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What Constitutes Punishment?

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I. Introduction

Be one lawyer or layman, the initial connotation derived when the word "punishment" is mentioned is that of a consequence resulting from an infraction of the criminal law. Indeed, in evidencing the lawyer's view *Black's Law Dictionary*[1] refers to the early Supreme Court decision in *Cummings v. Missouri*[2] and defines "punishment" as, "Any pain, penalty, suffering, or confinement inflicted upon a person by the authority of the law and the judgment and sentence of a court, for some crime or offense committed by him, or for his omission of a duty enjoined by law." For the layman, *Webster's New International Dictionary*[3] defines the word as, "A penalty inflicted by a court of justice on a convicted offender as a just retribution, and incidentally for reformation and prevention. . . ."

Because of the criminal law aspects generally attributed to punishment, the person upon whom it is inflicted in criminal proceedings is surrounded by a gamut of constitutional safeguards provided by the fifth, eighth, and fourteenth amendments. However, in many instances it has been found that courts have denied defendants the usual constitutional protections involved in criminal cases, while at the same time visiting upon them exactions which in reality amount to punishment, although not always denominating them as such. This has been consistently achieved through what appears to be no more than semantic gymnastics or word play, as well as through the flat declaration that the proceedings in question are not criminal in nature, regardless of positive, convincing evidence to the contrary. It is the purpose of this note to indicate the more notable areas in which such cases lie.

II. Due Process of Law

"No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ." So states the fifth amendment to the United States Constitution in making the due process requirement applicable to the federal courts. The concept is of course a fundamental one in the American jurisprudential system, and is intended to protect the individual against the arbitrary exercise of governmental power and to secure equal protection of the law to all.[4] Fair play is its very essence.[5]

The command embodied in the fourteenth amendment that the states shall afford due process to everyone is worded in a fashion similar to that of its counterpart in the fifth amendment. It has been said that the clause's purpose is not to protect an accused against a *proper* conviction, but rather to guard him from an *unfair* one.[6] Thus, fair play as the essence of due process is recognized in the fourteenth amendment with a force equal to its recognition as such in the fifth. Rather than creating new rights in the individual, the amendment shelters him from deprivation by the states of his fundamental or natural rights, such as those to life or liberty.[7]

In the area of punishment, the eighth amendment, which prohibits cruel and unusual punishments, stands in close conjunction with the due process requirement in guaranteeing that punishment will not be inflicted without the strict standards of the Constitution having first been met. It is believed that the concept of punish-

1 4th ed. 1951.
2 71 U.S. (4 Wall.) 277 (1866).
3 2d ed. 1959.
4 La Porte v. Bitker, 55 F. Supp. 882 (E.D. Wis.), *aff'd*, 145 F.2d 445 (7th Cir. 1944).
5 Galvan v. Press, 347 U.S. 522, *rehearing denied*, 348 U.S. 852 (1954).
6 Adamson v. California, 332 U.S. 46, *rehearing denied*, 332 U.S. 784 (1947).
7 Screws v. United States, 140 F.2d 662 (5th Cir. 1944), *rev'd on other grounds*, 325 U.S. 91 (1945).

ment comes too close to seriously damaging the dignity of man to be haphazardly applied.

Assuming that due process of law is a cherished institution that ought to be preserved and strengthened, there must then be certain policy reasons which justify nonadherence to the constitutional mandate that it be granted indiscriminately to every person. The initial area to be explored in this regard is that of proceedings in the juvenile courts.

III. Juvenile Court Proceedings

Nearly every jurisdiction in this country, if not all, has a body of statutory law pertaining to the handling of juvenile offenders. Before such juvenile court acts were passed in the several jurisdictions, it was well established that minors were entitled to the same constitutional safeguards as adults charged with crime.[8] But since the advent of these enactments, the juvenile has been increasingly denied those time-honored protections which would fully be his but for his age.

The two reasons most often advanced as to why the various constitutional safeguards need not be afforded in juvenile court proceedings are that the proceeding is not criminal, and that the disposition of the child is not punishment, but is rather for his "protection."[9] It is submitted that in many instances this is nothing more than sophistry. Typical of the general outlook is this recent statement by a Pennsylvania court:

> The Juvenile Court proceedings are not criminal in nature but constitute merely a civil inquiry or action looking to the treatment, reformation, and rehabilitation of the minor child, and, therefore many of the constitutional guarantees afforded to a criminal defendant are not available and not necessary.[10]

Because of the aforementioned reasons, such familiar constitutional rights as those to jury trial,[11] counsel,[12] a speedy and public trial,[13] and information as to the nature and cause of the accusation[14] have been withheld from the juvenile offender. Such an attitude toward the plight of wayward youth is definitely not a thing of the past; it prevails even today. For example, in *Cope v. Campbell*,[15] decided in February of this year, an Ohio juvenile court found a seventeen-year-old to be delinquent because he committed an act of malicious entry, an offense which is a felony if committed by an adult. The court did not furnish the boy with counsel, nor did it advise him of his constitutional rights prior to the ex parte hearing. The child, who had a record of delinquency, was sent to the Ohio state

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8 *E.g.*, People *ex rel.* O'Connell v. Turner, 55 Ill. 280 (1870); Commonwealth v. Horregan, 127 Mass. 450 (1879); State *ex rel.* Cunningham v. Ray, 63 N.H. 406 (1885).

9 Pee v. United States, 274 F.2d 556 (D.C. Cir. 1959); Shioutakon v. District of Columbia, 236 F.2d 666 (D.C. Cir. 1956); Rule v. Geddes, 23 App. D.C. 31 (1904); Application of Johnson, 178 F. Supp. 155 (D.N.J. 1957); People v. Dotson, 46 Cal.2d 891, 299 P.2d 875 (1956); *In re* Dargo, 86 Cal.App.2d 114, 194 P.2d 34 (1948); *Ex parte* Naccarat, 328 Mo. 722, 41 S.W.2d 176 (1931); Roberts v. State, 82 Neb. 651, 118 N.W. 574 (1908); Petition of Morin, 95 N.H. 518, 68 A.2d 668 (1949); State v. Goldberg, 124 N.J.L. 272, 11 A.2d 299 (Sup. Ct.), *aff'd*, 125 N.J.L. 501, 17 A.2d 173 (Ct. Err. & App. 1940); Cope v. Campbell, 175 Ohio St. 475 (1964); *In re* Holmes, 379 Pa. 599, 109 A.2d 523 (1954), *cert. denied*, 348 U.S. 973 (1955); Commonwealth v. Henig, 200 Pa. Super. 614, 189 A.2d 894 (1963); Dendy v. Wilson, 142 Tex. 460, 179 S.W.2d 269 (1944); *In re* Gomez, 113 Vt. 224, 32 A.2d 138 (1943). See also Antieau, *Constitutional Rights in Juvenile Courts*, 46 CORNELL L.Q. 387 (1961) for a review of the cases both affording and denying the juvenile the several constitutional safeguards.

10 Commonwealth v. Henig, 200 Pa. Super. 614, 189 A.2d 894, 896 (1963).

11 State v. Heath, 352 Mo. 1147, 181 S.W.2d 517 (1944).

12 People v. Dotson, 46 Cal.2d 891, 299 P.2d 875 (1956); Cope v. Campbell, 175 Ohio St. 475 (1964).

13 *In re* Mont, 175 Pa. Super. 150, 103 A.2d 460 (1954); Dendy v. Wilson, 142 Tex. 460, 179 S.W.2d 269 (1944). But it has been held that a proceeding in juvenile court does not even amount to a "trial." Commonwealth v. Fisher, 213 Pa. 48, 62 Atl. 198 (1905).

14 Cinque v. Boyd, 99 Conn. 70, 121 Atl. 678 (1923).

15 175 Ohio St. 475 (1964).

reformatory pursuant to statute. His petition for habeas corpus was denied by the Supreme Court of Ohio, which held that since juvenile court proceedings are civil rather than criminal in nature, the appellant was never prosecuted, indicted, convicted, or sentenced, and hence there was no violation of either the federal or state constitutions because of the failure to supply an attorney in the juvenile court. The court went on to remark that the statute in question impliedly provides for the *protection* of the child, not for his punishment. The legislature "clearly" did not intend to place any sort of stigma upon the youth; rather, it intended to provide for his correction and rehabilitation. The court either overlooked or did not care to comment upon the cold, hard fact that this boy was nevertheless still incarcerated and deprived of his freedom with its stamp of approval, regardless of the good intentions of the state's lawmakers.

Similar reasoning was employed in the recent case of *People v. Dotson*.[16] In that decision the juvenile was charged with felony-murder in the superior court. The proceeding was suspended in that tribunal while the juvenile court determined that the youth was not a fit subject over which it would exercise jurisdiction. He was not represented by counsel before the juvenile court. The Supreme Court of California, in holding that juvenile court proceedings are not criminal ones, although the charge is, said:

> While such minors are as much entitled to constitutional guarantees as when subjected to criminal proceedings, . . . nevertheless, because of the nature of the proceedings, the denial of those requirements which have been recognized as elements of a fair trial does not necessarily deprive one of due process of law in Juvenile Court proceedings. The fact that a minor is not represented by counsel need not be a denial of due process in the Juvenile Court.[17]

Fortunately, not all courts agree. Some have taken a realistic approach to the entire situation, as did the one in *In re Contreras*:[18]

> While the juvenile court law provides that adjudication of a minor to be a ward of the court shall not be deemed to be a conviction of crime, nevertheless, for all practical purposes, this is a legal fiction, presenting a challenge to credulity and doing violence to reason. Courts cannot and will not shut their eyes and ears to everyday contemporary happenings.
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> It is common knowledge that such an adjudication when based upon a charge of committing an act that amounts to a felony, is a blight upon the character of and is a serious impediment to the future of such minor. Let him attempt to enter the armed services of his country or obtain a position of honor and trust and he is immediately confronted with his juvenile court record.[19] And further, as in this case, the minor is taken from his family, deprived of his liberty and confined in a state institution. True, the design of the Juvenile Court Act is intended to be salutary, and every effort should be made to further its legitimate purpose, but never should it be made an instrument for the denial to a minor of a constitutional right or of a guarantee afforded by law to an adult. Regardless of the provisions of section 736 of the Welfare and Institutions Code, the fact remains that the minor herein was taken from the custody of his parents, deprived of his liberty and ordered confined in a state institution. . . .
>
> Surely, a minor charged in the juvenile court with acts denounced by law as a felony does not have lesser constitutional statutory rights or guaranties than are afforded an adult under similar circumstances in the superior court. The record herein is barren of sufficient legal evidence to establish even reasonable or probable cause of the minor's guilt, and he should have been returned to his family, . . . A charge against a minor resulting in his removal from the custody of his parents cannot be regarded lightly, and such action is not justified unless facts be shown

16 46 Cal.2d 891, 299 P.2d 875 (1956).
17 46 Cal.2d 891, 299 P.2d 875, 877 (1956).
18 109 Cal.App.2d 787, 241 P.2d 631, 633-34 (1952).
19 In some states, *e.g.*, Wisconsin, statutes have been enacted which prohibit the admission of juvenile proceedings into evidence in other courts of the state. This is based upon a strong social policy of protecting the child. *Smith v. Rural Mut. Ins. Co.*, 20 Wis. 2d 592, 123 N.W.2d 496 (1963) (Footnote added.)

> by evidence, the verity of which has been carefully and legally tested. We find nothing in the juvenile court law that attempts to impose any unlawful restraint upon personal liberty. In practically all of the cases affecting juvenile court proceedings that have come to our attention, the minor has admitted the charge lodged against him and the only problem presented to the court was how to best guide and control the minor with a view to his rehabilitation and further development. In the case at bar however, the minor emphatically and at all times denied his alleged delinquency. Under such circumstances his liberty should not be taken from him until his guilt of the charges lodged against him was established by legal evidence. That however praiseworthy, according to the viewpoint of the individual, may be the motives of the juvenile court, that tribunal may not impinge upon the legal rights of one brought before it. . . . In the final analysis the juvenile court is a judicial institution.

As the statement from the *Contreras* opinion indicates, the simple fact of the matter is that once a juvenile obtains a record, it manages to subsequently follow him around, irrespective of the state's noble efforts as *parens patriae* to shield the child from its odious mark. Evidencing this is *People v. Smallwood*,[20] in which it was held proper to ask a question pertaining to previous difficulties with juvenile authorities as a means of impeaching the credibility of an ex-juvenile delinquent who was the prosecuting witness in a statutory rape case.

Some juvenile court acts are patently Janus-faced in their wording. An interesting example is an early enactment of the city of Detroit, which provided that proceedings thereunder were not to be deemed criminal, while at the same time stipulating that if a child was adjudged to be a delinquent, the court could, *inter alia,* impose a fine upon him not exceeding twenty-five dollars. When the statute came under judicial scrutiny, the Supreme Court of Michigan declared it to be violative of the state constitution. The authority to fine a juvenile conferred by the act amounted to a giving of the power to *punish* him for delinquency, thereby making the proceeding under the law in effect a criminal one. Since a criminal proceeding was thus involved, the statute's provision for a six-man jury in delinquency trials was held unconstitutional because of the requirement of a jury of twelve in a criminal prosecution.[21]

Some state[22] and federal[23] decisions have lately recognized that although juvenile court proceedings are not to be regarded as criminal in nature, still there is a constitutional minimum standard of fundamental fairness towards the youthful offender which must be observed. Such tribunals are not about to allow juveniles to be stripped of all their rights because of an innocent-sounding label placed upon the proceedings by a legislature. Nor do they seem disposed towards permitting the laudable role of the government as *parens patriae* to provide a justification for what would otherwise be sheer deprivation of constitutional protections. In *In the Matter of Cromwell*,[24] two fifteen-year-olds were found to be delinquent pursuant to statute because they participated in civil rights demonstrations. The court, in noting that a minimum amount of fairness must be afforded juveniles, held that the detention of the pair beyond the immediate need for their protection could not be supported in view of the fact that the adults involved in the same demonstrations were either dismissed or received only minimum fines.

The courts of the District of Columbia are noteworthy in having faced up to the harsh realities of the situation and for having adopted what is submitted to be the better approach. As far back as 1955, the district court there ruled that despite the fact that the Juvenile Court of the District is not a criminal court, due process demands that a child before it is entitled to be advised that he has the

20 306 Mich. 49, 10 N.W.2d 303 (1943).
21 Robison v. Wayne Circuit Judges, 151 Mich. 315, 115 N.W. 682 (1908).
22 In the Matter of Cromwell, 232 Md. 409, 194 A.2d 88 (1963).
23 Application of Johnson, 178 F. Supp. 155 (D.N.J. 1957).
24 232 Md. 409, 194 A.2d 88 (1963).

right to counsel where the act in question would be a crime if committed by an adult, and even though the charge is denominated "juvenile delinquency" out of charitable considerations for the child's welfare.[25] Remarking that the intent of Congress in enacting the District of Columbia Juvenile Court Act was to give the juvenile safeguards in addition to those he already possessed instead of diminishing them, Judge Curran said:

> If this deprivation [of constitutional rights] were extended to cover certain crimes committed by adults, it would be condemned by the Courts. Yet by some sort of rationalization, under the guise of protective measures, we have reached a point where rights once held by a juvenile are no longer his. Have we now progressed to a point where a child may be incarcerated and deprived of his liberty during his minority by calling that which is a crime by some other name? . . . This Court stands steadfast in the belief that the Federal Constitution, insofar as it is applicable "cannot be nullified by a mere nomenclature, the evil or the thing itself remaining the same."[26]

A year later, the Court of Appeals for the District of Columbia Circuit in another case agreed, in the course of holding that advising a juvenile of his right to the assistance of an attorney is not incompatible with the twin objectives of dealing with children in an informal manner and encouraging dispositions looking toward treatment rather than punishment.[27]

As far as the District of Columbia courts are concerned, the test to be applied in determining if constitutional rights surround the juvenile is whether there is a potential loss of liberty involved because the final action of the court may result in taking from him his freedom.[28] It is therefore immaterial whether the juvenile court is a criminal court or a true civil forum, or whether the resulting confinement is in a jail, penitentiary, reformatory, training school, or other institution. In accord with *United States v. Dickerson* is *Trimble v. Stone*.[29] Simply because District of Columbia Juvenile Court proceedings are technically civil rather than criminal does not necessarily mean that constitutional protections are inapplicable. "Basic human rights do not depend on nomenclature."[30] Judge Holtzoff further observed:

> To say that a boy who is sent to a training school or a reform school by the Government in a paternalistic spirit, is not being punished, while a person who is committed to a reformatory or penitentiary is there for punishment, does not bear the aspect of reality. All incarceration consequent on an infraction of the law combines deterrence, punishment, and treatment for rehabilitation in varying degrees. . . . *The ultimate test is not whether the proceedings are denominated criminal or civil, but what their outcome may be. If as a result of an infraction of law, the proceedings may result in depriving a person of his liberty, the protection of the Bill of Rights is applicable.*[31]

Thus the right to bail was deemed applicable in proceedings before the juvenile court.[32]

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25 *In re* Poff, 135 F. Supp. 224 (D.D.C. 1955).

26 *Id.* at 226.

27 Shioutakon v. District of Columbia, 236 F.2d 666, 669 (D.C. Cir. 1956): "The 'right to be heard' when personal liberty is at stake requires the effective assistance of counsel in a juvenile court quite as much as it does in a criminal court."

28 United States v. Dickerson, 168 F. Supp. 899 (D.D.C. 1958), *rev'd*, 271 F.2d 487 (D.C. Cir. 1959). The case concerned a juvenile arrested for robbery, and the question before the District Court was whether the double jeopardy provision of the federal constitution was applicable in juvenile court proceedings. That court held that it was. In reversing, the Court of Appeals expressly stated that it was not deciding that jeopardy could never attach to dispositions of the juvenile court. So, the test enunciated by the lower court regarding possible loss of liberty was not robbed of its vitality by the reversal.

29 187 F. Supp. 483 (D.D.C. 1960). See also In the Matter of Alexander, 152 Cal. App. 2d 458, 313 P.2d 182 (1957).

30 *Id.* at 485.

31 *Id.* at 486. (Emphasis added.)

32 *Accord*, State v. Franklin, 202 La. 439, 12 So. 2d 211 (1943); *Ex parte* Osborne, 127 Tex. Crim. 136, 75 S.W.2d 265 (1934).

The argument that the disposition of the juvenile is not punishment is in many instances supposedly buttressed by the statement that the institution to which he is sent is on a level superior to that occupied by the ordinary penitentiary or common jail. The following is representative:

> "Our industrial school is not a place of punishment" nor is it in any sense a prison, no more so than our public schools upon which the law requires and enforces an attendance. It is a place of education, reformation, refinement, and culture. It is a beneficent provision for the uplift of boys. . . . The action of the court in sending them to the school is to avoid a "conviction" and change the prospective punishment into a blessing.[33]

Would the boys agree? Most probably not. How this attitude is correct is not readily apparent. But it still survives, and has led to absurd results such as the one in *Leonard v. Licker*,[34] in which the court acknowledged that the Ohio reformatory was a prison for felons. Nevertheless, the court approved of committing delinquent children thereto after they had performed acts which would be felonies if done by adults, because as to the delinquents, the place was only a reformatory or school, as its name implied. The obvious fact that mere youths were being placed in close proximity with hardened criminals was neatly avoided. However, there have been those who view the situation realistically:

> It cannot be said truthfully that the Industrial Training School in this state is not a penal institute. It is as much a penal institution as the modern, well-regulated, humanely managed penitentiary. Its inmates are restrained of their liberty of action, notwithstanding the purpose of the law is to reform and educate them. That also is true in a large measure of all penal institutions, both state and federal.[35]

All of the foregoing is designed to demonstrate that in the sphere of the juvenile court, judges every day are mechanically applying timeworn stock reasons why the youthful offenders before them are not to be given the same package of constitutional protections that the law jealously demands be afforded to adults charged with crime. None of these standard arguments appears to justify the deprivation of such important rights, and merely because they have somehow withstood the test of time is, by itself, surely no sufficient reason for their continuance. On the contrary, all of them in one way or another fly in the face of reality. It is felt that courts such as the one in *In re Contreras*[36] and those in the District of Columbia have reached the core of the matter and have acted accordingly to obtain for the juvenile the complete set of constitutional safeguards. It would do the other courts well to heed the dissenting words of Justice Musmanno of the Supreme Court of Pennsylvania before deciding to implement the old reasoning again in the future:

> How is the presence or absence of guilt to be ascertained? In all civilized countries it is determined by following a certain organized procedure which assures to the accused an opportunity to assert his innocence, face his accusers, call witnesses in his behalf, obtain the services of counsel and be adjudged by an impartial tribunal. Nowhere in the world are the rights of an accused so jealously guarded as in the United States. The case before us, however, presents an amazing paradox in jurisprudence. This Court says, through a majority of the Justices, that certain constitutional and legal guarantees such as immunity against self-incrimination, prohibition of hearsay, interdiction of ex parte and secret reports, all so zealously upheld in decisions from Alabama to Wyoming, are to be jettisoned in Pennsylvania when the person at the bar of justice is a tender-aged boy or girl.
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> The Majority is of the impression that the adjudication of delinquency of a minor is not a very serious matter because "No suggestion or taint of criminality attaches to any finding of delinquency by a

33 Roberts v. State, 82 Neb. 651, 118 N.W. 574, 576 (1908). See also Rule v. Geddes, 23 App. D.C. 31 (1904); State *ex rel.* Caillouet v. Marmouget, 111 La. 225, 35 So. 529 (1903); Petition of Morin, 95 N.H. 518, 68 A.2d 668 (1949).

34 3 Ohio App. 377 (1914).

35 Bryant v. Brown, 151 Miss. 398, 118 So. 184, 194 (1928) (dissenting opinion).

36 *Supra* note 18.

> Juvenile Court." . . . To say that a graduate of a reform school is not to be "deemed a criminal" is very praiseworthy but this placid bromide commands no authority in the fiercely competitive fields of every-day modern life.
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> A most disturbing fallacy abides in the notion that a Juvenile Court record does its owner no harm. The grim truth is that a Juvenile Court record is a lengthening chain that its riveted possessor will drag after him through childhood, youthhood, adulthood and middle age. . . .
>
> It is equally a delusion to say that a Juvenile Court record does not handicap because it cannot be used against the minor in any court. In point of fact it will be a witness against him in the court of business and commerce, it will be a bar sinister to him in the court of society where the penalties inflicted for deviation from conventional codes can be as ruinous as those imposed in any criminal court, it will be a sword of Damocles hanging over his head in public life, it will be a weapon to hold him at bay as he seeks respectable and honorable employment.[37]

IV. Deportation

Much along the same lines as the rationale employed to deny the penal character of juvenile court dispositions is that utilized to disregard deportation as a form of punishment. Over and over, deportation has been held not to be punishment; the proceedings in which deportation is imposed are not criminal ones.[38] It is again opined that this is a gross fiction generated by semantic confusion plus a tendency towards ignoring realities.[39] Some courts have approximated viewing the actualities through a recognition that deportation may be burdensome and severe, yet they have stubbornly clung to the old way by ruling that it is still not punishment in the legal sense.[40]

Evidently, the courts find it easier to rely upon such reasoning where the person involved is an alien residing in this country. Although it has been held that an alien is a "person," and as such is entitled to the same protection for his life, liberty, and property under the due process clause as is a citizen,[41] it is fairly obvious that the due process he does receive is often only a minimal amount.[42] For example, in *Costanzo v. Tillinghast*,[43] petitioner was a resident alien who was ordered deported to Italy. This order was held not to be a punishment within the meaning of the prohibition of the eighth amendment; it was not the imposition of a penalty upon the alien for any crime. Hence, a hearing upon deportation is not a trial in a criminal case, and therefore the rules of evidence which must be applied in such trials need not be followed. And in *Bhagat Singh v. McGrath*,[44] because deportation proceedings were deemed civil rather than criminal in nature,

37 *In re* Holmes, 379 Pa. 599, 109 A.2d 523, 528-29 (1954) (dissenting opinion), *cert. denied*, 348 U.S. 973 (1955).

38 Harisiades v. Shaughnessy, 342 U.S. 580, *rehearing denied*, 343 U.S. 936 (1952); Carlson v. Landon, 342 U.S. 524 (1952); Mahler v. Eby, 264 U.S. 32 (1924); United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149 (1923); Bugajewitz v. Adams, 228 U.S. 585 (1913); Fong Yue Ting v. United States, 149 U.S. 698 (1893); Hyun v. Landon, 219 F.2d 404 (9th Cir. 1955), *aff'd by an equally divided Court*, 350 U.S. 990 (1956); Quattrone v. Nicholls, 210 F.2d 513 (1st Cir.), *cert. denied*, 347 U.S. 976 (1954); Soewapadji v. Wixon, 157 F.2d 289 (9th Cir.), *cert. denied*, 329 U.S. 792 (1946); Bhagat Singh v. McGrath, 104 F.2d 122 (9th Cir. 1939); Costanzo v. Tillinghast, 56 F.2d 566 (1st Cir.), *aff'd*, 287 U.S. 341 (1932); Skeffington v. Katzeff, 277 Fed. 129 (1st Cir. 1922); Fougherouse v. Brownell, 163 F. Supp. 580 (D. Ore. 1958).

39 Navasky, *Deportation as Punishment*, 27 U. KAN. CITY L. REV. 213 (1959). The argument that deportation is punishment has been lightly dismissed by the statement that deportation is simply the refusal by the government to harbor those whom it does not want. Bugajewitz v. Adams, 228 U.S. 585 (1913).

40 Mahler v. Eby, 264 U.S. 32 (1924); Quattrone v. Nicholls, 210 F.2d 513 (1st Cir.), *cert. denied*, 347 U.S. 976 (1954).

41 Galvan v. Press, 347 U.S. 522, *rehearing denied*, 348 U.S. 852 (1954). *Accord*, United States v. Pink, 315 U.S. 203 (1942).

42 Although it is required to be exercised. Carlson v. Landon, 342 U.S. 524 (1952); Hyun v. Landon, 219 F.2d 404 (9th Cir. 1955).

43 56 F.2d 566 (1st Cir.), *aff'd*, 287 U.S. 341 (1932).

44 104 F.2d 122 (9th Cir. 1939).

it was not required that the alien be confronted by the witnesses against him. Consequently, such witnesses' testimony may be gathered by deposition, and the alien's right to cross-examination is preserved by allowing him to do so through deposition.

A particularly noteworthy illustration of the rule that deportation is not punishment is found in the decision of the Supreme Court of the United States in *Harisiades v. Shaughnessy.*[45] The Government sought to deport appellant, a legally resident alien, under the Alien Registration Act of 1940 for his activities as a member of the Communist Party. Because his membership in the party terminated prior to the enactment of the legislation, appellant argued that to deport him would violate the constitutional clause condemning ex post facto laws. In holding that it was constitutionally permissible for the United States to deport Harisiades, the Court said that there was no retroactivity involved because the 1940 Act was actually a continuation of prior laws. Then the Court mentioned that even if there was retroactivity, there would still be no infringement of the ex post facto clause since its prohibition pertains only to criminal punishments, among which deportation is not included. It is interesting to note that Justice Jackson, the author of the majority opinion, observed that if it were not so well-settled that deportation is not a criminal procedure, the principle might be debatable as a proposition of first impression. Justices Douglas and Black, in dissent, equated deportation with banishment, stating that the latter, as a practical matter, is punishment, and that Congress was in effect ordering appellant deported for what he once was.

Two cases which are outstanding examples of judicially approved human sufferings are *Shaughnessy v. United States ex rel. Mezei*[46] and *United States ex rel. Knauff v. Shaughnessy.*[47] In the former, Mezei was an alien who had resided in this country for some twenty-five years prior to making a journey to Europe in 1948, apparently to visit his dying mother in Rumania. Upon his return nearly two years later, immigration officials denied him re-entry. Because the government had information which supposedly dictated that Mezei was a security risk, and because this information was ostensibly of such a confidential nature that it was considered inimical to the national interest to disclose it, even *in camera,* the attorney general decided to make Mezei's exclusion permanent without granting him a hearing. He attempted to obtain a haven in other countries, but none would accept him. The result was that Mezei was confined at Ellis Island with no place to go. The Supreme Court, five to four, ruled that Mezei could be so excluded without a hearing, and that his detention on Ellis Island was not unlawful. Since Congress had spoken on the matter, it was irrelevant to consider that Mezei's plight indeed bore the mark of great hardship. The effect of the decision is that an alien in circumstances such as these may be held in custody indefinitely without a hearing, a ludicrous result to be sure.

Dissatisfied with its victory, and seemingly aware of its inequity, the Department of Justice appointed an *ad hoc* committee which permitted Mezei to know and meet the evidence against him. Although the committee found that he was a member of the Communist Party and as such legally excludable, it recommended that he be allowed to return to his home in Buffalo. The Justice Department followed the recommendation.[48]

The *Knauff* case likewise involved the exclusion of an alien without a hearing. Mrs. Knauff had been, prior to her marriage in Germany to a naturalized citizen who had an honorable discharge from the army, employed by the United States War Department in Germany. Her work for that agency was considered very

45 342 U.S. 580, *rehearing denied,* 343 U.S. 936 (1952).
46 345 U.S. 206 (1953).
47 338 U.S. 537 (1950).
48 See 1 DAVIS, ADMINISTRATIVE LAW TREATISE § 7.15 (1958).

satisfactory, and the commanding general at Frankfurt approved of the forthcoming union between her and Knauff. As a "war bride," she sought entry into the United States to be naturalized and was refused without a hearing, solely on the attorney general's finding that her admission would be prejudicial to American interests. In affirming the exclusion order, the Supreme Court based its decision upon the so-called "right-privilege" doctrine and held that since the admission of aliens is a privilege only, one who seeks it has no claim of right in the matter and may consequently be excluded without a hearing. In other words, since the alien has no right to reside in this country, he has lost nothing by being refused entry and is therefore not punished. "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[49] The case was not without a vigorous dissent, offered by three of the seven Justices, the following sample of which is an accurate indication of its tone:

> Security is like liberty in that many are the crimes committed in its name. The menace to the security of this country, be it great as it may, from this girl's admission is as nothing compared to the menace to free institutions inherent in procedures of this pattern. In the name of security the police state justifies its arbitrary oppressions on evidence that is secret, because security might be prejudiced if it were brought to light in hearings. The plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected. . . .[50]

Not all courts have been blind to the fact that deportation possesses penal characteristics. The Supreme Court itself has recognized this, in *Fong Haw Tan v. Phelan.*[51] In that case the Court was faced with doubts concerning the interpretation to be given the Immigration Act of 1917, which, *inter alia,* provided that a criminal alien could be deported. In adopting a narrow construction of the act, the Court resolved the uncertainties in a manner favorable to the alien because human freedom was involved, and because, "[D]eportation is a drastic measure and at times the equivalent of banishment or exile, . . . It is the forfeiture for misconduct of a residence in this country. *Such a forfeiture is a penalty.*"[52] And in *United States ex rel. Klonis v. Davis,*[53] which involved the same section of the 1917 Act, Judge Learned Hand stated that, "[H]owever heinous [the alien's] crimes, deportation is to him exile, *a dreadful punishment,* abandoned by the common consent of all civilized peoples. Such, indeed, it would be to anyone. . . ."[54]

From the aforementioned sampling of cases, it is believed that the average person would readily conclude that deportation is surely punishment; the vivid realities of the actual and possible consequences of that action certainly command that it be regarded as such. To deny the alien, or anyone else for that matter, due process of law, or to grant him only the barest quantity thereof merely because there is at hand a semantic label of easy application is to do a grave injustice to the one sought to be deported or excluded. Indeed, the *effect* of the sanction imposed, rather than the reason for imposing it, must be the criterion employed in order to decide whether the person is entitled to that bundle of safeguards provided by our Constitution. Such distinctions as the one between "right" and "privilege," for example, should have no place in this area as a basis for determining whether such a drastic measure as deportation should be inflicted.

V. Forfeiture of Property

In the realm of forfeiture statutes, there is once more advanced the propo-

49 338 U.S. 537, 544 (1950).
50 338 U.S. 537, 551 (1950) (dissenting opinion).
51 333 U.S. 6 (1948).
52 *Id.* at 10. (Emphasis added.) The Fifth Circuit is in accord. Wallis v. Tecchio, 65 F.2d 250 (5th Cir. 1933).
53 13 F.2d 630 (2d Cir. 1926).
54 *Id.* at 630. (Emphasis added.)

sition that the proceeding is not criminal, and that hence no punishment is inflicted upon the individual. Consequently, the quantum of proof that is sufficient to warrant a forfeiture is a preponderance of the evidence.[55] Moreover, the court may in such a case either direct a verdict for the government or enter a judgment *n.o.v.*[56]

Forfeiture actions are generally denominated as civil in rem proceedings.[57] Among the most popular of the various reasons assigned as to why a judgment of forfeiture against property is not criminal in nature and therefore does not amount to punishment is that the action is similar to the ancient law of deodand in that it is a proceeding against the property rather than against its owner. In *J. W. Goldsmith, Jr.-Grant Co. v. United States*,[58] for instance, it was sought to condemn an automobile which had been used to conceal whiskey upon which a federal tax had not been paid. The trial court instructed the jury to find the *car* guilty. The Supreme Court of the United States affirmed and held that in order to prevent violations of the revenue laws, Congress intended to ascribe a particular personality to the property in question. This sort of rationale seems patently fictitious; in fact, the Court even recognized the fiction, but neatly avoided the point by saying: "But whether the reason for [the 1866 statute pursuant to which the action was brought] be artificial or real, it is too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced."[59]

Because it is the thing itself which is deemed to be the offender, it becomes immaterial to consider whether its owner is himself guilty or innocent. Consequently, the item may still be confiscated although the owner had no complicity in, or even knowledge of, the offense committed through the means supplied by his property.[60] When such an owner asserts his innocence before a court, its reply is typically like this:

> This is a proceeding in rem, against the car, in which the law ascribes to it a power of complicity and guilt in the offense. . . . It is no longer necessary to quote in support of this well established doctrine the common law as to deodands or the Mosaic law as to the punishment inflicted upon an ox which gores a man.[61]

A recent state court decision[62] emphasized the general rule that acquittal in a prior criminal prosecution is not a bar to a later forfeiture proceeding. In that case the defendant was found not guilty of possessing alcoholic beverages, specifically beer, in a dry area for the purposes of sale. The state then brought a forfeiture action against the beer. Defendant's argument based upon the earlier acquittal was unsuccessful because the forfeiture proceeding was held to be one against the

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55 Toepleman v. United States, 263 F.2d 697 (4th Cir. 1959); United States v. One 1955 Mercury Sedan, 242 F.2d 429 (4th Cir. 1957); United States v. Twelve Ermine Skins, 78 F. Supp. 734 (D. Alaska 1948).

56 Toepleman v. United States, 263 F.2d 697 (4th Cir. 1959); United States v. Twelve Ermine Skins, 78 F. Supp. 734 (D. Alaska 1948).

57 Toepleman v. United States, 263 F.2d 697 (4th Cir. 1959); United States v. Gable, 217 F. Supp. 82 (D. Conn. 1963); United States v. One 1960 Ford 4-Door Galaxie Sedan, 202 F. Supp. 841 (E.D. Tenn. 1962); United States v. One 1948 Cadillac Convertible Coupe, 115 F. Supp. 723 (D.N.J. 1953); State v. Hondros, 100 S.C. 242, 84 S.E. 781 (1915); State v. Benavidez, 365 S.W.2d 638 (Tex. 1963); State v. Richards, 157 Tex. 166, 301 S.W.2d 597 (1957).

58 254 U.S. 505 (1921).

59 *Id.* at 511.

60 Van Oster v. Kansas, 272 U.S. 465 (1926); J. W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505 (1921); United States v. One 1957 Oldsmobile Automobile, 256 F.2d 931 (5th Cir. 1958); Associates Investment Co. v. United States, 220 F.2d 885 (5th Cir. 1955); United States v. One 1951 Oldsmobile Sedan, 135 F. Supp. 873 (E.D. Pa. 1955); United States v. One 1948 Cadillac Convertible Coupe, 115 F. Supp. 723 (D.N.J. 1953); United States v. One 1951 Cadillac Coupe De Ville, 108 F. Supp. 286 (W.D. Pa. 1952); United States v. One 1940 Packard Coupe, 36 F. Supp. 788 (D. Mass. 1941); State v. Benavidez, 365 S.W.2d 638 (Tex. 1963).

61 United States v. One 1940 Packard Coupe, 36 F. Supp. 788, 790 (D. Mass. 1941).

62 State v. Benavidez, 365 S.W.2d 638 (Tex. 1963).

beverage and not one against its owner or possessor. Thus, it is civil in nature, and the owner or possessor of the contraband is not being criminally tried in the forfeiture action. Hence, the prior adjudication of an issue in a criminal case is not res judicata or estoppel by judgment to a subsequent civil action involving the same factual issue, and the judgment of acquittal is not admissible as evidence in the forfeiture case.

The federal courts likewise follow the principle that a previous acquittal in a criminal case does not serve to bar the subsequent forfeiture action involving the identical set of facts. In *United States v. One 1951 Cadillac Coupe De Ville*,[63] for example, the owner of the automobile was charged with unlawful possession of narcotics being transported in the car, but was acquitted. It was held that this did not prevent the government from attempting to later confiscate the vehicle, and it was ordered forfeited. The court said that the judgments were not inconsistent since the burden of proof in a criminal proceeding is greater than that imposed in a forfeiture action. In the former, this burden rested upon the United States, whereas in the latter it was upon the claimant after the government had presented sufficient evidence to make out a prima facie case establishing probable cause for seizure of the property.

Where the owner is innocent, there of course could be no valid judgment of forfeiture against his property if it was conceded that such forfeitures work a penalty for the commission of crime.[64] Accordingly, the concept that forfeiture is not punishment continues to survive. Such forfeitures have been justified at the state level on the ground that it is a valid exercise of the sovereign's police power to brand certain uses of property as being so undesirable that the owner surrenders control thereof at his peril.[65] It is therefore believed that by sanctioning such rules the state is in a better position to effectively curb offenses like illegal transportation of narcotics. Ideally, in the narcotics situation for example, it is thereby made more difficult for those engaged in such traffic to borrow or rent vehicles with which to carry on their illicit trade. The result of rigid applications of such rules is unquestionably harsh[66] insofar as the untainted owner is concerned, but drastic measures are imperative in order that such harmful activities be suppressed.[67]

Other methods have been utilized to work a forfeiture of an innocent owner's property, and a recent federal case involving the unlawful transportation of narcotics illustrates one.[68] There, under the federal statutory law on the subject,[69] a vehicle used in the commission of one of the enumerated offenses is forfeitable unless the user obtained possession thereof through a violation of a federal or state criminal law. The court decided that the automobile in question did not come within the statutory exception because the offender had his mother's permission to use it. She was its owner, and was not aware that her son was an addict, much less that he would use the car to carry drugs. Nevertheless, since she gave her consent, the son did not gain possession of the vehicle in violation of any criminal law, and thus it was subject to forfeiture.

Another method through which forfeiture is successful is seen in the rule that property obtained as a result of an illegal search and seizure may still be con-

63 108 F. Supp. 286 (W.D. Pa. 1952).

64 State v. Richards, 157 Tex. 166, 301 S.W.2d 597 (1957). See State v. Hondros, 100 S.C. 242, 84 S.E. 781 (1915).

65 Van Oster v. Kansas, 272 U.S. 465 (1926); State v. Richards, 157 Tex. 166, 301 S.W.2d 597 (1957).

66 United States v. Addison, 260 F.2d 908 (5th Cir. 1958); United States v. One 1957 Oldsmobile Automobile, 256 F.2d 931 (5th Cir. 1958); Commonwealth v. Certain Motor Vehicle, 261 Mass. 504, 159 N.E. 613 (1928); State v. Richards, 157 Tex. 166, 301 S.W.2d 597 (1957).

67 State v. Richards, 157 Tex. 166, 301 S.W.2d 597 (1957). See United States v. One 1960 Ford 4-Door Galaxie Sedan, 202 F. Supp. 841 (E.D.Tenn. 1962).

68 United States v. One 1951 Oldsmobile Sedan, 135 F. Supp. 873 (E.D. Pa. 1955).

69 53 Stat. 1291 (1939); 49 U.S.C. §§ 781-82 (1959).

fiscated, even though it must be suppressed as evidence upon the criminal trial because of the violation of the fourth amendment.[70] The usual reason for this is that since the statute declares that there are no property rights in contraband, the claimant has no right to have it returned to him, regardless of the fact that the Consitution commands that it be excluded as evidence in the criminal prosecution.[71] At least two decisions have held that the unlawfulness of the search and seizure bars the civil forfeiture proceeding.[72] However, this minority position is no longer law in the Third Circuit.[73]

Courts have occasionally stated that forfeiture of property is in the nature of punishment.[74] Some have also said that forfeitures are not favored.[75] And at least two tribunals have declared that forfeiture is a variety of "civil punishment."[76] In *Commonwealth v. Certain Motor Vehicle,*[77] the Supreme Judicial Court of Massachusetts held that a forfeiture is a proceeding in rem to condemn property illegally used. It is both criminal and punitive by its nature, but is also more and different than simply punishment. Rather, it constitutes a legislative method whereby illegalities are restrained and prevented. This is why forfeiture may be had even though the owner is innocent of any wrongdoing. Furthermore, the harshness of such a rule is justified by the necessity of combating injuries to the public welfare.

It is again submitted that a recognition of realities dictates that despite all pronouncements to the contrary, forfeiture be tabbed for what it assuredly is, *i.e.,* a punishment. Unfortunately, cases like the ones mentioned in the preceding paragraph are few. More courts should become disposed towards removing their judicial blinders in this area, and accordingly should afford to the claimant of property sought to be condemned the same measure of rights and corresponding rules which are granted in criminal matters.

VI. Miscellaneous

Various other activities have been categorized as nonpunishment, albeit on their face they appear to be such. For instance, in *State v. Smith,*[78] defendant was convicted of slander and ordered to pay the costs of the action. A statute provided that a defendant could be jailed until he paid such costs. Smith failed to do so and was imprisoned for four months. The court held that the costs constituted no part of his punishment.

Another illustration is found in the New York State Mental Hygiene Law, which permits the initial confinement of an allegedly mentally ill person without prior notice or hearing. The statute came under constitutional attack in *In re Coates,*[79] but was upheld on the ground that due process does not demand a hearing

70 United States v. Jeffers, 342 U.S. 48 (1951); Trupiano v. United States, 334 U.S. 699 (1948); United States v. Lee Wan Nam, 274 F.2d 863 (2d Cir.), *cert. denied,* 363 U.S. 803 (1960); United States v. Bosch, 209 F. Supp. 15 (E.D. Mich. 1962); United States v. One 1956 Ford 2-Door Sedan, 185 F. Supp. 76 (E.D. Ky. 1960).

71 United States v. Jeffers, 342 U.S. 48 (1951).

72 United States v. Plymouth Coupe, 182 F.2d 180 (3d Cir. 1950); United States v. Loomis, 297 Fed. 359 (9th Cir. 1924). See Note, 38 NOTRE DAME LAW. 727 (1963).

73 See United States v. $1,058.00 In United States Currency, 323 F.2d 211 (3d Cir. 1963), *overruling* United States v. Plymouth Coupe, 182 F.2d 180 (3d Cir. 1950).

74 Boyd v. United States, 116 U.S. 616 (1886); United States v. One 1947 Oldsmobile Sedan, 104 F. Supp. 159 (D.N.J. 1952); Commonwealth v. Certain Motor Vehicle, 261 Mass. 504, 159 N.E. 613 (1928).

75 United States v. One Ford Coach, 307 U.S. 219 (1939); United States v. American Gas Screw Franz Joseph, 210 F. Supp. 581 (D. Alaska 1962); United States v. Twelve Ermine Skins, 78 F. Supp. 734 (D. Alaska 1948).

76 Toepleman v. United States, 263 F.2d 697 (4th Cir. 1959); United States v. One 1960 Ford 4-Door Galaxie Sedan, 202 F. Supp. 841, 843 (E.D. Tenn. 1962).

77 261 Mass. 504, 159 N.E. 613 (1928).

78 196 N.C. 438, 146 S.E. 73 (1929).

79 9 N.Y.2d 242, 173 N.E.2d 797, *appeal dismissed,* 368 U.S. 34 (1961).

in the situation where there is a *temporary* confinement, and where there is a need for immediate action for the protection of society and for the welfare of the one who is believed to be mentally ill. Saving the constitutionality of the section in question was the provision for a complete rehearing and review *ab initio*. Furthermore, the allegedly mentally ill individual is not declared to be incompetent, but is "merely" hospitalized in the first instance for not more than sixty days.[80]

As to licenses in general, it has been repeatedly held that the denial or revocation of them does not constitute punishment for an offense.[81] This is equally true as to such ones as driver's[82] and pharmacist's[83] licenses. And finally, another theory which has been employed to deny that the revocation of a license constitutes punishment is that the initial obtaining of one is a *privilege*, not a right.[84]

VII. Conclusion

Whatever may be the justification for each of these approaches to the concept of "punishment," the fact remains that it is only a semantic one in the vast majority of cases, while in the rest it seems to be the result of an activity analogous to burying one's head in the sand, ostrich-style. Punishment remains punishment, no matter how diligently many of our courts attempt to eradicate this truism by cleverly substituting other reasoning, other rationales, other language. After having perused some or all of the cases referred to herein, and after having read that the courts involved have blatantly declared that the dispositions are just not punishment, would the average layman, one untrained in the wiles and intricacies of the law, be disposed to heartily concur in the light of his everyday experiences and knowledge? The question answers itself. It can only be hoped that the judiciary will see fit to alter the picture in such a fashion that the question need not be posed again.

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80 *Cf.* In the Matter of Williams, 157 F. Supp. 871, 876 (D.D.C. 1958), *aff'd sub nom.* Overholser v. Williams, 252 F.2d 629 (D.C. Cir. 1958), wherein the court said: "This court is conscious . . . of the need for protection not only of the community but also of individuals in need of psychiatric care and treatment. But these laudable purposes, under our form of government, must be accomplished by procedures which are legal and not at the cost of disregarding constitutional safeguards by deprivation of liberty without due process of law. *The mere fact that a commitment without due process is temporary and for the purpose of psychiatric examination renders it no less unlawful.*" (Emphasis added.)

81 Hawker v. New York, 170 U.S. 189 (1898).

82 State *ex rel.* Connolly v. Parks, 199 Minn. 622, 273 N.W. 233 (1937).

83 Mandel v. Board of Regents of University of State of New York, 250 N.Y. 173, 164 N.E. 895 (1928).

84 Prichard v. Battle, 178 Va. 455, 17 S.E.2d 393 (1941).