *See, e.g.*, Knight v. Unites States, 310 F.2d 305 (5th Cir. 1962); Baker v. State, 122 Ga. App. 587, 178 S.E.2d 278 (1970), *cert. denied*, 401 U.S. 1012 (1971); People v. Coleman, 350 Mich. 268, 268 N.W.2d 281 (1957); People v. Longo, 16 App. Div. 2d 297, 227 N.Y.S.2d 815 (1962).

[123] United States v. Metcalf, 435 F.2d 754 (9th Cir. 1970).

[124] United States v. Cohen, 202 F. Supp. 587 (D. Conn. 1962); State v. Kowalczyk, 4 N.J. Super. 47, 66 A.2d 175 (1949).

[125] United States v. Kahn, 366 F.2d 259 (2d Cir.), *cert. denied*, 385 U.S. 948, *rehearing denied*, 385 U.S. 984 (1966); Stein v. United States, 337 F.2d 14 (9th Cir. 1964), *cert. denied*, 380 U.S. 927 (1965).

[126] *See* Walther v. O'Connell, 72 Misc. 2d 316, 339 N.Y.S.2d 386 (Civil Ct., 1972).

[127] United States v. Salazar-Gaeta, 447 F.2d 468 (9th Cir. 1971); People v. Nicholls, 42 Ill. 2d 91, 245 N.E.2d 771 (1969). *But see* Reid v. State, 285 N.E.2d 279 (Ind. 1972); Walther v. O'Connell, 72 Misc. 2d 316, 339 N.Y.S.2d 386 (Civil Ct., 1972). In *Reid*, the court admitted the results of the polygraph test since the defendant expressly waived any objection to admission of the test. In *Walther*, the court admitted the polygraph evidence in an action to recover an alleged oral loan. The evidence was admitted on the grounds that the test was administered by the court and was necessary to determine which party of the action was lying and which was telling the truth.

justice. The offense prevents a fair and proper trial in the particular proceeding and interferes in the overall administration of the judicial system. It is also undenied that a purpose of criminal statutes for perjury is to act as deterrents to the offense.[128] Nevertheless, perjury statutes cannot properly act as deterrents unless they are strictly enforced. Perjury cannot be deterred by court dicta noting its evil effects. Neither can it be deterred by arguing that the technicalities of the offense prevent simple enforcement of perjury statutes. Perjury can only be deterred by enforcing perjury statutes in instances where perjury occurs. If witnesses, attorneys and other parties involved in judicial proceedings believe that perjury and subornation of perjury will be prosecuted, then it may be assumed they will be more hesitant to commit these offenses. Moreover, the enforcement of perjury statutes will have the obvious effect of punishing those who commit perjury.

Thus, the remedy to the problem of perjury in the courts may be the simple one of developing a sterner sentiment in place of the apathy which presently exists.[129] If prosecutors and judges truly believe that perjury is a threat to the judicial system, then they should take positive steps to prevent its occurrence.

[128] The Court has observed, however, that perjury statutes are not the sole or even the primary deterrent against perjury. Bronston v. United States, 409 U.S. 352, 360 (1973). Nevertheless, the Court has provided no other alternatives besides perjury statutes and precise questioning of witnesses as deterrents of perjury.

[129] For an early advocate of this position, see Parrington, *Frequency of Perjury*, 8 COLUM. L. REV. 67 (1908).

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TRENDS IN LEGAL COMMENTARY ON THE EXCLUSIONARY RULE

The exclusionary rule in search and seizure cases has been the subject of continual controversy since the Supreme Court decision of *Weeks v. United States* in 1914.[1] Recent decisions by the Supreme Court in *United States v. Robinson*[2] and *United States v. Calandra*[3] will undoubtedly elicit further debate. Since the Supreme Court may reconsider the exclusionary rule in the near future,[4] the clarity and persuasiveness of any additional commentary for or against the rule will be critical.

The arguments for and against the rule have been exhaustively presented.[5] Because the literature on the question is extensive, no purpose would be served by merely restating these arguments. Instead, the purpose of this comment is to evaluate selected legal commentaries published at different stages during the development of the exclusionary rule and assess their impact to its development. In other words, this comment will present a historiography of the exclusionary rule. Case law references will be made only to provide the judicial background necessary to detect its similarities or differences with legal commentary trends.

The Pre-Mapp Commentary

The first suggestion that evidence obtained by an unreasonable search and seizure violated the fourth amendment appeared, by way of dictum, in *Boyd v. United States*.[6] This suggestion was severely

[1] 232 U.S. 383 (1914).

[2] 414 U.S. 218 (1973). *Robinson* involved the arrest, on a traffic charge for driving on a revoked license, of Willie Robinson, Jr. of Washington, D.C. Pursuant to certain regulations of the D.C. police force, the arresting officer was required to take Robinson into custody. Thus, in this case, the officer made a full body search after he stopped Robinson's auto. During the search, the officer found several caps of heroin in a crumpled cigarette package in Robinson's breast pocket. The circuit court of appeals eventually held that the heroin could not be introduced as evidence and that Robinson's conviction for its possession could not stand. Their rationale was that, in making an arrest for a traffic violation, a police officer was "substantially safe" and, therefore, had no right to make more than a cursory pat-down frisk for weapons. On appeal, the Supreme Court reversed. In a 6 to 3 decision, the Court permitted an arresting officer to make a full search of any person he has lawfully arrested, whether he is searching for fruits of the crime for which he made the arrest or simply for his own protection. In writing for the majority of the Supreme Court, Mr. Justice Rehnquist said, "a search incident to the arrest requires no additional justification." Mr Justice Rehnquist then referred to the number of policemen killed during traffic stops and the inherent danger to an officer of taking a person into custody.

[3] 414 U.S. 338 (1974). *Calandra* presented the question whether a witness summoned to appear and testify before a grand jury may refuse to answer questions on the ground that they are based on evidence obtained from an unlawful search and seizure. The Court in a 5–3 decision held that the exclusionary rule did not exclude the use of illegally seized evidence in all proceedings or against all persons, and its application was restricted to those areas where its remedial (deterrent) objectives are thought most efficaciously served. The Court emphasized that allowing a grand jury witness to invoke the exclusionary rule would unduly interfere with the effective and expeditious discharge of the grand jury's duties and extending the rule to grand jury proceedings would achieve only a speculative and minimal advance in deterring police misconduct at the expense of substantially impeding the grand jury's role.

[4] Certiorari was granted in the case of California v. Krivda, 409 U.S. 33 (1972), where the Court agreed to reconsider the exclusionary rule. After arguments, however, the Court did not decide the case but remanded it for a determination as to whether the state court had based its decision on state or federal grounds. This case may yet be heard if the California supreme court decides that its decision was based on the federal Constitution.

[5] *See, e.g.*, Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 SUP. CT. REV. 1 (1961); Allen, *The Wolf Case Search and Seizure, Federalism, and the Civil Liberties*, 45 ILL. L. REV. 1 (1950); Burger, *Who Will Watch the Watchman?* 14 AM. U.L. REV. 1 (1964); Burns, *Mapp v. Ohio: An All American Mistake*, 19 DEPAUL L. REV. 80 (1969); Driver, *Confessions and the Social Psychology of Coercion*, 82 HARV. L. REV. 42 (1968); Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929 (1965); Kamisar, *Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 MINN. L. REV. 1083 (1959); Katz, *Supreme Court and the States: An Inquiry into Mapp v. Ohio in North Carolina*, 45 N.C.L. REV. 119 (1966); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970); Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. CRIM. L.C. & P.S. 255 (1961); Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319.

For some of the more recent commentary, see Cox, *The Decline of the Exclusionary Rule: An Alternative to Injustice*, 4 SW. U.L. REV. 68 (1972); Gardner, *The Exclusionary Rule—Its Anticipated Demise—and A Meaningful Alternative*, J. CAL. LAW ENFORC. 55 (1972); Horowitz, *Excluding the Exclusionary Rule*, 47 L.A. BAR BULL. 91 (1972); Milner, *Supreme Court Effectiveness and the Police Organization*, 36 L. & CONTEMP. PROB. 467 (1971); Wingo, *Growing Disillusionment with the Exclusionary Rule*, 25 SW. L.J. 573 (1971).

See also F. INBAU, J. THOMPSON & C. SOWLE, CASES AND COMMENTS ON CRIMINAL JUSTICE: CRIMINAL LAW ADMINISTRATION 1–84 (3d ed. 1968).

[6] 116 U.S. 616 (1886). *Boyd* held that documents obtained under an order of court pursuant to a statutory provision which had authorized a court of the United

criticized[7] but it remained unchallenged for twenty years.[8] *Adams v. New York*[9] halted the development of the exclusionary rule until 1914 when the Supreme Court in the celebrated case of *Weeks v. United States*[10] "reverted to the approach taken in *Boyd*" [11] and for the first time adopted the rule of exclusion in the federal search and seizure cases in virtually its modern form. After a further extension of the Rule in 1949,[12] the Supreme Court in *Mapp v. Ohio*[13] extended the exclusionary rule to its fullest application by holding federal search and seizure standards applicable to state courts.

Throughout the development of the exclusionary rule, commentators have expressed various goals which the rule was purportedly designed to achieve. One of the leading articles of the early exclusionary rule commentary published in 1925 was written by Professor Thomas S. Atkinson.[14] In praising the rule, which at the time was applicable only to the federal courts,[15] he noted the ineffectiveness of certain methods other than the exclusionary rule to deter violations of the fourth amendment.[16]

States in revenue cases on motion of the government attorney to require the accused to produce in court his private books and papers, were erroneously admitted in evidence. The Court declared that both the fourth and fifth amendments to the federal Constitution had been violated. "We have already noticed the intimate relation between the two amendments," wrote Mr. Justice Bradley for the majority of the Court, "... And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself." Justice Miller delivered a dissenting opinion in which Chief Justice Waite concurred. The ground of the dissent was that only the fifth amendment was violated, as there was no search. Justice Miller in his opinion said:

> I am of opinion that this is a criminal case within the meaning of the clause of the Fifth Amendment to the Constitution of the United States which declares that no person 'shall be compelled in a criminal case to be witness against himself.' And I am quite satisfied that the effect of the act of congress is to compel the party on whom the order of the court is served to be witness against himself. The order of the court under the statute is in effect a subpoena duces tecum and though the penalty for the witness' failure to appear in court with the criminating papers is not fine and imprisonment, it is one which may be made more severe, namely, to have charges against him of a criminal nature, taken for confessed, and made the foundation of the judgment of the court. That this is within the protection which the Constitution intended against compelling a person to be a witness against himself is, I think, quite clear. But this being so, there is no reason why this court should assume that the action of the court below, in requiring a party to produce certain papers as evidence on the trial, authorizes an unreasonable search or seizure of the house, papers, or effects of that party.

[7] Dean Wigmore pointed out that logically there is no search or seizure when a person is merely required to testify, or, in the capacity of a witness, to bring a document or chattel into court. WIGMORE, EVIDENCE § 2264 (3d ed., 1940). In addition, he said, common law doctrine that the admissibility of evidence is not affected by the illegality of the means through which the party has been enabled to obtain the evidence was never doubted "until the appearance of the ill-starred majority opinion of *Boyd* . . ." 8 A.B.A.J. 479–80 (1922); Wigmore noted in this article that *Boyd* was thoroughly incorrect in its historical assertions and dealt with matters outside the question at issue. *Id.* Some of the case law at the time also considered the dictum in *Boyd* illogical and improper, *e.g.*, Van Hook v. Helena, 170 Ark. 1083, 282 S.W. 673 (1926); Gore v. State, 24 Okla. Crim. 394, 218 P. 545 (1923); Hoyer v. State, 180 Wis. 407, 193 N.W. 89 (1923); State v. George, 32 Wyo. 223, 231 P. 683 (1924).

[8] In 1904, the Supreme Court indicated that the sef-incrimination provision had no application to search and seizure, and that violations of the latter guaranty would not be punished indirectly by excluding the evidence. Adams v. New York, 192 U.S. 585 (1904).

[9] *Id.*

[10] 232 U.S. 383 (1914). In *Weeks* the Court held that documents and contraband lottery tickets illegally seized were inadmissable because the taking was in violation of the Fourth Amendment. The *Weeks* doctrine was reaffirmed in Gould v. United States, 255 U.S. 298 (1921), where writings were seized illegally by federal officers, and in Amos v. United States, 255 U.S. 313 (1921), where contraband liquor was found in a search of defendant's home without a warrant.

[11] 116 U.S. 616 (1886).

[12] In Wolf v. Colorado, 338 U.S. 25 (1949), the Supreme Court held that unreasonable searches and seizures by state law enforcement officials violated the due process clause of the fourteenth amendment. The states, however, were left to adopt whatever means they desired to protect against such conduct.

[13] 367 U.S. 643 (1961).

[14] Atkinson, *Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures*, 25 COLUM. L. REV. 11 (1925).

[15] Weeks v. United States, 232 U.S. 383 (1914).

[16] Atkinson, *supra* note 14, at 24. Discussing the ineffectiveness of both criminal and civil remedies, Atkinson said:

> Generally an innocent person whose rights have been invaded will not seek civil relief unless there is substantial physical or property injury. Courts and juries are not in the habit of giving substantial damages where there has been a mere violation of privacy without visible loss. Few innocent persons will lay out time and money in order to recover nominal damages for the violation of a right, no matter how fundamental and precious that right may be. Yet the soul will be rankled and the people dissatisfied. A guilty person is in even a worse position. He could not even hope to recover more than nominal damages unless the search was attended by serious personal injury or destruction of lawful property. Of course he could not recover the amount of the fine or the value of his time during imprisonment. The other alternative, a criminal action against the offending officer, seems inadequate. If mere technical violations of the Fourth Amendment are punished criminally, this would discourage an officer from doing his duty whenever there could be any doubt as to the legality of the search. On the other hand, if punishment be con-

Recognizing that the exclusion of illegally obtained evidence was a sanction less direct than criminal and civil penalties, he pointed out that exclusion of the evidence would nevertheless result in a real means of enforcing the fourth amendment when all other means practically failed.[17] The deterrent effect would be real because "if the officers know that the evidence which they obtain through violation of the Amendment cannot be used, they will have no incentive to indulge in even merely technical violations." [18] Despite the purported practical failure of "all other means" of enforcing the fourth amendment, Atkinson recommended that "the more violent and obvious infringement may be curtailed through civil or criminal actions against the guilty officers." [19]

Atkinson's reply to the criticism that the remedy of excluding evidence was too stringent because it freed guilty defendants[20] was to note that the prosecution lost nothing to which it was lawfully entitled.[21] If officers regularly discovered guilty persons by means of unreasonable searches, it was because the laws which they sought to enforce were fatally unpopular or it was an argument in favor of a judicial relaxation as to what was an unreasonable search.[22] "But so long as the Fourth Amendment has a place in the fundamental law," he said, "searches which are unreasonable must be discouraged by every feasible means." [23]

The primary thrust of Atkinson's thesis, however, was that just as the evidence obtained in violation of the self-incrimination clause is excluded,[24] the evidence obtained in violation of the fourth amendment should also be excluded as was suggested in *Boyd*. Atkinson argued that every possible legitimate reason of policy or social need for the rule of self-incrimination could be urged for the inadmissability of evidence procured by unreasonable search. "Indeed, in some regards," he added, "the latter presents the much stronger argument for exclusion in evidence." [25]

Approximately twenty-three years after Atkinson's article and about a year before the exclusionary rule was expanded in *Wolf v. Colorado*,[26] Professor Fraenkel authored an article surveying the developments in the federal law of searches and seizures.[27] His discussion of the exclusionary rule re-inforced for the most part the acclamation of the rule expressed by Atkinson. "Most of the criminals let go by reason of the application of the federal rule might safely be in prison had the law enforcement officers used more care in procuring the evi-

fined to malicious violations of the Fourth Amendment or cases in which substantial physical damages were done, the result would be that the force of the Fourth Amendment would be gradually whittled away. In addition, prosecutors are naturally loathe to proceed against the officers who have furnished them the convicting evidence. An example of this is shown by recent experience. An amendment to the National Prohibition Law provides for criminal punishment of officers who make illegal searches. About three years have elapsed and there is no reported case in which an officer has been punished under its provisions. Cases are numerous in which unreasonable searches were made. The absence of cases punishing officers criminally or giving compensation to persons whose rights are violated shows that these means are not adequate to preserve the Fourth Amendment as part of our living law.

[17] Atkinson, *supra* note 14, at 24.

[18] *Id.*

[19] *Id.*

[20] *Id.* at 25.

[21] *Id.*

[22] *Id.* at 26.

[23] *Id.*

[24] Atkinson stated that it was natural to make this dichotomy between exclusion of evidence under the self-incrimination clause and inclusion of it under the reasonable search and seizure clause in view of the manner in which the clauses were separated in historical growth and constitutional statement. "Yet from the standpoint of policy it would seem that the two provisions have much in common," he said. Developing this point further, he said:

> They are both based upon the idea that the government's authority to infringe upon personal privacy should be limited. The Fourth Amendment is generally a limitation upon enforcement officers, and the privilege against self-incrimination is a limitation upon prosecutors and trial courts. The former is ostensibly to protect physical privacy; and the latter the privacy of one's knowledge. Privacy is just as much and as unreasonably infringed by the seizure of a document or a chattel as by compelling a person to produce the same or to testify concerning them in such manner as to incriminate himself; and the practical result is the same. Indeed, if either infringement on privacy is reasonable, it is the act done at the trial under the supervising eye of the judge who can guard against unreasonable abuses. The search cannot be so effectively restrained, for it is ordinarily conducted by petty, free-lance officials, away from the eye of the court. On this score the unreasonable search presents a much stronger case for the exclusion of the evidence obtained thereby than does the case of self-incrimination. There is no inherent reason for admitting evidence already found through an unreasonable search and excluding it where the evidence will not be learned until a witness is compelled to testify or produce something.

Id. at 17. Some of the case law from *Boyd* until *Wolf v. Colorado* followed an approach quite similar to the one suggested by Atkinson. *E.g.*, United States v. Lefkowitz, 285 U.S. 452, 466–67 (1932); Gould v. United States, 255 U.S. 298, 303–04 (1921); Amos v. United States, 255 U.S. 313, 315–16 (1921).

[25] Atkinson, *supra* note 14, at 29.

[26] 338 U.S. 25 (1949).

[27] Fraenkel, *Recent Developments in the Federal Law of Searches and Seizures*, 33 IOWA L. REV. 472 (1948).

dence against them," said Fraenkel.[28] "It is undeniable, of course, that illegal searches continue despite the risk that a conviction based on the evidence seized may be reversed," he said, "but that they would be much more numerous if there were no such risk can hardly be doubted." [29]

Fraenkel maintained that in the last analysis, the issue would be determined by what was considered to be a greater good: to preserve the privacy of a citizen or to catch a few criminals?[30] He pointed out that those who drafted the Bill of Rights made a choice based on their reading of history; the wisdom of the founding fathers still seemed best.[31]

The commentary of both Atkinson and Fraenkel are fairly representative of the trend to expand the exclusionary rule during the pre-*Wolf* years.[32] These proponents frequently asserted the deterrent effect of the rule without referring to any empirical data to corroborate such a conclusion. Neither Atkinson nor Fraenkel considered the possibility that the exclusionary rule could be an ineffective remedy. On the contrary, both authors simply assumed that if illegal searches were made futile, then the incidence of illegally obtained evidence would be diminished; or inversely, if lawless searches and seizures resulted in convictions, lawlessness would flourish and increase. This reasoning, said Professor John Barker Waite, "is a logical enough theory, impregnable in the library. But in light of eventualities it appears to have been dim-visioned theory spectacled in rose." [33] "Not a shred of evidence has been discovered," added this critic, "to indicate that the police of Ohio and New York, where use of evidence is permitted, are worse behaved than the police of Michigan and Illinois, where it is excluded." [34]

Professor Francis A. Allen, a supporter of the rule, writing in 1950, noted that "one seeking to discover the actual consequences of the Exclusionary Rule in protecting individual rights of privacy and its effects upon the process of law enforcement cannot fail to be impressed by the paucity of empirical evidence upon which anything more than highly tentative conclusions may be based. Data to supply adequate answers to even elementary questions is largely non-existent." [35] Fully aware of the tentative nature of any conclusions on the subject, Professor Allen nevertheless submitted that the most powerful argument in support of the adoption of the exclusionary rule came from a consideration of the alternatives advanced to fulfill its function.[36]

In meeting the traditional criticism of the exclusionary rule, he conceded that the rule of exclusion in a great many particular cases had resulted in the release of defendants clearly guilty of serious crimes.[37] This argument, he responded, seemed predicated upon the assumption that effective law enforcement required police misconduct in the form of invasion of individual rights of privacy, for in all such cases law enforcement was obstructed only to extent that police officials themselves engaged in unlawful conduct.[38] He suggested that if the interest of individual privacy at some point seemed to be outweighed by other important social interests the solution was not to abandon the exclusionary rule but to reconsider the realities of law enforcement in defining the scope of the right of privacy.[39]

Allen's recommendation to retain the rule was based, in part, upon his difficulty in accepting the proposition that the rule did not have any substantial regulative effect. "Certainly, the rule subjects the individual officers," he said, "to the pres-

[28] Fraenkel, *supra* note 27, at 498.
[29] *Id.* at 499.
[30] *Id.* at 500.
[31] *Id.* at 501.
[32] For a detailed presentation of the pro and cons during the pre-*Wolf* period see Plumb, Jr., *Illegal Enforcement of the Law*, 24 CORNELL L.Q. 337, 369–85 (1938–39).
[33] Waite, *Police Regulation by Rules of Evidence*, 42 MICH. L. REV. 679, 685 (1944). While this criticism was directed against the legal commentary, the judiciary did not escape the wrath of Professor Waite's criticism; he pointed out that the judicial decisions were based not upon research, not even upon careful evaluation of known data, but wholly upon the predilections of the particular judges who assume that power to choose between competing nations. It was not the choice of a scientist, not even of a social scientist, he said. It was at best the empirical reaction of individuals whose knowledge of realities varied greatly. By no other less condemnatory theory, said Waite, can the disparity of belief and divergence of judicial opinion be explained. Waite stated that on the federal bench itself, Holmes, Brandeis, Butler and Stone took emphatic issue with Taft, Van Devanter, McReynolds, Sutherland and Sanford. Yet not one of these judicial statesman, choosing policies, making law for the government of society, asked for information of the realities upon which to predicate his choice. No one would queston the intelligence of a Holmes. But what knowledge of realities, asked Waite, does even a Holmes possess—after four decades in the ivory towered cloisters of an appellate bench? *Id.* at 684–85.
[34] *Id.* at 685.
[35] Allen, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 ILL. L. REV. 1, 16–17 (1950).
[36] *Id.* at 17.
[37] *Id.* at 18.
[38] *Id.* at 19.
[39] *Id.*

sure of those charged with making an efficient record of criminal convictions to avoid conduct which imperils successful prosecution." [40]

Much of the criticism directed against Atkinson and Fraenkel is equally applicable to Professor Allen. Although he was "fully conscious" of the paucity of data surrounding the application of the rule of exclusion, he proceeded to attribute a deterrent quality to the rule without offering any empirical support for such conclusion. Only six years earlier, Professor John Barker Waite had reiterated in a Michigan Law Review article[41] the findings of a study originally published in 1933[42] in which he said that "at least one-fourth of all the guilty gun-toters discovered and arrested during that year escaped any penalty, not because they were innocent, but solely because of the judge-made rule that evidence of their guilt could not be used." [43]

The expectation that the exclusionary rule deterred police misbehavior was temporarily shattered by a study[44] of the exclusionary rule in Illinois.[45] Despite the rigorous enforcement of the rule, the study demonstrated that the right of privacy was overwhelmingly disregarded by Illinois police officers.[46] However, in a series of public lectures delivered at the University of Chicago Law School in July of 1952, Professor Jerome Hall asserted the expectation again.[47] Speaking on the subject of police and law in a democratic society, Professor Hall stated that daily discipline, thoughtful conduct and legal control of the police were decisive factors in deterring illegal searches and seizures.[48] He said the claim that admission of illegally obtained evidence is necessary for efficient law-enforcement was "certainly not supported by the record of federal prosecutions which show an extremely high percentage of convictions." [49] He suggested that perhaps this could be explained on the ground of superior police service, but submitted that it may also be true that such service was stimulated by the federal exclusionary rule.[50] Despite the results of both Waite's police study[51] and the Northwestern Law Review's survey of the Chicago Municipal Court,[52] Professor Hall intimated that the rule of exclusion could be an effective deterrent device.[53] In reviewing the various situations confronting a police officer, Hall commented that police ought to be able to combat crime without

[40] *Id.* at 20.

[41] Waite, *supra* note 33, at 687.

[42] Waite, *Public Policy and the Arrest of Felons*, 31 MICH. L. REV. 749 (1933).

[43] Waite, *supra* note 33, at 687–88. Professor Waite stated that during one year 1,347 robberies were reported, 237 persons were prosecuted for the felony of carrying concealed weapons and only 134 were convicted. In nine of the failures to convict, the accused had jumped bail. In other cases the weapon had been found on the floor of an automobile, without evidence as to which of the occupants had possessed it; three defendants were sent to insane asylums; and a razor was held not to be a concealed weapon. But in at least forty-one instances the prosecution had been dismissed because the trial judge held the arrest unlawful because made on suspicion only. The consequent search was held to be "unreasonable," and the evidence thereby procured inadmissible. In a large number of other instances arrests did not even reach the stage of accusation; the offenders were discharged by order of the superintendent because it was obvious that the courts would not permit use of the evidence. No one appears to have investigated the number of liquor law violators and other criminals released for similar reasons; nor have similar releases in other cities been compiled. The total number, however, must run into appallingly high figures, concluded Waite. *Id.* at 688.

[44] Note, *Search and Seizure in Illinois: Enforcement of the Constitutional Right of Privacy*, 47 NW. U.L. REV. 493 (1952–53).

[45] People v. Castree, 311 Ill. 392, 143 N.E. 112 (1924); People v. Brocamp, 307 Ill. 448, 138 N. E. 728 (1923).

[46] The data was gathered from a study of Branch 27 of the Chicago Municipal Court for the year 1950. The study indicated that the rule clearly failed to deter any substantial number of illegal searches. In 4,673 out of 6,649 cases, the legality of the method of obtaining evidence was put in issue by the defendant. In 4,593 of these cases, the court determined that the search had in fact been illegal and granted the motion to suppress the evidence. No cases were found in which conviction was secure despite the suppression of the evidence. Note, 47 NW. U.L. REV. 493, 497 (1952–53).

[47] Hall, *Police and Law in a Democratic Society*, 28 IND. L.J. 133 (1953).

[48] *Id.* at 175.

[49] *Id.* at 173–74. This analogy is not particularly persuasive to the opponents of the rule because of the differences between the FBI and state police forces. These differences were succinctly summarized by Professor Barrett as follows:

> It should be noted that, in general, the federal investigating agencies, such as the F.B.I., Treasury and Internal Revenue, operate with comparatively large budgets and highly selected personnel and do not face the same types of problems as do the local police. The federal agencies are not charged with maintaining law and order in large cities, nor are they faced with the necessity of dealing constantly with emergency situations and with the problem of the criminal easily fleeing their jurisdiction to avoid apprehension. A large portion of the federal police work is of the type which permits long investigations and careful development of cases before arrest is made.

Barrett, *Exclusion of Evidence Obtained by Illegal Searches—A Comment on People v. Cahan*, 43 CAL. L. REV. 565, 592 (1955).

[50] Hall, *supra* note 47, at 173–74.

[51] Waite, *supra* note 33.

[52] Comment, *Search and Seizure in Illinois: Enforcement of the Constitutional Right of Privacy*, 47 NW. U.L. REV. 493 (1952).

[53] Hall, *supra* note 47, at 173–74.

triggering the adverse impact of the exclusionary rule.[54]

The development of the exclusionary rule gained much momentum during the years following *Wolf v. Colorado*. In 1955 the influential Supreme Court of California adopted the exclusionary rule in *People v. Cahan*.[55] The majority opinion, written by Chief Justice Traynor, examined in detail the arguments for and against the exclusionary rule and concluded that fifty years of California precedents holding the evidence admissible should be overruled.

> We have been compelled to reach that conclusion because other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers with the attendant result that the courts under the old rules have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers.[56]

Only thirteen years earlier, Justice Traynor speaking for the majority of the Supreme Court of California had vigorously reaffirmed the common law rule of admissibility.[57] His personal view of the reasoning behind his change of position was expressed in 1962 in an address at Duke University School of Law.[58]

> My misgivings about its admissibility grew as I observed that time after time it was being offered and admitted as a routine procedure. It became impossible to ignore the corollary that illegal searches and seizures were also a routine procedure subject to no effective deterrent; else how could illegally obtained evidence come into court with such regularity? It was one thing to condone an occasional constable's blunder, to accept his illegally obtained evidence so that the guilty would not go free. It was quite another to condone a steady course of illegal police procedures that deliberately and flagrantly violated the Constitution of the United States as well as the state constituion. It was the cumulative effect of such routine that led us last in the case of People v. Cahan to reject illegally obtained evidence. It had become all too obvious that unconstitutional police methods of obtaining evidence were not being deterred in any other way.[59]

These observations by Chief Justice Traynor had been advanced in 1955 by Professor Edward L. Barrett, Jr., in a comprehensive comment on *People v. Cahan*.[60] Evaluating the existing law enforcement situation in California prior to *Cahan*, Barrett concluded that *Cahan* came when California was badly in need of (1) a re-examination and definition of the rules governing police searches and seizures, and of (2) developing more effective remedies for police violations of the rules.[61]

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[54] The police officers difficulties in law enforcement were described by Professor Hall as follows:

> The police officer's problem frequently require a choice to be made between speedy solution of a crime by methods which violate the Constitution (even though in his jurisdiction the courts will admit the evidence), and a delayed solution in order to get the necessary evidence lawfully. These situations are distinguishable from those where search warrants can be secured. If competent methods of detection are patiently pursued, a suspect can often be caught in the act of committing a crime or he can be found in a room working with the instrumentalities and evidence of his criminal vocation, *e.g.*, in gambling, so that an arrest at that time does not require ransacking an entire house to get the evidence. More difficult problems are posed where the police are dealing not with professional criminals but with a person who has committed a single major offense. Here the temptation is great to seize the hidden gun or the stolen property immediately. Even in these situations, however, there is often nothing to prevent one officer from keeping the suspect under surveillance while another goes for the search warrant. Besides, in dealing with a person who has committed a single offense, the training and resourcefulness of the police should more than compensate for the delay in acquiring specific evidence. In sum, if professional criminals, for example, dealers in narcotics, are involved, it is usually possible to secure a search warrant or, if there is patience and skillful detection, to arrest them at a strategic time and place; while in the cases of amateurs, except for those attempting to flee the jurisdiction, the police can normally solve their crimes without resorting to illegal searches and seizures. That, at least, is a fair inference from the enforcement records of states which follow the exclusionary rule.

For a critic's view of the Exclusionary Rule and police conduct see Peterson, note 75, *infra*.

[55] 44 Cal. 461, 282 P.2d 905 (S. Ct. 1955).

[56] *Id.* at 471, 282 P.2d at 911. The dissenting judges concluded that the cost of adopting the exclusionary rule was too great. They urged, instead, the retention of the exclusionary rule and a re-examination of the state laws concerning the sanctions to be placed upon illegal searches and seizures. *Id.* at 484, 282 P.2d at 919.

[57] People v. Gonzales, 20 Cal. 2d 165, 124 P.2d 44 (1942). In reaffirming the common law rule of admissability, Justice Traynor, writing the majority opinion, said:

> It does not necessarily follow, however, that the use of law of evidence thus obtained is so contrary to fundamental principles of liberty and justice as to constitute a denial of due process so long as it is fair and impartial. . . . The fact that an officer acted improperly in obtaining evidence presented at the trial in no way precludes the court from rendering a fair and impartial judgment.

Id. at 170–71, 124 P.2d at 47.

[58] Traynor, *Mapp v. Ohio At Large In the Fifty States*, DUKE L.J. 319 (1962).

[59] *Id.* at 321–22.

[60] Barrett, *supra* note 49.

[61] *Id.* at 578.

The exclusionary rule continued its surge during the forties and fifties as a means to deter police violations of search and seizure laws with substantially no empirical support. In 1957, Professor Monrad G. Paulsen joined the ranks of proponents of the rule and reiterated the empirically undemonstrated conclusion that the rule was the most effective remedy against lawless law enforcement.[62] Professor Paulsen characterized the rule as a genuine incentive devise for police departments to educate their members in the constitutional rights of suspected persons.[63] He pointed to *Wolf v. Colorado* where Mr. Justice Murphy in his dissenting opinion presented an informal survey disclosing that states using the rule emphasized this type of education more than others.[64] He cited California as an additional example of where the rule adopted in *Cahan* stirred a great deal more police interest in the search and seizure law than was the case before.[65]

The rule's favorable commentary during the fifties[66] reiterated most of the standard arguments presented by previous generations,[67] but was not supported by any empirical studies. Writing in 1965, Professor Wayne R. LaFave observed that notwithstanding the existence of the exclusionary rule on the federal level for nearly half a century and in many states for almost as long, there was no systematic attempt to measure the precise impact of the rule or to determine its limitations.[68] Instead, the proponents merely acknowledged this paucity of data and then proceeded to enunciate their "tentative" conclusions. The issues were simply phrased as a struggle between effective law enforcement and the right to privacy.[69] In resolving this dilemma, the proponents rarely looked beyond the law library although the issues were primarily factual. Two important empirical studies[70] indicating the ineffectiveness of the rule were either ignored or explained away.[71] More conveniently, the proponents postulated that the protection to individual privacy afforded by the exclusionary rule would be greater than the loss of protection to society.

Another characteristic of the literature during the fifties and also common in the earlier commentary was the near unanimous agreement that all remedies except the exclusionary rule were inadequate to deter police misbehavior.[72] It was logically explained that criminal sanctions—judicial or statutory, were "inherently" weak and the civil sanctions were an illusory relief. These contentions were usually empirically unsubstantiated.

Not all the pre-*Mapp* commentary praised the rule or expected it to function effectively. In 1957, Virgil W. Peterson unleashed a rigorous critique of the rule.[73] "As amazing or incredulous as it may seem," he said, "we are rapidly approaching the position where the right of privacy of the criminal is to be considered paramount to any right society may have to be protected from crime planned or committed in secrecy."[74] Peterson acknowledged that it was of the utmost importance that individuals rights receive adequate protection. But he urged that it did not follow that the judicially created exclusionary rule was the proper method of achieving this objective.[75] He noted that the rule,

[62] Paulsen, *Safeguards in the Law of Search and Seizure*, 52 NW. U.L. REV. 65, 74 (1957).

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *See, e.g.*, Hall, *Police and Law in a Democratic Society*, IND. L.J. 133 (1953); Paulsen, *Safeguards in the Law of Search and Seizure*, 52 NW. U.L. REV. 65 (1957).

[67] *See, e.g.*, Atkinson, *Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures*, 25 COLUM. L. REV. 11 (1925); Fraenkel, *Recent Developments in the Federal Law of Searches and Seizures*, 33 IOWA L. REV. 472 (1948).

[68] LaFave, *Improving Police Performance Through the Exclusionary Rule—Part I: Current Police and Local Court Practices*, 30 MO. L. REV. 391, 394 (1965).

[69] *E.g.*, Fraenkel, *Recent Developments in the Federal Law of Searches and Seizures*, 33 IOWA. L. REV. 472, 501 (1948).

[70] Waite, *supra* note 33; Comment, *Search and Seizure in Illinois: Enforcement of the Constitutional Right of Privacy*, 47 NW. U.L. Rev. 493 (1952).

[71] In evaluating the statistical study of the operation of the rule in a branch of the Municipal Court of Chicago made by the student editors of the Northwestern University Law Review, Professor Paulsen observed that the data was partial and inconclusive. It suggested, said Paulsen, "that the Chicago police engaged in a great deal of harrasment of gamblers by bringing cases which they knew they could not win." He also commented that little attention was paid to the rules of law in these cases. Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. CRIM. L.C. & P.S. 255, 262 (1961). The data above was given another interpretation by an opponent of the rule. He observed that it was obvious, from an analysis of the court records that the exclusionary rule was a failure in its objective of deterring police misconduct. Peterson, *Law and Police Practice: Restrictions in the Law of Search and Seizure*, 52 NW. U.L. Rev. 46, 56 (1957–58).

[72] This characteristic was particularly noted in Atkinson, *Admissibility of Evidence obtained through unreasonable Searches and Seizures*, 25 COLUM. L. REV. 11 (1925).

[73] Peterson, *supra* note 71.

[74] *Id.* at 48–59.

[75] *Id.* at 60. Peterson referred to two general weaknesses of the rule. One was the side effect of its application—freeing a dangerous or potentially dangerous criminal; the other weakness was the confusing and often contradicting judicial definitions of reasonable search and seizure. *Id.* at 46 *et seq.* For a chilling ex-

while failing to prevent one type of abuse, was creating others that were advancing a general disrespect for the law, its agencies of enforcement, the courts, and the Constitution itself.[76]

Another dissenter from the generally favorable commentary of the fifties was Professor John Barker Waite[77] who had expressed his dislike for the rule several years earlier.[78] Professor Waite castigated the judiciary for its role in adopting and perpetuating the exclusionary rule. His thirty page indictment commenced as follows:

> One does not happily charge the judiciary with responsibility for the country's burden of crime, but the responsibility does in fact exist. Judges, though they may not encourage crime, interfere with its prevention in various ways. They deliberately restrict police efficiency in the discovery of criminals. They exempt from punishment many criminals who are discovered and whose guilt is evident. More seriously still, they so warp and alter the public's attitude toward crime and criminals as gravely to weaken the country's most effective crime preventive.[79]

Waite's serious charge and Peterson's harsh critique apparently did not serve to dampen the enthusiasm of those who lauded the rule. In a symposium on the exclusionary rule regarding illegally seized evidence conducted by Northwestern University School of Law in 1960,[80] the enthusiasm for the rule prompted Frank J. McGarr, a panel participant, to recognize that in arguing against the rule he was taking "a somewhat lonely position." [81] It was indeed a lonely position for a year later the Supreme Court of the United States imposed the federal exclusionary rule upon all the states.[82] The rule had run its full course. Initially conceived by way of dictum in 1886,[83] the rule had become the supreme law of the land three quarters of a century later.

Post-Mapp Commentary

Much of the pre-*Mapp* debate addressed to the question of whether the police were in fact deterred became, to some extent, largely academic.[84] Writing four years after *Mapp*, Professor LaFave suggested that the concern should now be "whether the Exclusionary Rule is doing as good a job of improving police performance as one might hope, and if it is not, whether the factors which contribute to this result can be identified." [85] In an article devoted to this inquiry, he outlined three requirements to harmonize the exclusionary rule with effective law enforcement: (a) that the law on arrest, search, and seizure be developed in some detail and in a manner sufficiently responsive to both the practical needs of law enforcement and the individual right of privacy, (b) that these laws be fashioned in a manner understandable by the front-line lower-echelon police officer and that they be effectively communicated to him, and (c) that the police desire to obtain convictions be sufficiently great to induce them to comply with these requirements.[86] He noted that it was fair to say that, currently (1965), deficiencies in all three respects existed.[87] In another study co-authored with Remington in 1964–65, the authors analyzed the judge's role in making and reviewing law enforcement decisions and concluded that the exclusionary rule's limited impact was attributable in large measure to inadequate communication between the police and the courts.[88]

Both of these articles typified the earnest attempts after *Mapp* to accommodate the seemingly inconsistent interests of effective law enforcement and right of individual privacy. The authors emphasized not whether police enforcement was hampered by the rule but the necessity that the courts gain a better understanding of the factual bases of police action, the underlying policies being furthered by such action, and the necessity of the police to be more effectively informed as to what must be done to avoid exclusion.[89]

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ample of the first weakness see Peterson, *supra* note 71, at 54–55.

[76] *Id.* at 60. Chief Justice Burger has also expressed this view. Burger, *Who Will Watch the Watchman?* 14 AM. U.L. REV. 1, 12 (1964).

[77] Waite, *Judges and the Crime Burden*, 54 MICH. L. REV. 169 (1955).

[78] Waite, *supra* note 33 and 41.

[79] Waite, *supra* note 71.

[80] This symposium was probably the last pre-*Mapp* debate. McGarr, *The Exclusionary Rule Regarding Illegally Seized Evidence—An International Symposium*, 52 J. CRIM. L.C. & P.S. 245 (1961).

[81] McGarr, *The Exclusionary Rule: An Ill Conceived and Ineffective Remedy*, 52 J. CRIM. L.C. & P.S. 266 (1961).

[82] Mapp v. Ohio, 367 U.S. 643 (1961).

[83] Boyd v. United States, 116 U.S. 616 (1886).

[84] LaFave, *Improving Police Performance Through the Exclusionary Rule—Part I: Current Police and Local Court Practices*, 30 MO. L. REV. 391, 395 (1965).

[85] *Id.*

[86] *Id.* at 395–96. These three requirements reflect, for the most part, the criticism of the rule expressed by Peterson, *supra* note 71, and Barrett, *supra* note 49, among others.

[87] LaFave, *supra* note 68, at 396.

[88] LaFave & Remington, *Controlling the Police: The Judges' Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987, 1012 (1964–65).

[89] *Id.*

Another effort to foster a favorable environment for the orderly development of the exclusionary rule after *Mapp v. Ohio* was made by Chief Justice Traynor in 1962.[90] He expressed hope that his own experience with exclusionary rule problems (rejecting the rule in 1942[91] and accepting it in 1955[92]) would serve as a useful introduction to the responsibilities awaiting the states after *Mapp*.[93] However, Chief Justice Traynor stressed that the initiative in giving meaning to *Mapp* rested with the state courts.[94]

This spirit of adjusting to *Mapp* evidenced by Traynor, LaFave and Remington, however, did not prevail. In an address to the National District Attorneys' Association on July 26, 1961, Professor Fred E. Inbau berated the Supreme Court's decision in *Mapp v. Ohio* for "taking it upon itself, without constitutional authorization, to police the police" and for its function "at times as a superlegislative body." [95] Professor Inbau's disgust with *Mapp* was succinctly expressed in the following:

> Individual rights and liberties cannot exist in a vacuum. Alongside of them we must have a stable society, a safe society; otherwise there will be no medium in which to exercise such rights and liberties. To have "rights" without safety of life, limb, and property is a meaningless thing. Individual civil liberties, considered apart from their relationship to public safety and security, are like labels on empty bottles.[96]

This criticism evoked a reply from Professor Yale Kamisar.[97] Unlike many previous supporters of the exclusionary rule, Kamisar confronted Inbau with substantial data to support the purported merits of the rule.[98] The ensuing debate[99] between Professors Inbau and Kamisar demonstrated that the merits of the rule were far from settled after *Mapp*. Despite Kamisar's persuasive and atypical defense of the exclusionary rule, it is fair to state that the post-*Mapp* commentary trend began to slowly move toward the anti-exclusionary rule position.

This new trend was strengthened in 1964 by the disenchantment with the exclusionary rule expressed by Warren E. Burger, then a Judge of the United States Court of Appeals for the District of Columbia.[100] Judge Burger traced the evolution of the rule and noted that although the Supreme Court had steered a waivering course—confusing and even contradictory at times—the Court now appeared to have settled upon the need for deterrence of police violations as the principal reason for exclusion.[101] He then challenged the capability of the rule to accomplish this stated purpose of deterrence. "As I see it," said Judge Burger, "a fair conclusion is that the record does not support a claim that police conduct has been substantially affected by the suppression of the prosecution's evidence." [102] He offered four reasons why this may be so: (1) the rule did not deter policemen because it imposed no undesirable consequences upon them,[103] (2) the basic training of a policeman was rarely adequate to make him understand what he could and could not do in all situations,[104] (3) no effective

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[90] Traynor, *supra* note 53.

[91] People v. Gonzales, 20 Cal. 2d 165, 124 P.2d 44 (1942).

[92] People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955).

[93] Traynor, *supra* note 58, at 321.

[94] *Id.* at 328.

[95] Inbau, *Public Safety v. Individual Civil Liberties: The Prosecutor's Stand*, 53 J. CRIM. L.C. & P.S. 85, 86 (1962).

[96] *Id.* at 95.

[97] Kamisar, *Public Safety v. Individual Liberties: Some "Facts" and "Theories,"* 53 J. CRIM. L.C. & P.S. 171 (1962).

[98] Kamisar's observations about the exclusionary rule's impact upon law enforcement were documented with letters from the Attorney Generals of California and Minnesota and the United States Attorney for the District of Columbia. *Id.* at 179–81. Numerous empirical references were also cited along with various federal and state crime statistics. *Id.* at 184–90.

[99] Inbau, *More About Public Safety v. Individual Civil Liberties*, 53 J. CRIM. L.C. & P.S. 329 (1962); Kamisar, *Some Reflections on Criticizing the Courts, and "Policing the Police,"* 53 J. CRIM. L.C. & P.S. 453 (1962). For some of the commentary provoked by this debate see Note, 53 J. CRIM. L.C. & P.S. 231–32, 501–02 (1962).

[100] Burger, *supra* note 76.

[101] *Id.* at 10.

[102] *Id.* at 11.

[103] How then are police deterred in the future because a court today rejects evidence seized illegally a year ago? I am informed by experts that a policeman is rarely disciplined for action declared illegal by a court as a basis for suppression. Curiously, those in the legal world who contend most ardently that deterrence of crime by punishment is an outmoded concept are among the most vocal in claiming a deterrent effect for the suppression of evidence. If prisons do not deter forbidden conduct, how can we think that a policeman will be deterred by a judicial ruling on suppression of evidence which never affects him personally, and of which he learns, if at all, long after he has forgotten the details of the particular episode which occasioned suppression? This is an important issue which proponents of deterrence-by-suppression must meet; it cannot be swept under the rug.

Id.

[104] I doubt that policemen have the time or inclination to read the opinions of appellate courts, and even if they did so it is hardly likely they would grasp their full import without sustained expert guidance. . . . It is unlikely that without some special

mechanisms of communication to inform and educate police existed in any real sense in metropolitan police departments,[105] and (4) the operation of the "Suppression Doctrine" unhappily brought before the public eye a spectacle repugnant to all decent people—the frustration of justice.[106] In recommending the abolishment of the rule, Judge Burger concluded his article with the following suggestion:

> We can well ponder whether any community is entitled to call itself an "organized society" if it can find no way to solve this problem except by suppression of truth in the search for truth.[107]

Approximately a year after Judge Burger's commentary, another prominent jurist called for the modification of the exclusionary rule.[108] Judge Henry J. Friendly submitted that it was inconsistent with the objective of deterrence that the maximum penalty of exclusion should be enforced for an error of judgment by a policeman, "necessarily formed on the spot and without a set of the United States Reports in his hands." [109] He proposed that the rule be applicable only to "intentional or flagrantly illegal" police activity. It was no objection that such modification would require courts to make still another determination, said Judge Friendly. "The recognition of a penumbral zone where mistake will call for the drastic remedy of exclusion would relieve [the court] of exceedingly difficult decisions [focusing on] whether an officer overstepped the sometimes almost imperceptible line between a valid arrest or search and an invalid one." [110]

These two judges typified the two general early sixties post-*Mapp* attack upon the exclusionary rule: one urged its abolishment and the other its modification. However, both judges resorted to factual documentation of their arguments as infrequently[111] as most proponents of the pre-*Mapp* exclusionary rule. Just as the latter had repeatedly advanced factless arguments that the rule would deter police misconduct, the opponents of the rule now were similarly asserting that the rule was not deterring such police misconduct.

The enthusiasm for the rule began to dwindle in the late sixties. Although the rule had been in operation since 1961 it did not appear to accomplish its stated purpose of deterrence. Yet no empirical studies were conducted to certify this appearance. However, in 1970 the first detailed empirical study of the rule's effectiveness was conducted by Dallin H. Oaks, then a professor at the University of Chicago.[112] He scrutinized all the available data and concluded that the data did not provide any "empirical substantiation or refutation of the deterrent effect of the exclusionary rule." [113] His own judgment was that the exclusionary rule was "a failure" as a deterrent.[114]

Professor Oaks' findings became the most potent weapon available in the early seventies to the

effort and outside help he will ever understand what he did wrong in a given case. Moreover we cannot blame him too much for not accepting what he does not understand.

Id.

[105] In most cases a policeman does not hear or learn about the ultimate disposition of the case that fails because of his acts, or if he does, it may be years later. If he reads a newspaper account of the disposition of the case, the chances are it will be a garbled version which indulges in the overworked oversimplification that the prosecution was 'thrown out' because of 'technicalities.' If the officer in the particular case gains an understanding of what error led to suppression, and the reason for suppression, he will be less likely to repeat that error. If this missing element of understanding is supplied to the particular officer, it is likely that his fellow officers would become aware of the problems in detail and that others would learn from his experience.

Id. at 12. Professor LaFave said this criticism did not counsel for the abandonment of the rule but for more effective police-judge relationship to maximize the intended purpose of the rule. LaFave and Remington, *supra* note 88.

[106] The impact of the doctrine is dramatic and easily understood, while the important reasons underlying it are almost beyond comprehension to most laymen, including most police officers. This is one of the major causes of popular discontent with the administration of the criminal law. Additionally, it has operated and will—until explained—operate as a demoralizing element in law enforcement agencies.

Id.

[107] *Id.* at 23.

[108] Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929 (1965).

[109] *Id.* at 952.

[110] *Id.* at 953.

[111] Quite reminiscent of the way pre-*Mapp* proponents of the rule had prefaced their conclusions, Judge Burger prefaced his conclusions about the ineffectiveness of the exclusionary rule as follows: "No empirical evidence is available to support a claim that significant deterrence has been the result of the [Exclusionary] doctrine." Burger, *supra* note 76, at 10. Chief Justice Burger observed that in recent years Supreme Court opinions have begun to indicate some hint of doubt and skepticism that suppression of evidence operates to deter future illegalities. *Id.* The validity of this proposition is dubious in view of the authority cited—a 1954 Supreme Court opinion, Irving v. California, 347 U.S. 128, 136 (1954)—which had been clearly repudiated by the time Judge Burger made this statement. *See* Mapp v. Ohio, 367 U.S. 643 (1961).

[112] Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).

[113] *Id.* at 709.

[114] *Id.* at 755.

steadily rising number of critics of the exclusionary rule.[115] The factless arguments previously advanced against the rule by Burger and Friendly were reasserted by other critics[116] and buttressed by the findings made by Oaks. The appeals for adjustment sounded by Traynor in 1962 and LaFave and Remington in 1964 and 1965 were ignored.

Aside from its influence upon the trend against the rule, the Oaks study also stimulated needed empirical research. Thus, three years after Professor Oaks' study, another major and exhaustive study was conducted by James E. Spiotto.[117] The latter's study corroborated the findings of the earlier study that police misbehavior was not deterred by the exclusionary rule.

This new systematic and detailed research-oriented literature began to dispel the deeply rooted notion that the exclusionary rule deterred search and seizure irregularities. Aware of the success of this approach, other critics pursued similar studies to substantiate the purported futility of the exclusionary rule. An excellent opportunity for this factual trend to reach the Supreme Court was presented in *State of California v. Krivda*.[118] One of the questions considered was whether the exclusionary rule should be modified in state trials. In an amicus brief in support of modification of the rule, the Americans for Effective Law Enforcement, and the International Association of Chiefs of Police presented the Court with an empirical study indicating that during the twenty-seven month period of January, 1970 through March, 1972, the appellate courts nationwide found police conduct in cases of warrantless search and seizure to be proper in six out of every seven cases.[119] A.E.L.E. contended that these findings demonstrated the dedication to lawful and proper conduct of law enforcement officials. These figures further indicated, according to A.E.L.E., that police professionalism in the search and seizure area was such that the absolute sanctions of the exclusionary rule were no longer constitutionally mandated.[120] In meeting the reasonable inference that this study evidenced the beneficial exclusionary rule influence upon law enforcement, A.E.L.E. argued that the threat of the exclusionary rule was not an effective sanction to police misconduct as indicated by the Oaks study.[121] The reasons for the high incidence of proper police conduct were attributed, instead, to "police professionalism: an attempt by the majority of policemen to know, at least in a general way the restrictions on their search and seizure activities and a good faith desire to comport themselves properly within such restrictions."[122]

In an attempt to demonstrate the deleterious effect of the exclusionary rule upon society and upon law enforcement, A.E.L.E. in *Krivda* again pursued the factual oriented attack. It collected brief summaries of sixteen sample cases in which the exclusionary rule was applied in recent years.[123] These cases purportedly demonstrated instances in which convictions were reversed or highly probative evidence was suppressed in cases involving serious crimes committed by the offender and relatively insubstantial "violations" by police officers.[124] The impact of these factual presentations remains unknown because the Supreme Court, after hearing arguments, did not decide *Krivda*; the Court remanded it for a determination of whether the state court had based its decision on federal or state grounds.[125]

Although *Krivda* was remanded, the possibility that the exclusionary rule may soon be reconsidered is likely. The two most recent Supreme Court

[115] See the recent articles cited in note 5, *supra*.

[116] *Id.*

[117] Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUDIES 243 (1973).

[118] 409 U.S. 33 (1972).

[119] Brief for Americans for Effective Law Enforcement, Inc., and the International Association of Chiefs of Police, as Amici Curiae in Support of the Petitioners at 4 [hereinafter cited as A.E.L.E. Amicus Brief]. California v. Krivda, 409 U.S. 33 (1972).

> The cases studied were characterized as those in which the policeman, on the street, must make his own decision as to whether to proceed with a given search or not, [and] as cases in which the officer is acting on his own with no assistance from a magistrate or prosecuting attorney, cases in which his activity must stand or fall based on his own judgment, knowledge of search and seizure restrictions, and his desire to abide by such restrictions.

Id. at 16.

The results of the study were explained as follows:

> Of 1,371 cases involving warrantless searches and seizures by the police which were decided by appellate courts during the 27 month period covered by the study, the police conduct of the search and seizure was upheld as lawful in 1,157 cases and held to be unlawful in 214 cases. Thus six of every seven searches and seizures studied were upheld by reviewing courts; 84% of police search and seizure procedures were found to be proper upon appellate review.

Id. at 16–17.

[120] A.E.L.E. Amicus Brief, at 17.

[121] *Id.* at 18.

[122] *Id.* at 19.

[123] *Id.* at 10. For the case summaries see Appendix to brief.

[124] *Id.*

[125] California v. Krivda, 409 U.S. 33 (1972).

cases[126] dealing with the rule may be construed as indicative of the Court's disposition to proceed in that direction. As of this writing, the Supreme Court of California had not determined whether *Krivda* was decided on the basis of the state constitution or the federal Constitution. Should that court resolve this ambiguity in favor of the federal Constitution, an appeal to the Supreme Court would follow and *Krivda* could well provide the awaited vehicle for the narrowing or even abolishing the exclusionary rule.

A decision by the Supreme Court narrowing or abolishing the exclusionary rule would not be surprising in view of the recent legal commentary trend. The factual justification expounded in *Mapp* is under such attack that continued judicial adherence to the rule might be empirically unsound. Some commentary has suggested however that the Supreme Court will hesitate to reconsider the exclusionary rule until a suitable remedy can be found.[127] Others have urged the Court that "concern over viable alternatives should not prevent the Court from reconsidering the Rule." [128] "If the Exclusionary Rule were effective and meaningful as a deterrent," it was argued, "it might be proper to ponder the necessity for replacing it with something else.... If the Exclusionary Rule has no deterrent effects, its absence will not leave a void to be filled." [129]

[126] United States v. Robinson, 414 U.S. 218 (1973). United States v. Calandra, 414 U.S. 338 (1974).

[127] *See, e.g.*, Gardner, *The Exclusionary Rule—Its Anticipated Demise—And A Meaningful Alternative*, J. CAL. LAW ENFOR. 55, 56 (1972). This view has also been expressed by Chief Justice Burger quoted in Gardner, *Id.*

[128] Brief of the State of Illinois as Amicus Curiae in Support of Petitioner at 10. United States v. Robinson, 414 U.S. 218 (1973).

[129] *Id.*

Conclusion

Most recently, the commentary trend has departed, to a great extent, from the generally polemic and intuitive arguments of the past. Unlike previous commentary, the recent commentators are both evaluating the factual justification of the exclusionary rule with detailed empirical studies and proposing alternatives to it.[130] Although the accuracy of these empirical studies remains to be scrutinized, their influence has been significant. However, this influence has not yet moved the Supreme Court to change the exclusionary rule. Nevertheless, a general observation about this recent literary trend is proper: The methodical and detailed empirical approach to the exclusionary rule will probably influence the Court the same way that the enthusiastic and generally factless commentary influenced the Court in *Mapp v. Ohio.*

[130] Katz, *Supreme Court and the States: An Inquiry into Mapp v. Ohio in North Carolina*, 45 N.C.L. REV. 119 (1966); Nagel, *Testing the Effects of Excluding Illegally Seized Evidence*, 1965 WIS. L. REV. 283. The two leading and most recent empirical studies are Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970) and Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUDIES 243 (1973).

For additional references see note 5, *supra.*

For literature commenting on alternatives to the exclusionary rule see Davidow, *Criminal Procedure Ombudsman as a Substitute for the Exclusionary Rule: A Proposal*, 4 TEX. TECH. L. REV. 317 (1973); Kates & Kouba, *Liability of Public Entities Under Section 1983 of the Civil Rights Act*, 45 S. CAL. L. REV. 131 (1972); Roche, *A Viable Substitute for the Exclusionary Rule: A Civil Rights Appeals Board*, 30 WASH. & LEE L. REV. 223 (1973); Comment, *Use of § 1983 to Remedy Unconstitutional Police Conduct: Guarding the Guards*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 104 (1970); Comment, *The Federal Injunction as a Remedy for Unconstitutional Police Conduct*, 78 YALE L. J. 143 (1968); Note, *Developing Governmental Liability Under 42 U.S.C. §1983*, 55 MINN. L. REV. 1201 (1971); Note, *Excluding the Exclusionary Rule: Congressional Assault on Mapp v. Ohio*, 61 GEO. L. J. 1453 (1973).