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Judicial Sentencing Error: *Thomas v. Morris* and The Double Jeopardy Clause

The Honorable Paul G. Flynn*

I. INTRODUCTION

"Historians have traced the origins of our constitutional guarantee against double jeopardy back to the days of Demosthenes, who stated that 'the laws forbid the same man to be tried twice on the same issue.'"¹ The fifth amendment of the Bill of Rights clearly states: "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb"² The meaning of this phrase is anything but clear.³ Until 1969, the United States Supreme Court had not recognized that the guarantee against double jeopardy was enforceable against the states through the fourteenth amendment.⁴ Ul-

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1. *Whalen v. United States*, 445 U.S. 684, 699 (1979) (Rehnquist, J., dissenting) (citing 1 Demosthenes 589 (J. Vince trans., 4th ed. 1970)).

2. U.S. Const. amend. V.

3. See *Whalen*, 445 U.S. at 699 (Rehnquist, J., dissenting).

Despite its roots in antiquity, however, this guarantee seems both one of the least understood and, in recent years, one of the most frequently litigated provisions of the Bill of Rights. This Court has done little to alleviate the confusion, and our opinions, including ones authored by me, are replete with *mea culpa's* occasioned by shifts in assumptions and emphasis.

Id. Justice Rehnquist implores the reader to compare *United States v. Jenkins*, 420 U.S. 358 (1975) with *United States v. Scott*, 437 U.S. 82 (1978) (overruling *Jenkins*), and to see also *Burks v. United States*, 437 U.S. 1, 9 (1978), which affirmatively admits that the Court's holdings on this subject "can hardly be characterized as models of consistency and clarity." See generally Western & Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81; Note, *Twice in Jeopardy*, 75 YALE L.J. 262 (1965).

4. *Benton v. Maryland*, 395 U.S. 784, 794 (1969). See generally Annotation, *What*

timately, the Supreme Court acknowledged that the guarantee against double jeopardy is composed of three distinct constitutional protections: First it guards against being prosecuted a second time following acquittal for the same offense; second, it prohibits a second prosecution once convicted of the same crime; and third, it denies multiple punishments for the same offense.⁵

This last—protection from multiple punishments—is the broad area which was addressed by the Eighth Circuit Court of Appeals in *Thomas v. Morris*.⁶ The United States Supreme Court recently granted a writ of certiorari to consider the decision.⁷ The issue presented in *Thomas* is: if a defendant satisfies a sentence prior to the trial court's vacation of the sentence as illegally imposed, does a subsequent vacation of the sentence, and defendant's continuing confinement under a life sentence for a felony murder conviction (for which the predicate felony was attempted robbery), violate the double jeopardy clause. The Eighth Circuit, en banc, held that it did, and remanded the case to the district court with instructions to issue the requested writ of habeas corpus.⁸ Four judges vehemently dissented from what they viewed as a decision clearly contrary to the legislators' and trial court's intent.⁹ Additionally, the dissenters criticized the "extreme hypertechnicality"¹⁰ of the opinion that removed "logic and judicial control from the sentencing process."¹¹

This special commentary will first explore the significant Supreme Court decisions which constitute the basis of the majority opinion, along with current circuit court opinions interpreting those decisions; the continuing vitality of the authorities cited will be considered. A review of the factual and procedural history of *Thomas* will then be presented, followed by an analysis of the majority opinion, as contrasted with the assertions of the dissent. Finally, the impact of the *Thomas* decision, and the probable resolution by the Supreme Court will be discussed.

Provisions of the Federal Constitution's Bill of Rights are Applicable to the States, 23 L. Ed. 2d 985 (1970).

5. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). For a summary of the general principles involved in double jeopardy issues, see *United States v. DiFrancesco*, 449 U.S. 117 (1980).

6. 844 F.2d 1337 (8th Cir. 1988), *cert. granted sub nom. Jones v. Thomas*, 109 S. Ct. 781 (1989). See generally Cantrell, *Double Jeopardy and Multiple Punishment: An Historical and Constitutional Analysis*, 24 S. TEX. L.J. 735 (1983); Thomas, *A Unified Theory of Multiple Punishment*, 47 U. PITT. L. REV. 1 (1985); Note, *Are Sanctions Imposed Under the Multiple Punishment Doctrine of the Double Jeopardy Clause of the Fifth Amendment? Missouri v. Hunter*, 27 HOW. L.J. 371 (1984).

7. *Jones v. Thomas*, 109 S. Ct. 781 (1989).

8. *Thomas*, 844 F.2d at 1342.

9. *Id.* at 1343 n.1 (Bowman, J., dissenting).

10. *Id.* at 1345 (Bowman, J., dissenting).

11. *Id.* at 1346 (Bowman, J., dissenting).

II. HISTORICAL BACKGROUND

The fifth amendment contains the guarantee against the threat of double jeopardy.¹² When introduced to the first Congress, James Madison's draft of the double jeopardy clause read: "No person shall be subject, except in cases of impeachment, to more than one punishment or on trial for the same offence"¹³

It has been said that state trials are a "formidable engine in the hands of a dominant administration. . . . To prevent this mischief the ancient common law, as well as [the] Magna Charta itself, provided that one acquittal or conviction should satisfy the law."¹⁴

A. *Ex parte Lange and In re Bradley*

*Ex parte Lange*¹⁵ was first in the line of cases holding that the double jeopardy clause protects not only being twice tried for the same offense, but being twice punished as well.¹⁶ In *Lange*, the defendant was convicted of the theft of United States mail bags. As provided by the applicable statute, the punishment was imprisonment for not more than one year or a fine between \$10 and \$200. The presiding judge not only sentenced the defendant to serve one year in jail but also ordered him to pay a \$200 fine. That very day the defendant began serving his prison term; and on the next, he paid the entire fine. The defendant filed a petition for writ of habeas corpus. Realizing his error, the sentencing judge entered an order vacating the prior judgment while resentencing the defendant to one year in jail from the date of resentencing.¹⁷ The fine, however, had been paid into the United States Treasury and could not be returned. Additionally, the defendant would have served one year and five days in prison as a result of the new sentence—a sentence well in excess of the statutory limit.

The Supreme Court concluded that "[t]he protection against the action of the same court in inflicting punishment twice must surely be as necessary, and as clearly within the maxim, as protection from

12. See *supra* note 2 and accompanying text.

13. *North Carolina v. Pearce*, 395 U.S. 711, 729 (1969) (Douglas, J., concurring) (citing 1 ANNALS OF CONG. 434 (J. Madison, 1789)).

14. *Ex Parte Lange*, 85 U.S. (18 Wall.) 163, 171 (1873); see also *Green v. United States*, 355 U.S. 184, 198-217 (1957) (Frankfurter, J., dissenting).

15. 85 U.S. 163 (1873).

16. *Id.* at 176.

17. *Id.* at 164.

chances or danger of a second punishment on a second trial.”¹⁸ The Court continued by posing the question:

for of what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict? Why is it that, having once been tried and found guilty, he can never be tried again for that offense? Manifestly it is not the danger or jeopardy of being a second time found guilty. It is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution. But if, after judgment has been rendered on the conviction, and the sentence of that judgment executed on the criminal, he can be again sentenced on that conviction to another and different punishment, or to endure the same punishment a second time, is the constitutional restriction of any value? . . .

The argument seems to us irresistible, and we do not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for the same offence as from being twice tried for it.¹⁹

Even though the district court attempted to correct the mistake in the same term, the Supreme Court further held that because the prisoner had suffered an alternative punishment, the court was powerless to punish further. “[T]he prisoner had fully performed, completed, and endured one of the alternative punishments which the law prescribed for that offence, and had suffered five days imprisonment on account of the other. It thus showed the court that its power to punish for that offence was at an end.”²⁰ The writ of habeas corpus issued, and *Lange* was discharged.²¹

*In re Bradley*²² examined a situation seventy years later very similar to that presented in *Lange*.²³ In *Bradley*, the defendant was convicted of contempt because he intimidated a witness. The sentencing judge imposed a term of six months in jail and, additionally, a fine of \$500. The applicable statute, however, provided only for a fine, or imprisonment. The defendant was committed to prison. Several days

18. *Id.* at 169. The Court had previously provided an appropriate illustration: “A criminal may be sentenced to a disgraceful punishment, as whipping, or, as in the old English law, to have his ears cut off, or to be branded in the hand or forehead. . . . The judgment of the court to this effect being rendered and carried into execution before the expiration of the term, can the judge vacate that sentence and substitute fine or imprisonment, and cause the latter sentence also to be executed? . . . Not only the gross injustice of such a proceeding, but the inexpediency of placing such a power in the hands of any tribunal is manifest.” *Id.* at 168.

19. *Id.* at 173.

If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence. And though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offence, or to bring the party within the jurisdiction of more than one court, there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offence.

Id. at 168.

20. *Id.* at 176.

21. *Id.* at 178.

22. 318 U.S. 50 (1943).

23. *Ex Parte Lange*, 85 U.S. (18 Wall.) 163 (1873).

later his attorney paid the fine in cash to the court's clerk. The court realized its error that same day and instructed the clerk to return the fine, leaving only the imprisonment in place. The attorney refused to accept the return of the fine.²⁴

In a terse opinion, the Supreme Court, relying on *Lange*, held that once the defendant paid the fine, he "had complied with a portion of the sentence which could lawfully have been imposed."²⁵ Since the judgment was fully satisfied, the court's jurisdiction over the matter ended. Thus, the Court held that the amendment to the sentence did not avoid the satisfaction of the judgment. By paying the fine, an alternative provision of the original sentence was satisfied; and the petitioner was therefore freed of further restraint.²⁶

In a sharp dissent, Chief Justice Stone distinguished *Lange* because the fine was paid into the United States Treasury, and the court could not direct its return.²⁷ In *Bradley*, however, the court could direct the return of the fine and the defendant would not be deprived of his money. Chief Justice Stone opined that it should not violate double jeopardy protections to force the defendant to serve his sentence after a return of the fine on the same day it was paid.²⁸ The Chief Justice concluded: "The Constitution is concerned with matters of substance not of form. Nothing in its words or history forbids a common sense application of its provisions, or excludes them from the operation of the principle *de minimis*."²⁹

B. Additional Supreme Court Precedent

The 1969 decision *Benton v. Maryland*³⁰ found that the fifth amendment guarantee against double jeopardy was made applicable to the states through the fourteenth amendment.³¹ That same term, the Supreme Court, in *North Carolina v. Pearce*,³² held that if a state must retry and reconvict a defendant, all punishment exacted must be credited to the new sentence.³³ However, the Constitution in no way barred a court from imposing a more severe sentence on recon-

24. *Bradley*, 318 U.S. at 51-52.

25. *Id.* at 52.

26. *Id.*

27. *Id.* at 53 (Stone, C.J., dissenting).

28. *Id.* (Stone, C.J., dissenting).

29. *Id.* at 53-54 (Stone, C.J., dissenting).

30. 395 U.S. 784 (1969).

31. *Id.* at 793-96.

32. 395 U.S. 711 (1969).

33. *Id.* at 718-19.

viction.³⁴ This followed from previous cases imposing no bar on the ability of the state to retry a defendant who was successful in collaterally attacking the conviction.³⁵

*Whalen v. United States*³⁶ extended *Pearce*: “[T]he question whether punishments imposed by a court after a defendant’s conviction upon criminal charges are unconstitutionally multiple cannot be resolved without determining what punishments the Legislative Branch authorized.”³⁷ Especially with respect to felony murder statutes, which often do not require proof of intent to kill, the punishment for the killing *and* the underlying felony is impermissible unless the legislature so provides.³⁸ “The Double Jeopardy Clause at the very least precludes federal courts from imposing consecutive sentences unless authorized by Congress to do so.”³⁹ Justice Blackmun, concurring, desired a clearer holding: “The question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed.”⁴⁰

In dissent, Justice Rehnquist stated that “the Double Jeopardy Clause as interpreted in *Ex parte Lange* prevents a sentencing court from increasing a defendant’s sentence for any particular statutory offense, even though the second sentence is within the limits set by the legislature.”⁴¹ For Justice Rehnquist, it was purely a matter of statutory construction in which the double jeopardy clause plays no part.⁴²

Notwithstanding the discussion on what does or does not involve multiple punishment, the Supreme Court recently held in *Morris v. Mathews*⁴³ that, when a defendant is convicted of a jeopardy-barred charge of aggravated murder, reduction of that conviction to the non-jeopardy-barred lesser included offense of murder is an adequate remedy to any alleged double jeopardy violations.⁴⁴ In *Morris*, the defendant pleaded guilty to a charge of aggravated robbery. Later ev-

34. *Id.* at 723; *see also* *Stroud v. United States*, 251 U.S. 15 (1919).

35. *Pearce*, 395 U.S. at 720 (commenting on *United States v. Ball*, 163 U.S. 662 (1896)); and *United States v. Tateo*, 377 U.S. 463 (1964)).

36. 445 U.S. 684 (1979).

37. *Id.* at 688.

38. *Id.* at 689.

39. *Id.* This decision dictated the result in *State v. Morgan*, 612 S.W.2d 1 (Mo. 1981) (en banc). *See infra* note 65.

40. *Whalen*, 445 U.S. at 698 (Blackmun, J., concurring). His view was adopted. *Albernaz v. United States*, 450 U.S. 333, 344 (1981) (“Where Congress intended . . . to impose multiple punishments, imposition of such sentences does not violate the Constitution.” (footnote omitted)).

41. *Whalen*, 445 U.S. at 703 (Rehnquist, J., dissenting) (citing *North Carolina v. Pearce*, 395 U.S. 711 (1969) and *United States v. Benz*, 282 U.S. 304 (1931)).

42. *Id.* at 705-06 (Rehnquist, J., dissenting).

43. 475 U.S. 237 (1986).

44. *Id.* 246-47.

idence lead to an indictment for aggravated murder, with the aggravation being the robbery for which he was previously convicted. He was found guilty, even though the jury was also instructed on the lesser included offense of murder. The state court of appeals, in considering the defendant's double jeopardy claim, reduced his conviction to the lesser included offense of murder.⁴⁵ On appeal, the Supreme Court held:

[W]hen a jeopardy-barred conviction is reduced to a conviction for a lesser included offense which is not jeopardy-barred, the burden shifts to the defendant to demonstrate a reasonable probability that he would not have been convicted of the non-jeopardy-barred offense absent the presence of the jeopardy-barred offense. . . .

[W]here it is clear that the jury necessarily found that the defendant's conduct satisfies the elements of the lesser included offense, it would be incongruous always to order yet another trial as a means of curing a violation of the Double Jeopardy Clause.⁴⁶

C. Federal Circuit Opinions

*Holbrook v. United States*⁴⁷ involved consecutive sentences of twenty years and five years on a two-count indictment; however, the bank robbery indictment at issue involved only a single sentenceable offense. The defendants, after serving five years, attacked the two sentences as violative of the double jeopardy clause. Neither sentence had been fully served, as the trial court ordered the longer sentence to be served first.⁴⁸ The court, noting that the sentencing judge intended a lengthy prison term, concluded that because both sentences alone were valid under the statute, the only invalidity under the circumstances arose from the prohibition against double jeopardy or punishment. The court stated that in these circumstances the judge, and not the defendant, has the power to eliminate one of the two unexecuted consecutive sentences to avoid the possibility of double punishment. The court specified that the judge's decision may be made "up to the time that there has been a legal satisfaction of one of the sentences"⁴⁹ The court thus distinguished *Lange* and *Bradley*, because there the punishments were concurrent, one of which was fully satisfied.⁵⁰

45. *Id.* at 238-41.

46. *Id.* at 246-47.

47. 136 F.2d 649 (8th Cir. 1943).

48. *Id.* at 650.

49. *Id.* at 652.

50. *Id.* The dissent argued that this case conflicted with *Bradley*, and saw "no merit in the arguments which have been based on the fact that appellants had not

The Ninth Circuit in *United States v. Edick*⁵¹ enlarged on the dicta contained in *Holbrook*. The court agreed that the defendant had been illegally sentenced to two consecutive terms for possession of a sawed-off shotgun and possession of a firearm not identified by serial number, for which the defendant had satisfied the first penalty.⁵² The court determined that if a judge sentences a defendant to illegal consecutive terms, the whole sentence must be vacated and the defendant resentenced.⁵³ The court found dispositive the language in *Holbrook* that a court has "the option of vacating either of the sentences 'up to the time there has been a legal satisfaction of one of the sentences.'"⁵⁴ Since one penalty was already satisfied, the court could not resentence the defendant.⁵⁵

Finally, a recent Fifth Circuit case, *United States v. Holmes*,⁵⁶ is quite analogous to *Lange* and *Bradley*, and appears to support their continuing vitality. The defendant pleaded guilty to a single offense of contempt and was sentenced to one year in jail and a fine of \$10,000—although the punishment should have been one or the other. He paid the fine, and contended that *Lange* and *Bradley* precluded further punishment.⁵⁷ The court recognized that resentencing to correct illegal sentences does not involve double jeopardy rights.⁵⁸ However, "[w]hat differentiates the *Bradley*-type case from these other cases is that a *Bradley* defendant who has paid his fine has suffered the maximum sentence authorized by the statutes."⁵⁹ The court followed *Bradley*, despite the awareness that it resulted in a miscarriage of justice.⁶⁰ "*Bradley* may be overly technical, as Chief Justice Stone contended in his dissent there, arguing that the less than one day the contemner had been deprived of his money was *de minimis*. [citation] But it is not for us to overrule or modify *Bradley*."⁶¹

fully completed their five year sentence at the time when they made their motion in the district court." *Id.* at 653 (Woodbrough, J., dissenting).

51. 603 F.2d 772 (9th Cir. 1979).

52. *Id.* at 773.

53. *Id.* at 776.

54. *Id.* at 778 (quoting *Holbrook v. United States*, 136 F.2d 649, 652 (8th Cir. 1943) (emphasis in original)).

55. *Id.* But see *Rollins v. United States*, 543 F.2d 574 (5th Cir. 1976) (per curiam opinion vacating and remanding for resentencing defendant similarly convicted, even though one of the two original sentences was completely served).

56. 822 F.2d 481 (5th Cir. 1987).

57. *Id.* at 483-84.

58. *Id.* at 498 (citing *United States v. Denson*, 603 F.2d 1143, 1148 (5th Cir. 1979) (en banc)).

59. *Id.* at 498-99.

60. *Id.* at 502.

61. *Id.* at 501. A separate opinion vigorously argued that the validity of *Bradley* was already questionable, as it relied on *Lange*, which the author believed was restricted to its facts by *United States v. DiFrancesco*, 449 U.S. 117 (1980). *Holmes*, 822 F.2d at 502-06 (Brown, J., concurring and dissenting). Of particular import to the opin-

III. BACKGROUND OF *THOMAS V. MORRIS*A. *Factual History*

In November 1972, the defendant Larry Thomas and his accomplice entered an auto parts store in St. Louis, Missouri. The general manager, a clerk, and Mentoe Vernell, a regular customer, were the only people in the store. As Thomas's accomplice engaged the general manager in conversation, Thomas pulled a gun and announced a holdup. Vernell reached for Thomas's gun, whereupon Thomas fired four or five shots point blank at Vernell. Vernell, also armed, pulled a gun from his pocket and shot Thomas three times in the arm and leg. The police arrived almost immediately and disarmed Thomas. Both men were rushed to the hospital. Vernell died of gunshot wounds enroute. While in the hospital under medication, Thomas orally confessed to his crimes.⁶²

B. *Procedural History*

1. State Proceedings

Thomas was convicted by the circuit court of felony murder in the first degree and of attempted robbery in the first degree by means of a dangerous and deadly weapon. In May 1973, he was sentenced to life imprisonment for first degree murder and fifteen-years for attempted robbery in the first degree. The terms were to run consecutively, with the fifteen-year sentence to run first. The Missouri Court of Appeals affirmed the conviction, with the only issue before it being the voluntariness of the confession.⁶³

Thomas collaterally attacked the judgment by filing a motion for post-conviction relief.⁶⁴ First filed in 1977, it was denied; but on ap-

ion is rule 35 of the Federal Rules of Criminal Procedure, which states, in part, "[t]he court may correct an illegal sentence at any time." FED. R. CRIM. P. 35. After examining *DiFrancesco* and rule 35, the judge stated: "I find myself in the audacious, and generally impermissible position of seriously questioning whether the Supreme Court's prior decision has been implicitly overruled by its later decisions and rulings." *Holmes*, 822 F.2d at 503 (Brown, J., concurring and dissenting). He concluded "that the *Bradley* decision is no longer valid and that the power of the Court is no longer at an end when a defendant has satisfied a portion of an illegal sentence." *Id.* at 506 (Brown, J., concurring and dissenting). On this point the majority concluded that the Supreme Court had distinguished and left unaffected *Lange*. *Id.* at 497.

62. *State v. Thomas*, 522 S.W.2d 74, 75 (Mo. Ct. App. 1975), *appealed on other grounds following remand*, 665 S.W.2d 621 (Mo. Ct. App. 1983). Thomas subsequently filed a writ of habeas corpus. See *infra* notes 68-135 and accompanying text.

63. *Thomas*, 522 S.W.2d at 77.

64. MO. SUP. CT. R. 27.26.

peal, the dismissal was remanded for a new hearing because the record on appeal did not contain all evidence adduced at the first hearing. In June 1982, following a hearing on Thomas's motion, amended in March 1981 to include the double jeopardy claim, the trial court vacated Thomas's conviction for attempted robbery in the first degree. The court held that convicting the defendant for both attempted robbery and felony murder violated the double jeopardy clause. The court reasoned that the Missouri Legislature did not intend separate and cumulative punishments for felony murder and the predicate felony.⁶⁵ The state trial court left intact Thomas's felony murder conviction and credited his time served to the life sentence.⁶⁶

The previous year, in June 1981, Thomas's fifteen-year sentence for attempted robbery had been commuted by then Missouri Governor Christopher S. Bond.⁶⁷ This was approximately one year prior to the vacation of that sentence by the state trial court. Thomas for the first time raised on appeal the issue of whether his continuing confinement for felony murder violated the double jeopardy clause because of the timing of the commutation and vacation of his attempted robbery conviction.⁶⁸ The Missouri Court of Appeal opined that the

65. See *State v. Morgan*, 612 S.W.2d 1 (Mo. 1981) (en banc). The Missouri Supreme Court decided *Morgan* pursuant to *Whalen v. United States*, 445 U.S. 684 (1980). See *supra* notes 33-39 and accompanying text. *Whalen* requires that separate and cumulative punishments for felony murder and the predicate felony not be imposed unless there is a specific finding that the legislature intended such punishment. *Whalen*, 455 U.S. at 689-90. While the Missouri Supreme Court held that the legislature did not intend separate and cumulative punishments, the Missouri Legislature amended the statutes in 1984 to allow separate and cumulative punishment. MO. REV. STAT. § 565.021(2) (Supp. 1984) ("The punishment for second degree murder shall be in addition to the punishment for commission of a related felony or attempted felony, other than murder or manslaughter."). Thus, although *Morgan* is no longer an accurate statement of the case, it controls here. Such a revised statute is not necessarily unconstitutional under the double jeopardy clause. *Albernaz v. United States*, 450 U.S. 33, 344 (1981) ("The question of what punishments are constitutionally permissible is no different from the question of what punishments the Legislative Branch intended to be imposed. Where Congress intended . . . to impose multiple punishments, imposition of such sentences does not violate the Constitution."); *United States v. DiFrancesco*, 449 U.S. 117, 438 (1980) (double jeopardy not a problem if Congress provides punishment by fine and imprisonment, "even though that is multiple punishment"); see *In re Snow*, 120 U.S. 274, 283-86 (1887) (the proper unit of prosecution is dependent on the legislature's intent); see also *Missouri v. Hunter*, 459 U.S. 359, 368-69 (1983).

66. See *supra* notes 32-35 and accompanying text.

67. The commutation read in part: "Whereas Larry Thomas . . . was . . . convicted of the crime of . . . ATTEMPTED ROBBERY FIRST DEGREE BY MEANS OF DDW, . . . I, CHRISTOPHER S. BOND, Governor of the State of Missouri, by virtue of authority in me vested and for good and sufficient reasons, do hereby commute the sentence of the above mentioned recipient thereof, to a term ending June 16, 1981." See *Thomas v. Morris*, 816 F.2d 364, 366 (8th Cir. 1987), *withdrawn and vacated*, 844 F.2d 1337 (8th Cir. 1988), *cert. granted sub nom. Jones v. Thomas*, 109 S. Ct. 781 (1989).

68. Commutation is defined as "[a]lteration; change; substitution; the act of substituting one thing for another. In criminal law, the change of a punishment to one which is less severe; as from execution to life imprisonment." BLACK'S LAW DICTION-

trial court did not prejudice Thomas since his time served was credited on the life sentence. Thus it was proper to vacate the underlying felony and leave intact the conviction for first degree murder.⁶⁹

2. District Court Proceedings

In August 1984, Thomas filed a petition for writ of habeas corpus⁷⁰ in federal district court asserting that his continued confinement was unconstitutional under the double jeopardy clause. A United States Magistrate recommended that the writ be issued because Thomas had fully served the sentence for attempted robbery. Further, the state court could not vacate the same sentence to force Thomas to serve life imprisonment for the same conviction.⁷¹

The district court rejected this recommendation. It held that the "double jeopardy clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended."⁷² The punishment had not exceeded the legislature's intent; the period of incarceration for the attempted robbery was credited to the life sentence on the felony murder conviction.⁷³

3. Panel Decision

The original panel decision,⁷⁴ decided April 3, 1987, reversed and remanded the case to the district court. The panel ordered the court to institute proceedings for resentencing or retrial within ninety days; otherwise the writ of habeas corpus would issue.⁷⁵ The decision produced three separate opinions, with Judge Hanson⁷⁶ authoring the opinion of the court. Judge McMillian concurred in all but the remedy afforded, to which he dissented and would have issued the writ.⁷⁷ On rehearing en banc, his would be the majority opinion. Judge Bowman dissented from the conclusion that a double jeopardy viola-

ARY 254 (5th ed. 1979). Vacation of judgment is defined as "[t]he setting aside of a judgment on grounds that it was issued by mistake, inadvertence, surprise, excusable neglect or fraud." *Id.* at 1388.

69. *Thomas v. State*, 665 S.W.2d 621, 625 (Mo. Ct. App. 1983).

70. 28 U.S.C. § 2254 (Supp. IV 1986).

71. *Thomas v. Morris*, No. 84-1760 C(5), slip op. at 11 (E.D. Mo. Mar. 29, 1985).

72. *Thomas v. Morris*, No. 84-1760 C(5), slip op. at 3 (E.D. Mo. June 28, 1985).

73. *Id.*

74. *Thomas v. Morris*, 816 F.2d 364 (8th Cir. 1987), *withdrawn and vacated*, 844 F.2d 1337 (8th Cir. 1988), *cert. granted sub nom.* 109 S. Ct. 781 (1989).

75. *Id.* at 370-71.

76. United States Senior District Judge for the Northern and Southern Districts of Iowa, sitting by designation. Judge Hanson did not sit on the en banc panel.

77. *Id.* at 371-72 (McMillian, J., concurring and dissenting).

tion occurred, but agreed that resentencing or retrial would remedy any problems in setting aside the felony murder conviction.⁷⁸

The first issue addressed by the court was whether Thomas had fully satisfied the fifteen-year sentence awarded for conviction of attempted robbery.⁷⁹ If he had not, double jeopardy was not at issue as no double punishment would have occurred.⁸⁰ The court examined Thomas's commutation of sentence⁸¹ and concluded that the document mentioned neither felony-murder conviction nor the accompanying life sentence.⁸² As such, the court found no merit in the State's contention that the commutation was a "substitution of one sentence for the two sentences."⁸³ Since Missouri law regards a commuted sentence equivalent to a completed sentence for the commuted term,⁸⁴ the court held that Thomas had legally satisfied the attempted robbery sentence.⁸⁵

The court next focused on the issue of whether Thomas's continuing confinement violated the double jeopardy clause.⁸⁶ Examining *Lange*⁸⁷ and *Bradley*,⁸⁸ the court concluded that Thomas's position was similar to the defendants' in *Lange* and *Bradley*: the court "did not have the authority to punish him for attempted robbery under both [attempted robbery and felony murder] alternatives of Missouri law."⁸⁹

Constrained by *Lange* and *Bradley* with one alternative fully satisfied, the court decided Thomas was no longer punishable under the alternative sentence.⁹⁰ For support, the court looked to the Supreme Court's belief that "[t]he Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner,"⁹¹ and the Missouri Legislature's disapproval of separate and cumulative punishments.⁹² Thus, the

78. *Id.* at 372-75 (Bowman, J., dissenting).

79. *Id.* at 366-67.

80. *Id.* at 366 (quoting *Holbrook v. United States*, 136 F.2d 649, 652 (8th Cir. 1943) (It is the court's "right to say which of two consecutive sentences, contemporaneously imposed and both unexecuted, shall be eliminated in order not to subject the defendant to . . . double punishment.")). See also *supra* notes 48-52 and accompanying text.

81. See *supra* note 67 and accompanying text.

82. *Thomas*, 816 F.2d at 366.

83. *Id.*

84. *State v. Cerny*, 248 S.W.2d 844, 845 (Mo. 1952).

85. *Thomas*, 816 F.2d at 367.

86. *Id.* at 367-70.

87. See *supra* notes 15-21 and accompanying text.

88. See *supra* notes 22-28 and accompanying text.

89. *Id.* at 368.

90. *Id.*

91. *Id.* at 369 (quoting *United States v. DiFrancesco*, 449 U.S. 117, 135 (1980) (quoting *Bozza v. United States*, 330 U.S. 160, 166-67 (1947))).

92. *Thomas*, 816 F.2d at 369 (citing *State v. Morgan*, 612 S.W.2d 1, 2 (Mo. 1981)). See *supra* note 65 and accompanying text.

court found that vacating the attempted robbery sentence and crediting the time served to the felony-murder sentence was not adequate to remedy a double jeopardy violation.⁹³ Disagreeing with the dissent's view that this was somehow a "hypertechnical interpretation of the law"⁹⁴ the majority believed it lacked discretion to apply the double jeopardy clause other than by observing the order in which the sentences were imposed.⁹⁵

With the goal of approximating the intention of the sentencing judge, the court next addressed the issue of constitutionally remedying the double jeopardy violation.⁹⁶ Following *Morris v. Mathews*,⁹⁷ the court held that "the state court judge can correct the double jeopardy problem by changing the jeopardy-barred felony-murder conviction to a non-jeopardy-barred lesser included offense [e.g., murder]."⁹⁸ Under such an analysis, Thomas would have the burden of showing that absent the improper inclusion of the jeopardy-barred charge, reasonable probability existed that he would not have been convicted.⁹⁹

Judge McMillian, dissenting from the proposed remedy, stated that "[a]ll the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction shall be prosecuted in one proceeding."¹⁰⁰ His additional views regarding the question why the requested writ should issue are addressed in the analysis of his majority en banc opinion.¹⁰¹

93. *Thomas*, 816 F.2d at 370.

94. *Id.* In dissent, Judge Bowman stated: "The extreme hypertechnicality of today's decision is illustrated further by the point that had Thomas been sentenced to concurrent, rather than consecutive, sentences of fifteen years and life imprisonment, commutation of the fifteen-year sentence would not provide a basis for his early release on double jeopardy grounds." *Id.* at 374 (Bowman, J., dissenting).

95. *Id.* at 370.

96. *Id.* at 370-71. See *Gerberding v. United States*, 471 F.2d 55, 56 (8th Cir. 1973) (The proper approach to curing multiple punishment is that which "most clearly approximates the intention of the district judge at the time of the original sentencing.").

97. 475 U.S. 237 (1986).

98. *Thomas*, 816 F.2d at 371.

99. *Id.*

100. *Id.* (McMillian, J., concurring and dissenting) (quoting *Mathews v. Morris*, 475 U.S. 237, 257 (1986) (Brennan, J., dissenting)).

101. *Id.* (McMillian, J., concurring and dissenting). Judge Bowman dissented from the holding and agreed with the proposed remedy. *Id.* at 372 (Bowman, J., dissenting). As his dissent here is virtually a verbatim copy of his dissent from the en banc opinion, it will be discussed in that section. See *infra* notes 119-35 and accompanying text.

IV. ANALYSIS OF THE EN BANC DECISION

Having granted the petitions of both Thomas and the State of Missouri, the Eighth Circuit reheard the case en banc on September 14, 1987.¹⁰² Thomas argued that the panel decision ran contrary to Supreme Court and circuit court precedent.¹⁰³ The state argued that the decision contravened holdings which allowed the imposition of a single sentence to correct the imposition of illegal multiple sentences.¹⁰⁴ The case was decided in Thomas's favor¹⁰⁵ on April 21, 1988, nearly fifteen years after the original imposition of the life sentence and the additional fifteen-year sentence.

A. *The Majority Opinion*

The threshold issue again was whether Thomas fully satisfied the fifteen-year sentence for attempted robbery.¹⁰⁶ Reiterating the wording of the original opinion, the Court concluded that the governor had commuted Thomas's fifteen-year sentence, that Thomas had served the commuted sentence for the attempted robbery, and that as such, under Missouri law Thomas had satisfied the sentence for this offense.¹⁰⁷

Noting that *Lange*¹⁰⁸ was the first case to hold that the double jeopardy clause prohibits multiple punishments for the same offense,¹⁰⁹ the court aligned itself with the position of *Lange*—such a rule was necessary to give meaning to the prohibition against double prosecution for a single offense.¹¹⁰ The court also acknowledged that *In re Bradley*¹¹¹ reaffirmed this principle seventy years later.¹¹² Further, the court cited the Ninth Circuit's opinion in *United States v. Edick*¹¹³ for the rule that "a court lacks authority to impose a second consecutive sentence after the defendant has served one sentence for the offense."¹¹⁴ As a final precedent, the court indicated that the

102. *Thomas v. Morris*, 844 F.2d 1337 (8th Cir. 1988), cert. granted sub nom. *Jones v. Thomas*, 109 S. Ct. 781 (1989).

103. *Id.* at 1339 (citing *In re Bradley*, 318 U.S. 50 (1943); *Ex Parte Lange*, 85 U.S. (18 Wall.) 163 (1873); *Holbrook v. United States*, 136 F.2d 649 (8th Cir. 1943)).

104. *Id.*

105. *Id.* at 1342. This was a 5-4 decision with Chief Judge Law and Judges Heaney, McMillian, Arnold, and Magill comprising the majority. Judges Givson, Fagg, Bowman, and Wollman dissented.

106. *Id.*

107. *Id.* at 1340.

108. See *supra* notes 15-21 and accompanying text.

109. *Thomas*, 844 F.2d at 1340.

110. *Id.*

111. 318 U.S. 50 (1943). See also *supra* notes 22-28 and accompanying text.

112. *Thomas*, 844 F.2d at 1340.

113. 603 F.2d 772 (9th Cir. 1979). See also *supra* notes 51-55 and accompanying text.

114. *Edick*, 603 F.2d at 1341.

Fifth Circuit's decision in *United States v. Holmes*,¹¹⁵ a case factually similar to *Lange*, demonstrated the longevity of this line of cases.¹¹⁶

The court concluded that "[t]he critical factor in the cases discussed above is that the defendant had legally satisfied one of the illegally imposed multiple sentences."¹¹⁷ *Morris v. Mathews*,¹¹⁸ relied upon by the panel for the proposition that a double jeopardy violation can be cured by resentencing for a non-jeopardy-barred lesser included offense,¹¹⁹ lacked this distinction. The defendant in *Mathews* fully satisfied neither the sentence for the aggravated robbery nor the sentence for the felony murder. In the present case, however, Thomas did fully satisfy the sentence for the attempted robbery. Because this same distinction also appeared in the cases of *Lange*, *Bradley*, *Edick*, *Holmes*, and *Holbrook*, the court held the distinction determinative.¹²⁰

Finally, the court rejected the state's argument that the controlling cases dealt with illegal multiple punishments of different quality, e.g., imprisonment and fine.¹²¹ The state cited no authority, and the court believed there to be none, for the assertion that multiple punishments of a similar quality for the same offense are permitted by the double jeopardy clause.¹²² As such, the court concluded that Thomas's continuing confinement violated the double jeopardy clause. The matter was remanded to the district court with instructions to issue the writ of habeas corpus.¹²³ The Supreme Court granted certiorari on January 9, 1989.¹²⁴

B. *The Dissenting Opinion*

Judge Bowman dissented vehemently, contending that Thomas had

115. 822 F.2d 481 (5th Cir. 1979). See also *supra* notes 56-61 and accompanying text.

116. *Thomas*, 844 F.2d at 1341.

117. *Id.* The court emphasized this point by noting that the district court had the option of vacating either of two sentences improperly imposed only 'up to the time there has been a legal satisfaction of one of the sentences.'" *Id.* (quoting *Holbrook v. United States*, 136 F.2d 649, 652 (8th Cir. 1943)).

118. 475 U.S. 237 (1986). See *supra* notes 43-46 and accompanying text.

119. *Thomas v. Morris*, 816 F.2d 364, 371 (8th Cir. 1987), *withdrawn and vacated*, 844 F.2d 1337 (8th Cir. 1988), *cert. granted sub nom. Jones v. Thomas*, 109 S. Ct. 781 (1989).

120. *Thomas v. Morris*, 844 F.2d 1337, 1342 (8th Cir. 1988), *cert. granted sub nom. Jones v. Thomas*, 109 S. Ct. 781 (1989).

121. *Id.*

122. *Id.*

123. *Id.*

124. *Jones v. Thomas*, 109 S. Ct. 781 (1989).

not been placed in double jeopardy.¹²⁵ He believed that under the majority opinion, Thomas would only serve seven years following conviction of attempted robbery and felony murder and “go free on the basis of a series of fortuitous events.”¹²⁶

The dissent began by distinguishing *Lange* and *Bradley* on three grounds. First, it was not established until 1981 that it was illegal in Missouri to impose two sentences where there was a conviction of both felony murder and an underlying felony;¹²⁷ whereas, in *Lange* and *Bradley* “the first judgment was confessedly in excess of the authority of the court.”¹²⁸ Second, Thomas’s case involved two separate alternative statutory punishments for one offense, as in *Lange* and *Bradley*.¹²⁹ Third, since both punishments of Thomas involved imprisonment, the sentences were interchangeable,¹³⁰ unlike the punishments in *Lange* and *Bradley*.¹³¹

The dissent argued that the majority opinion produces “strangely anomalous results.”¹³² First, the majority ignored precedent by holding that determinative weight should be given to the intention of the sentencing judge when deciding which of two sentences that cannot stand together must be vacated.¹³³ Here, however, the majority made

125. *Thomas*, 844 F.2d at 1342-46 (Bowman, J., dissenting).

126. *Id.* at 1342 (Bowman, J., dissenting). A footnote continued: “Under today’s decision, Thomas effectively slips through a judicially manufactured crack in the criminal justice system, even though his early release contravenes not only the intent of the sentencing court, but also the intent of the Missouri legislature as expressed in the current statutory punishment for the felony murder.” *Id.* at 1343 n.1 (Bowman, J., dissenting). See also *supra* note 65.

127. *Id.* (Bowman, J., dissenting).

128. *Id.* (Bowman, J., dissenting) (quoting *Ex Parte Lange*, 85 U.S. (18 Wall.) 163, 175 (1873)). The dissent argued that the majority relied upon dicta in *Holbrook* to find that *Lange* controlled this case, and that “no circuit court of appeals had found *Lange* to be applicable beyond its narrow facts, *i.e.*, in the situation of ‘statutory alternative sentences’ for the same offense.” *Thomas*, 844 F.2d at 1343 n.2 (Bowman, J., dissenting) (citing *Holbrook v. United States*, 136 F.2d 649, 653 (8th Cir. 1943) (Stone, J., concurring)).

129. *Thomas*, 844 F.2d at 1344 (Bowman, J., dissenting).

130. The dissent cited *North Carolina v. Pearce*, 395 U.S. 711 (1969), for the proposition that “when resentencing is required following a new trial, time already served under the old sentence [must] be credited toward the new sentence.” *Thomas*, 844 F.2d at 1344 (Bowman, J., dissenting). The dissent agreed that Thomas’s double jeopardy claim would be valid if he were made to serve both sentences, but here the time served on the attempted robbery sentence was credited to his life sentence for felony murder, in accordance with *Pearce*. “However, the double jeopardy clause does not require that Thomas be given the choice of which of two simultaneously imposed prison sentences he is to serve when it transpires that he cannot be made to serve both.” *Id.* (Bowman, J., dissenting). See *Rollins v. United States*, 543 F.2d 574 (5th Cir. 1976) (remanded for vacation of shorter of two consecutive sentences which had been fully served).

131. *Thomas*, 844 F.2d at 1344 (Bowman, J., dissenting). This factor would also distinguish *Holmes* and *Edick*, on which the majority relied. See *supra* notes 51-61 and accompanying text.

132. *Thomas*, 844 F.2d at 1344 (Bowman, J., dissenting).

133. *Id.* (Bowman, J., dissenting) (citing *Jones v. United States*, 396 F.2d 66, 69 (8th

the decisive weight to be the order of the sentences; the anomaly is that Thomas would have no claim if he were serving his life sentence first.¹³⁴ "Surely, the question of whether a convicted murderer is to serve the life term that the sentencing authority plainly intended he was to serve should not be decided on a basis so essentially whimsical."¹³⁵ Second, if Thomas had been sentenced to concurrent terms, rather than consecutive, there would be no violation.¹³⁶ "[T]he right of the court in such a situation to simply vacate the shorter sentence and allow the longer one to stand has been recognized."¹³⁷

The dissent concluded that Thomas's release is not required by case law nor by language in the double jeopardy clause itself. Under Thomas's present sentencing order he is subject to only one punishment—the life sentence for felony murder. "The time he already has served on the fifteen-year sentence for attempted robbery would count toward his completion of the life sentence. He therefore would serve in total not one day more than the period of confinement that a life sentence entails."¹³⁸

As a parting shot, the dissent concluded that if a double jeopardy violation must be found, then returning the case for proceedings in the state court pursuant to *Morris v. Mathews*¹³⁹ would cure the vio-

Cir. 1968), *cert. denied*, 393 U.S. 1057 (1969); and *Sawyer v. United States*, 312 F.2d 24, 27-29 (8th Cir. 1962), *cert. denied*, 374 U.S. 837 (1963)).

134. *Thomas*, 844 F.2d at 1344 (Bowman, J., dissenting).

135. *Id.* at 1344-45 (Bowman, J., dissenting). The dissent emphasized that the United States Supreme Court "rejected the sporting game approach to double jeopardy" in *Green v. United States*, 365 U.S. 301, 306 (1962). "Although petitioner is technically correct that sentences should not have been imposed on both counts, the remedy he seeks does not follow. . . . Plainly enough, the intention of the district judge was to impose the maximum sentence of twenty-five years for aggravated bank robbery, and the formal defect in his procedure should not vitiate his considered judgment." *Id.*; see also *supra* note 91 and accompanying text.

136. *Thomas*, 844 F.2d at 1345 (Bowman, J., dissenting).

137. *Id.* (Bowman, J., dissenting) (quoting *Hardy v. United States*, 292 F.2d 192, 194 (8th Cir. 1961)). On this point the dissent concluded the majority "fail[ed] to offer any coherent reason for its conclusion that the consecutive rather than concurrent nature of Thomas's prison sentences breathes life into a double jeopardy claim that otherwise would have been dead on arrival." *Thomas*, 844 F.2d at 1346 (Bowman, J., dissenting).

138. *Id.* (Bowman, J., dissenting). This tied in with the dissent's previous comment about the state trial court: "The original error in sentencing Thomas was made in good faith reliance on existing Missouri law. . . . The law of Missouri authorizes a life sentence for felony murder and it is clear that the sentencing court intended that Thomas should serve a life sentence. In these circumstances, it is little short of preposterous that the sequence in which the consecutive sentences were pronounced should provide a basis for Thomas's early release." *Id.* at 1345 (Bowman, J., dissenting).

139. 475 U.S. 237 (1986). See *supra* notes 43-46 and accompanying text.

lation.¹⁴⁰ But on this point the dissent deferred to the original panel decision.¹⁴¹

V. IMPACT

The decision in *Thomas v. Morris* technically appears to be correct, at least in the sense of applying stare decisis. However, it is this technicality which makes the result so disturbing. Larry Thomas did murder Mentoe Vernell. The Missouri Legislature did provide for life imprisonment for such a murder. The sentencing judge did hand down a life sentence. Thomas will now go free because of what amounts to a mere sentencing error.

Ironically, the sentencing judge was not even aware of his "error" because the Missouri Supreme Court did not declare it as such until eight years later.¹⁴² Had the governor not been so quick to rectify the perceived wrong by commuting the lesser erroneous sentence, no double jeopardy issue would have arisen. Had the legislature made clearer its intent that punishment be authorized for both crimes, no double jeopardy issue would have arisen. Had the sentencing judge ordered the two sentences to run concurrently—or simply reversed the order in which they would be served consecutively—no double jeopardy issue would have arisen. Surely this is what the Supreme Court disavowed when rejecting "the sporting game approach to double jeopardy."¹⁴³ If not, this case cuts against the settled proposition that "[t]he Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner."¹⁴⁴

Unfortunately, the United States Supreme Court may not reach this issue; it has certified a much narrower initial issue: "May federal appeals court overturn a remedy granted by state court for double jeopardy violation as being contrary to its understanding of state law?"¹⁴⁵ An answer in the negative will overturn the decision without needing to address the more difficult double jeopardy issue.¹⁴⁶ Regretfully, Chief Justice Stone's fears, as expressed in his dissent in

140. *Id.* at 1346 (Bowman, J., dissenting).

141. *Id.* (Bowman, J., dissenting).

142. *See supra* note 65 and accompanying text.

143. *Green v. United States*, 365 U.S. 301, 306 (1980). *See supra* note 135 and accompanying text.

144. *United States v. DiFrancesco*, 449 U.S. 117, 135 (1980). *See supra* note 91 and accompanying text.

145. 57 U.S.L.W. 3317 (1989). *Jones v. Thomas* is on the Supreme Court docket as No. 88-420.

146. Most likely this would in effect affirm the original panel decision and its remedy under *Morris v. Mathews*. *See supra* notes 96-98 and accompanying text. It is interesting that the Supreme Court might now defer to the state court, when the original problem arose on remand to interpret state statutes in accordance with federal precedent in *Whalen v. United States*, 445 U.S. 684 (1980).

In re Bradley, may well become realized. His belief that *Ex parte Lange* does not control where no real double punishment occurs is sound.¹⁴⁷ *Thomas* presents the vehicle through which the Supreme Court could restrict application of technical constructions which free a legally guilty defendant—even when the violations for which the Constitution was drafted to protect against did not, in fact, occur.

The majority in *Thomas* cannot convincingly provide precedent which would lead a court to conclude that *Thomas* must be freed. Instead, the authorities cited make it only appear that such a conclusion should be reached. As the dissenting judges ably argued, the authorities relied upon by the majority dealt with statutory alternative punishments for a single act, rather than separate punishments for two different acts.¹⁴⁸ *Lange* and *Bradley* dealt with the punishments of imprisonment and a fine, whereas *Thomas* involved punishment by imprisonment only, albeit sentences of different lengths of time. This distinction alone deserves special scrutiny; at least greater scrutiny than afforded by the majority.¹⁴⁹

These distinctions present appropriate grounds for the Court to decline to follow *Lange* and *Bradley*. With these thoughts in mind, the Supreme Court now has the opportunity to distinguish or overrule inopposite precedent so that, on the present facts, sound logic and the intent of the legislature and sentencing judge in meting out punishment for crime will not be defied.

VI. CONCLUSION

Chief Justice Stone stated it best: "The Constitution is concerned with matters of substance not of form. Nothing in its words or history forbids a common sense application of its provisions, or excludes them from the operation of the principle of *de minimis*."¹⁵⁰ Here, form has won over substance. To the extent past precedent mandates such a decision, the Supreme Court should examine this authority and reject it. The business of the courts should be allowed to proceed as just that: a business, and not a game.

147. *In re Bradley*, 318 U.S. 50 (1943). See *supra* note 28 and accompanying text.

148. See *supra* note 129 and accompanying text.

149. See *supra* notes 130-31 and accompanying text.

150. *Bradley*, 318 U.S. at 53-54 (Stone, C.J., dissenting).

