1951

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PUNISHMENT FOR CRIME: THE SUPREME COURT AND THE CONSTITUTION

FRANK J. WHALEN, JR.*

In the past six terms of the Supreme Court punishment for crime has received little treatment. Only fifteen cases have been fully considered. Several conclusions can be drawn. Perhaps the federal and state legislatures, the judiciary, and the prosecuting and correction officers have learned to act within the confines of constitutional provisions to which time has at last given content. Or perhaps the pressure of other business has compelled the Court to leave questions with such narrow impact (sometimes upon a single individual only) to the inferior courts. It may be that counsel have failed to present important constitutional issues in the sharpest relief. Perhaps the truth is this prosaic: the usual criminal defendant who has capable counsel is not put into a position where the punishment imposed is violative of the Federal Constitution; and those who are not well represented (or are without counsel at all) either never become aware of the violation, or awareness comes at such a late stage that the objection is lost. Yet, the few cases do show that the portions of the Constitution applicable to punishment are still effectual.

We have in our Constitution certain provisions relating primarily to punishment and other more general limitations channelizing the whole governmental process. Some of these provisions

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1. Ten cases involved constitutional issues. The other five concerned interpretation of federal statutes.

2. After long disuse, the bill of attainder provision was revived in United States v. Lovett, 328 U. S. 303 (1946).

Electrocution stood approved for sixty years, only to be the subject of the celebrated case of Willie Francis, involving mechanical failure, 329 U. S. 459 (1947).
restrict only the Federal Government; others apply to the States. This paper has the modest aim of indicating, in a broad way, the past application of them to punishment for crime, and of interrelating the constitutional doctrines thus developed.

Certain technical matters are beyond the scope of this undertaking. For example, the determination of whether a crime is "infamous" so that the defendant has a constitutional right in federal courts to trial by jury and indictment or presentment by a grand jury depends largely on the possible punishment. Such requirement relates more to criminal procedure, and therefore is not treated. So also, certain provisions, such as double jeopardy, due process, and equal protection, with direct relevance to punishment, have other important functions, which are not developed here.

In this area as elsewhere in constitutional law, there has been a long struggle to delineate those notions contained in the Bill of Rights which the general guarantees of the Fourteenth Amendment—due process, equal protection, and privileges and immunities of citizens of the United States—comprehend. The decisions of the nation's highest court have been so few and even dicta so rare, that it would take a bold prognosticator indeed to predict

3. Directly applicable to the Federal Government only: (1) double jeopardy, Amend. V; (2) cruel and unusual punishments, and excessive fines, Amend. VIII.
   Directly applicable to both Federal and State Governments: (1) bills of attainder and ex post facto laws, Art. I, §§ 9, 10; (2) due process of law, Amend. V. and XIV.
   Directly applicable to the States only: (1) equal protection of the laws, Amend. XIV.


   The protections of Amendments I-VIII are not included within the privileges and immunities of citizens of the United States guaranteed by the Fourteenth Amendment, except so far as such rights pertain to federal citizenship. Slaughter-House Cases, 16 Wall. 36 (U.S. 1873), followed in In re Kemmler, supra, as to allegedly cruel and unusual punishments. Nor is "due process of law" of the Fourteenth Amendment shorthand for Amendments I-VIII. In re Kemmler, supra, but compare Louisiana ex rel. Francis v. Resweber, 329 U. S. 459 (1947); Palko v. Connecticut, supra, applying a natural law interpretation of "due process" as to allegedly cruel and unusual punishments, and double jeopardy.

the result in any but an extreme situation. An attempt has been made here to indicate how far the inhibition of the States has progressed. Suffice it to say now that such expansion is very slight. Thus far the Court has considered itself a poor geometer of the proper balance between the interests of society in retribution, reformation, deterrence, and elimination of offenders, and the interests of the convicted criminal.

Most of all, it should be remembered that, unlike the victim of a forced confession, the complainant against punishment for crime seldom stands before legislature or court in a sympathetic light; for he is a criminal, convicted by orderly process of law.

I. CRUEL, UNUSUAL, AND EXCESSIVE PUNISHMENTS

The only general provision in the Federal Constitution, specifically affecting punishment, is embodied in the Eighth Amendment:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."8

This provision has a clearly traceable lineage, although it is of no great antiquity.7

In England during the revolutionary struggles of the Tudor and Stuart reigns there had been great atrocities. Incarcerations had been drawn out for long, indefinite periods for failure to furnish exorbitant bail, or to pay enormous fines; and punishments of extreme ferocity had been imposed.8 As a consequence Parliament, after the accession of William and Mary, included in the Bill of Rights, in 1689, a provision that

6. Proposed by Congress, September 25, 1789; ratified by three-fourths of the states, as required, December 15, 1791. Art. I, Sec. 3, limits the effect of impeachment; Art. III, Sec. 3, limits the effect of attainder of treason.

7. Compare Double Jeopardy and Due Process of Law, infra. Limitations on fines for felonies (i.e., feudal offenses) were stated in Magna Carta c. 20; amercements were to save the freeman his contenement; to the merchant, his merchandise; and to the villein, his wainage. Cooley, Constitutional Limitations 329 (1868); McKechnie, Magna Carta 284-293 (2d ed. 1914).

8. Typical in the time of James II was the sentence of Titus Oates for perjury: (among other punishments) to stand at the pillory at divers times and places, and to be whipped from Aldgate to Newgate, and Newgate to Tyburn, on successive days, and to be imprisoned for life. 10 Howell's State Trials 1079, 1317. Oates was relieved of the balance of the sentence by royal pardon in 1689. William, Earl of Devonshire, was fined 30,000£ and committed for failure to pay. This was likewise set aside in 1689. 11 Howell's State Trials 1362. 6 Holdsworth, History of English Law 214-215 (3rd ed. 1922).

Complaints on the same score were part of the reason for the demise of the Star Chamber in 1641. 11 Howell's States Trials 1362; Cooley, op. cit. supra note 7, at 342-343. 1 Holdsworth, op. cit. supra at 505-506, is less severe, pointing out that large fines were often reduced by the Star Chamber, and statutory punishments in common law courts were as oppressive.
“excessive bail ought not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

Thus, the language of the English constitutional provision was borrowed verbatim, save for the substitution of the hopeful “shall not” for the more candid “ought not.”

(1) Cruel Punishment

Aside from the matter of excessive bail it is apparent that the constitutional guaranty is directed at two elements in punishment: first, how it is inflicted; and secondly, how much is imposed.

Although there had been one previous decision, the first serious consideration in the Supreme Court came in 1878. The procedural impediments to review of federal criminal cases precluded until that late date the raising of such an issue to the highest appellate level. The cause came on writ of error from the Territory of Utah. The defendant relied on the Eighth Amendment as inhibiting the Territory, which derived its authority from the Federal Government and was therefore subject to the constitutional limitations of the Bill of Rights. A territorial statute provided that a capital offense should be punished by “being shot, hung, or beheaded,” as the court should direct or as the defendant should elect. The defendant had been convicted of murder in the first degree and sentenced to be shot. It was held that death by shooting was not an unusual punishment, since it was less arduous than methods known to the common law and was regularly imposed under the

10. Analogous provisions were not unknown to the States: e.g., the Body of Liberties of the Massachusetts Bay Colony included, in 1641: “For bodilie punishments we allow amongst us none that are inhumane, barbarous, or cruel.” Colonial Laws of Mass. (1889), p. 43. See also the pre-1791 state constitutional provisions collected by Mr. Justice White in Weems v. United States, 217 U.S. 349, 394 (1910).
11. It must be remembered that incarceration before trial can be used, in the absence of deliverance on habeas corpus, to punish without a hearing. Cf. U. S. Const. Art. I, § 9, Cl. 2, prohibiting suspension of the writ of habeas corpus “unless when in cases of rebellion or invasion the public safety may require it.” Cooley, op. cit. supra note 7, at 338-345; 6 Holdsworth, op. cit. supra note 8, at 39.
12. Wilkerson v. Utah, 99 U. S. 130 (1878). Pervear v. Massachusetts, 5 Wall. 475 (U.S. 1867) had ended in curt dismissal of a writ of error on which defendant contended that a fine of $50 and 3 months at hard labor for illegal sale of liquor was cruel and unusual.
13. See note 115 infra.
14. Wilkerson v. Utah, 99 U. S. 130, 135 (1878): dragging to place of execution for treason; disembowelling alive, beheading, and quartering, for high treason; dissection for murder; burning alive for treason by a female.
Articles of War.\textsuperscript{15} No torture being involved, the writ of error was dismissed.

The next important decision was \textit{In re Kemmler},\textsuperscript{16} in which the petitioner, who was under death sentence imposed by a state court, attacked the constitutionality of electrocution as violative of the Eighth Amendment and the due process of law and privileges and immunities guarantees of the Fourteenth Amendment. The case arose on an original petition for writ of habeas corpus from the Supreme Court. Habeas corpus was denied on the ground that the petitioner should first be heard in the Federal Circuit Court.\textsuperscript{17} However, the New York Court of Appeals had already affirmed the denial of habeas corpus by a state court, so that the United States Supreme Court undertook to hear the merits on a motion for a writ of error to review the state habeas corpus decision.\textsuperscript{18}

The sentence, pursuant to statute, read in part:

"... by then and there causing to pass through the body of him... a current of electricity of sufficient intensity to cause death, and that the application of such current of electricity be continued until he... be dead."\textsuperscript{19}

In the legislative discussions leading up to the adoption of electrocution for capital punishment, there had been a great deal of scientific information considered, all of it directed to whether the method was dependable and instantaneous.\textsuperscript{20} Much evidence of a similar nature had been taken in the New York judicial proceeding. The Court of Appeals had held first that evidence could not be introduced to overthrow the presumption of constitutionality; and secondly, even if the evidence were considered, the defendant had failed in the attempt.\textsuperscript{21} The state court had treated the case as one involving only the state constitution, but since the state and federal provisions were substantially alike, the state court,

\textsuperscript{15} The Articles did not specify the manner of inflicting the death penalty, but custom approved shooting or hanging. \textit{Id.} at 133-135.
\textsuperscript{16} 136 U. S. 436 (1890).
\textsuperscript{17} The writ of habeas corpus had already been granted by the Circuit Court, and hearing was imminent.
\textsuperscript{18} Such appears to have been common practice. See, \textit{e.g.}, \textit{Spies v. Illinois}, 123 U. S. 131 (1887).
\textsuperscript{19} \textit{In re Kemmler}, 136 U. S. 436, 441 (1890).
\textsuperscript{20} \textit{Id.} at 444, 449.
\textsuperscript{21} It was the legislature of the same State which, by basing its 1933 Milk Control Act on even more thorough investigation and findings of fact, laid the foundation for the reversal of the laissez-faire trend of substantive due process decisions. \textit{Nebbia v. New York}, 291 U. S. 502 (1934).
in substance, had decided the federal question adversely to Kemmler.

The Supreme Court rejected the contention that the privileges and immunities clause applied, there being no right connected with federal citizenship,22 and repeated as settled law the principle that the first eight Amendments restricted only the Federal Government.23 However, the opinion of Chief Justice Fuller went on to indicate that even if electrocution were employed by the Federal Government, no constitutional right would be violated:

"Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life."24

With the decision of the Kemmler case, the basic issue of the constitutionality of electrocution was settled. And indeed no serious doubt was entertained by any of the state courts which later came to consider the constitutionality of the lethal gas chamber.25 Nearly sixty years passed before the constitutionality of electrocution again was considered by the Supreme Court.26

In 1946, an attempted electrocution of Willie Francis failed, presumably because of mechanical defect. Denial of writs of certiorari, mandamus, prohibition, and habeas corpus by the state courts27 was followed by Louisiana ex rel. Francis v. Resweber in the Supreme Court on writ of certiorari.28 The petitioner contended that the Fourteenth Amendment due process clause would be violated by a second execution, insofar as the due process provision

23. See cases cited note 5 supra; 2 Story, Commentaries on the Constitution § 1904 (2d ed. 1851).
24. In re Kemmler, 136 U. S. 436, 447 (1890). The decision was rendered only three days after the case was argued orally, indicating that there was little dispute within the Court.
26. Malloy v. South Carolina, 237 U. S. 180 (1915) indicates how thoroughly the issue was closed.
protected against double jeopardy and cruel and unusual punishments.

In an opinion by Mr. Justice Reed, speaking for four members of the Court, it was assumed *arguendo* that the Fourteenth Amendment included protection against cruel and unusual punishment.\(^29\) And it was presumed (absent proof) that the state officials had carried out their duties in a careful and humane manner.\(^30\) The vague contours of the due process clause were expanded to include some element of protection against arbitrary punishment:

> "The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence. . . . The Fourteenth [Amendment] would prohibit by its due process clause execution by a state in a cruel manner."\(^31\)

However, the Court concluded that the petitioner was the victim of an unfortunate accident, inflicting on him no more hardship than would have resulted if the cell block had burned down. No law can protect against accidents.\(^32\) The concurrence of Mr. Justice Frankfurter, which was needed to constitute a majority, was grounded upon the continued freedom of the state to administer criminal justice unless it should offend "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."\(^33\)

Four members of the Court were unwilling to decide against the petitioner in the existing state of the record. They urged that the case be remanded for further trial of the question of whether in fact current was applied to the petitioner, and if so, how much.\(^34\) The dissenting opinion by Mr. Justice Burton emphasized that if

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\(^29\) *Id.* at 462.

\(^30\) *Ibid.*

\(^31\) *Id.* at 463. The struggle to select those fundamental notions of justice in a free society which the due process clause of the Fourteenth Amendment encompasses has been the object of a long series of cases. See *supra*, note 5. It would seem that at least the portion of the Eighth Amendment providing against cruel and unusual punishments is sufficiently ingrained in the fabric of Anglo-American tradition to qualify. Cf. 2 Story, *op. cit.* *supra* note 23, at § 1903: "... it is scarcely possible, that any department of such a government should authorize or justify such atrocious conduct."

\(^32\) *Id.* at 459, 464-465. A contention grounded on denial of equal protection by inflicting psychological stress which others avoided was similarly rejected. In 1701, Captain Kidd was hanged again, when the rope broke the first time. 1 Pelham, Chronicles of Crime 6 (1887).

\(^33\) *Id.* at 469, quoting language of Mr. Justice Cardozo in *Snyder v. Massachusetts*, 291 U. S. 97, 105 (1934).

\(^34\) Justices Burton, Douglas, Murphy, and Rutledge. *Id.* at 472. In the briefs there were conflicting affidavits as to what had occurred to Francis at the first attempt.
in fact there would be a second application of electric current, this would not be instantaneous execution, which had been upheld in Kemmler's case.\textsuperscript{35} To the minority the intent of the executioners was irrelevant: torture is torture to the tortured whether intentional or not. As for the interest of Louisiana in punishing offenders the dissenters would regard the problem as one for the state to solve. Should there be a denial of due process by the proposed punishment, the state would have to find other means of dealing with petitioner.\textsuperscript{36}

In the year following the Kemmler case, perhaps encouraged by the results of a case involving an \textit{ex post facto} law,\textsuperscript{37} appeals were brought in two cases on the ground that solitary confinement pending electrocution violated an alleged "fundamental right to be free from cruel and unusual punishments inflicted by a state."\textsuperscript{38} The contention was justly regarded as of little merit.

In 1910, \textit{Weems v. United States}\textsuperscript{39} came to the Court through the territorial courts of the Philippine Islands. Upon conviction of falsifying a public and official document recording certain wage payments (without proof of fraud, injury to anyone, or even selfish purpose), the defendant had been sentenced to fifteen years \textit{cadena temporal},\textsuperscript{40} and fined four thousand pesos and costs. The \textit{cadena temporal} was a form of punishment derived from the Spanish regime in the Philippines and had long been employed there. Under such a sentence the prisoner was kept at hard labor, chained at the ankles and wrists, and deprived of any assistance from without the prison. He was subjected to civil interdiction, perpetual absolute disqualification, and surveillance for life.

\begin{footnotes}
\footnote{35. \textit{Id.} at 473-477.}
\footnote{36. \textit{Id.} at 480-481. It is doubtful that other means could be found without violating the \textit{ex post facto} clause. \textit{See}, e.g., Hartung v. People, 26 N. Y. 167 (1863). Death could not be imposed and imprisonment was not authorized by statute at the time of the crime.}
\footnote{37. \textit{Ex parte Medley}, 134 U. S. 160 (1890), discussed text at note 184 \textit{infra}. Medley's case was put to some astonishing uses. In Rogers \textit{v. Peck}, 199 U. S. 425 (1905), it was relied upon, even though the confinement was the result of successive reprieves granted to enable the condemned woman to prosecute appeals.}
\footnote{38. McElvaine \textit{v. Brush}, 142 U. S. 155 (1891); Trezza \textit{v. Brush}, 142 U. S. 160 (1891). In both cases, the question was raised on appeal from denial of habeas corpus by federal court. The circumstance that there had been a reversal of the first trial on appeal by the defendant, followed by a conviction at the second trial (with duplication of the solitary confinement) was regarded as of little importance. \textit{Cf. Murphy v. Massachusetts}, 177 U. S. 155 (1900).}
\footnote{39. 217 U. S. 349 (1910). Due to deaths and illness, the Court consisted of only six: Chief Justice Fuller and Justices McKenna, Harlan, and Day for reversal; Justices Holmes and White dissenting.}
\footnote{40. Literally "temporary chains."}
\end{footnotes}
In language strongly reminiscent of Marshall's: "We must never forget it is a constitution we are expounding," the Court held, in an opinion by Mr. Justice McKenna, that the punishments prohibited by the Eighth Amendment should not be limited to those forms of torture which the framers of the Bill of Rights had in mind. In short, that a punishment was developed under the Roman rather than the Anglo-Saxon dispensation made it no less subject to condemnation. Strongly weighing against the validity of the punishment, was the fact that it exceeded by far the punishments exacted for greater crimes.

Justices White and Holmes dissented on two grounds: first, the question of the punishment being cruel and unusual had not been raised below; secondly, the legislature should be left free to fix the punishment according to the necessity of the situation without measuring it against those imposed in other United States jurisdictions, and without including a reformatory objective in framing the treatment of offenders. The opinion by Mr. Justice White emphasized the supposed function of the English Bill of Rights, from which the Eighth Amendment was derived, in limiting the Crown and the judiciary, but not the Parliament. He argued that the English interpretation was that "cruel and unusual" must be regarded disjunctively and that *cadena temporal* could in no sense be considered "cruel" because no torture was involved.

A few attacks, most of them abortive, have been made recently upon the constitutionality of the chain gang as it is employed in some of the Southern states. Thus far, no case has brought the question to the Supreme Court for decision on the merits.

41. Weems v. United States, 217 U. S. 349, 373 (1910). Actually the provision at issue was the Article of the Organic Act corresponding to the cruel and unusual clause of the Eighth Amendment.

42. Transition from Civil Law to Anglo-American notions in the newly acquired Spanish Territories involved a series of cases turning on the *ex proprio vigore* doctrine. See, e.g., note 90 infra.


44. Id. at 383-87.

45. Id. at 397. A leading British historian concludes that the English Bill of Rights was intended to bind all branches of government by reestablishing the supremacy of law. *6 Holdsworth, op. cit. supra* note 8, at 258-262.


48. In Johnson v. Dye, *supra* note 47, it was held, six judges sitting en banc (one dissenting in part), that the Georgia chain gang as the testimony described it constituted a cruel punishment prohibited by the Fourteenth
The problem of proof is extreme in such situations and may preclude for a long time a definitive adjudication of the issue.\textsuperscript{49} Certain it is that if conditions continue in those states, the enlargement of the scope of the Fourteenth Amendment by the Francis case, at least to include torture within the methods of punishment prohibited by the due process clause, will provide a healthy atmosphere in which the fuel of the Weems case can be used.\textsuperscript{50}

\begin{enumerate}
\item \textbf{Excessive Punishment}
\end{enumerate}

The Eighth Amendment expressly prohibits "excessive fines." As we have seen, the object was to eliminate the possibility of abuses such as had existed in England prior to the Revolution.\textsuperscript{51} There is, however, no express limitation on the quantity of other forms of punishment which may be imposed.

At the outset one caveat must be noted. The problem of interpretation of a criminal statute to determine what is the unit of prohibited conduct to which a given measure of punishment is applied, is completely distinct from the problem of applying the constitutional limitation to the punishment ultimately imposed through the definitive action of the sentencing court. Consequently we are not concerned primarily with those cases which involve the question of how many offenses have been committed, however unwise it may seem that there should be multiplication of offenses by reason of some minor distinguishing element.\textsuperscript{52} Of Amendment. The case arose in a Federal District Court in Pennsylvania on petition for writ of habeas corpus by an escaped convict who was being held for extradition. The judgment was reversed by the Supreme Court per curiam on the authority of \textit{Ex parte Hawk}, 321 U. S. 114 (1944), for failure to exhaust remedies in the state courts in 338 U. S. 864 (1949).

Crucial, indeed, will be the question of the proper remedy where the issue is raised in the state of asylum: remand to the demanding state, absolute discharge, or conditional discharge are some of the possibilities. See Note, 2 Stan. L. Rev. 174 (1949).

\textsuperscript{49} E.g., The petitioner in Johnson v. Dye, \textit{supra} note 47, called as witnesses other fugitives, and a former Army man who had observed such punitive methods in Georgia. Also magazine articles dealing with conditions in Georgia were introduced. The difficulty is even greater than that encountered in proof of foreign law, because the credibility of the witnesses is necessarily suspect. Undoubtedly prejudices such as hamper the enforcement of the Federal Civil Rights Statutes would similarly make an attack upon the chain gang in local courts at least as difficult.

\textsuperscript{50} See Solesbee v. Balkcom, 339 U. S. 9 (1950) (Frankfurter, J., dissenting, arguing that execution of an insane person would deny due process of law).

\textsuperscript{51} See text at note 8 \textit{supra}.

\textsuperscript{52} See text at note 139, \textit{infra}, where the matter is considered at length. Typical are \textit{In re Henry}, 123 U. S. 372 (1887) (each mailing, and each receipt of a single letter or packet held a separate offense of using the mails
course, the punishment, as ultimately imposed, must be tested in relation to the crime and the criminal, for obviously there can be no "excessive fine" or "imprisonment of such duration as to violate the fundamental notion of due process of law," in the abstract. "Make the punishment fit the crime!" is more than a lilting lyric. Still the interpretation of the statute is an independent process, subject only to the usual desire to avoid constitutional doubts.

One of the earliest cases involving the excessiveness of punishment, and one deserving renewed interest since the decision of the Francis case was O'Neil v. Vermont. The defendant had been convicted of selling liquor in violation of Vermont law. Each sale, under the state statute, constituted a separate offense and was subject to a fine of twenty dollars. Proof was found adequate by the state courts on 307 offenses, with the result that the total fine exceeded six thousand dollars. The defendant was sentenced (unless payment was made within a fixed time) to imprisonment for 19,914 days (over 54 years) at the going rate of three days for each dollar. The writ of error was dismissed by the Supreme Court for want of an adequately presented federal question.

Such a holding is somewhat appalling even today, however

53. 144 U. S. 323 (1892).
54. These were C.O.D. sales made from New York State, through instrumentalities of interstate commerce. The case was litigated in the state courts during the reign of the License Cases, 5 How. 504 (U.S. 1847). Leisy v. Hardin, 135 U. S. 100 (1890) was decided after the writ of error had been taken to the Supreme Court. It seems certain from the opinions that the Court considered that the latter application of the silence of Congress doctrine would strike down the Vermont statute as applied to this type of transaction. Mr. Justice Harlan, dissenting in O'Neil v. Vermont, supra note 53, at 366, indicates the belief that the interstate commerce question was still open to defendant, the necessary result of the state action being to follow the License Cases. The lesson for the lawyer is all too clear.
55. The jury found the defendant guilty of 307 sales. Earlier, a justice of the peace had found O'Neil had made 457 sales, and imposed a sentence of 28,836 days (approximately 79 years). O'Neil's appeal to the jury thus reduced the sentence 25 years. See O'Neil v. Vermont, 144 U. S. 323, 326-27 (1892).
56. The position of the majority was that the only point taken in the State Court and again asserted in the Supreme Court was that the sales had been completed outside Vermont. Defendant's assignment of error appeared to abandon the cruel and unusual punishment and excessive fine objection. Id. at 334. It is clear that the opinion of the Supreme Court of Vermont decided that even though a federal constitutional objection might be based upon the excessiveness of punishment for a single offense, the mere fact defendant had committed so many offenses, could not create a federal question. See O'Neil case below, 58. Vt. 140, 165 (1885).
sympathetic one may be with the need for sound federal-state relations, and for freedom in the state legislature to deal adequately with the problems of crime prevention. And so it is not surprising that Mr. Justice Field, oldest in point of service on the bench at the time, found such a sentence for a crime of *this kind* too much to stand approved, especially by refusal of the Court to intervene because the defendant had failed to include the constitutional objection in the assignment of errors. Harking back to his dissent in an earlier case wherein the doctrine had been rejected, he argued that the privileges and immunities of the Fourteenth Amendment at least encompassed the right of free men to immunity from such arbitrary imposition. He showed quite conclusively that an independent judgment by the Court, giving due weight to the initial determination by the legislature of the suitability of the punishment, is necessary if the constitutional limitation on punishments is to have any effect at all. As for the argument that the defendant had merely made himself liable to a multiplicity of punishments by committing a multiplicity of offenses, he stated the *reductio* thus:

"The State may, indeed, make the drinking of one drop of liquor an offense to be punished by imprisonment, but it would be an unheard-of cruelty if it should count the drops in a single glass and make thereby a thousand offenses, and thus extend the punishment for drinking the single glass of liquor to an imprisonment of almost indefinite duration."

Joining in dissent were Justices Harlan and Brewer, who felt that at least the defendant was entitled to have a decision on the merits, the questions having been raised and implicitly decided below.

57. Then 76 years of age, with 29 years on the Court.
59. Slaughter-House Cases, 16 Wall. 36 (U.S. 1873). Mr. Justice Field, also emphasized the argument of J. Randolph Tucker, in Spies v. Illinois, 123 U.S. 131 (1887); See note 5 *supra*.
60. O'Neil v. Vermont, 144 U.S. 323, 339-341 (1892). This is a thesis which some members of the Court would appear at times to have rejected, even when dealing with statutes directly subject to the Eighth Amendment. See text at note 44 *supra*.
61. *Id.* at 340. *Compare* City of Hoboken v. Bauer, 26 N.J. Misc. 1, 55 Atl. 2d 883 (1947) (where defendant was liable to a $24,600 fine [or about 30 years for failure to pay] "all because she owned and possessed a penny bubble gum machine.").
62. Also a dissenter in Slaughter-House Cases, 16 Wall. 36 (U.S. 1873).
PUNISHMENT FOR CRIME

As the warnings in the Weems\textsuperscript{64} and Francis\textsuperscript{65} cases made clear, and this case brings home even more poignantly, there is in any consideration of the cruelty, or novelty, or excessiveness of punishment the problem of evolving a standard according to which the particular punishment, being employed in a particular context, must be measured.\textsuperscript{66} And there is here as in a few other types of cases, an emotional reaction to the predicament of the defendant in question or to the attempt of the legislature to deal with a knotty question of protection of the public interest, which tends to cloud the issue and even the process through which it has arisen.\textsuperscript{67} It is no help to the Court that the usual case which decides anything about punishment that is really worth deciding takes on the aura of a cause célèbre.

During the three decades following the O'Neil case, there were several cases brought to the Supreme Court seeking to challenge state-imposed punishments on one ground or another.\textsuperscript{68} All failed.\textsuperscript{69} None of them could hope to evoke the sympathy O'Neil demanded. The position of the Court was consistently that expressed in the last case of the series in the words of Mr. Justice Pitney:

\begin{itemize}
  \item \textsuperscript{64} See text at note 44 \textit{supra}, dissent of Mr. Justice White.
  \item \textsuperscript{65} See text at note 28 \textit{supra}.
  \item \textsuperscript{66} The matter is considered from a psychological viewpoint in Braden, \textit{The Search for Objectivity in Constitutional Law}, 57 Yale L. J. 571 (1947); see District of Columbia v. Clawans, 300 U. S. 617, 628 (1937) (Stone, J.).
  \item \textsuperscript{67} \textit{Cf.} United States v. United Mine Workers, 330 U. S. 256, 342 (1947) (Rutledge, J., dissenting); State v. Olander, 193 Iowa 1379, 186 N. W. 53 (1922) (Evans, J., concurring) where the emotional pressures are analyzed.
  \item \textsuperscript{68} Howard v. Fleming, 191 U. S. 126 (1903) (10 years in penitentiary for conspiracy to defraud); Collins v. Johnston, 237 U. S. 502 (1915) (1-14 years imprisonment, rejecting contention Eighth Amendment applied to States).
  \item \textsuperscript{69} Coffey v. County of Harlan, 204 U. S. 659 (1907) (penalty of $22,390 to be paid to County from which defendant had embezzled one-half that sum, with no allowance for restitution); Seaboard Air Line Railway v. Seegers, 207 U. S. 73 (1907) (penalty of fifty dollars for failure to pay a $1.75 claim against defendant common carrier); Waters-Pierce Oil Co. v. Texas (No. I), 212 U. S. 86 (1909) ($1,623,500 penalties for violation of state anti-trust laws, assessed against defendant corporation with over forty million dollars in assets, rejecting argument based on due process clause); St. Louis, Iron Mountain and Southern Railway Co. v. Williams, 251 U. S. 63 (1919) ($75 penalty, plus attorney's fees, for 62¢ overcharge).
  \item In United States \textit{ex rel.} Milwaukee S. D. Publishing Co. v. Burleson, 255 U. S. 407, 435 (1921) (Mr. Justice Brandeis, dissenting, with whom Mr. Justice Holmes concurred, considered deprivation of the second-class mail privilege, increasing relator's costs up to $150 per day, a cruel and unusual punishment, since it was an indefinite fine).
  \item It must be noted that Weems v. United States, 217 U. S. 349 (1910) is the only Supreme Court decision holding that punishment violated the Constitution because of cruelty or excessiveness.
\end{itemize}
"... The States still possess a wide latitude of discretion in the matter and ... their enactments transcend the limitation [of due process] only where the penalty prescribed is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable."\(^7\)

Note that there is inherent in this statement the ultimate holding of the *Francis* case: due process is denied if punishment and offense have no rational relation or if punishment is transmuted into inhuman treatment.

An auxiliary issue, which was rather summarily dismissed from several of the cases, arose because fines or penalties were payable to the person injured by the prohibited conduct, rather than to the state. Many were truly penal in that they were intended to punish an offense against the state and the amount had no relation to compensation of the individual.\(^7\) Here again the legislatures were left free to run the gamut in devising remedies; so long as there was reasonable relation between the method employed and the interest of the public, the probable frequency of the offense, the harm done, the difficulty of detection, and the likelihood of other remedies being employed.\(^7\)

Thus in this area of the interrelation between the legislatures and the Federal Constitution as implemented by the Supreme Court, we have broad underlying freedom for the legislatures to lay down the basic rule, prospectively, within wide channels of discretion, free as they are from the emotional impulses created by the context of a particular case.\(^7\) And the state judiciary is likewise free to interpret and to test the law by its own fundamental notions of fairness. But in the background is the Court and the federal due process limitation, given added color by the related specific provisions of the Eighth Amendment and the long history of the Anglo-American accusatorial criminal process.\(^7\)

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72. See note 68, par. 2 supra. There is a myriad of cases involving due process and equal protection objections to various penalty and punitive damage provisions in regulatory statutes. See, *e.g.*, Annotations, 13 A. L. R. 829, 19 A. L. R. 205, 26 A. L. R. 1200, 51 A. L. R. 1379.
73. See Louisiana *ex rel.* Francis v. Resweber, 329 U. S. 459, 469 (1947) (Frankfurter, J., concurring).
74. The presumption of innocence, and the related guarantee of freedom from compulsory self-incrimination (Fifth Amendment) are the foundation of the Anglo-American criminal procedure. 4 Wigmore on Evidence, §§ 2250-2251 (2d ed. 1923). The antithesis is the inquisitorial method where torture is employed to convict the defendant.
II. Double Jeopardy

". . . Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ."

So reads the Fifth Amendment. As we shall see, this is a constitutional provision of deceiving simplicity fraught today with convolutions certain to trip him who reads while running.

Protection against double jeopardy is of great antiquity. It appears to have been borrowed from canonical procedure by both the Anglo-American and Continental systems. Maxims have variously expressed the concept: "nemo debet bis puniri pro uno delicto," and "nemo debet bis vexari pro eadem causa."

While the general notion was familiar to the pre-Revolutionary common law, it had not been applied consistently. The pleas of "autrefois acquit," "autrefois convict," and even "autrefois attaint" were available, subject to extensive exceptions. It seems unlikely that verdicts in criminal cases were reversed by attaint, as they certainly were in civil cases, although there is doubt about the historical fact. But jurors were fined and otherwise abused, and mistrials on pretext occurred often enough to cause Blackstone to remonstrate though he contended that the practice had long been abandoned. By the late eighteenth century, however, only the ancient survival, appeal of felony, remained—an expiring but still adamant contradiction of the principle.

Thus, by the time of the adoption of our Bill of Rights the concept of not-twice-in-jeopardy had become well established in the new States. There were exceptions; but generally once a man out of his own mouth. See Watts v. Indiana, 338 U. S. 49, 54, 57, 59 (1949) (Justices Frankfurter, Jackson).

Encroachments such as that in Twining v. New Jersey, 211 U. S. 78 (1908) and Adamson v. California, 332 U. S. 46 (1947) which allowed comment on the failure of defendant to testify are far on the fringe. See comment on Palko v. Connecticut, text at note 87 infra.

75. Proposed, with the rest of the "Bill of Rights," by Congressional Resolution, September 25, 1789; ratified by required three-fourths of the states, December 15, 1791.
76. Radin, Handbook of Anglo-American Legal History 228 (1936).
79. 2 Hawkins, Pleas of the Crown 521, § 8 (8th ed. 1824); Id. at 528, § 15 states exceptions common today: retrial for insufficiency of first indictment, or after mistrial.
80. 1 Holdsworth, op. cit. supra note 8, at 340.
81. 4 Bl. Comm. *354. See also 2 Hale, Pleas of the Crown 294-296 (Wilson ed. 1800) [Hale died in 1676].
82. 2 Woodnesson, Law Lectures 564, Lecture 38 (1792); 2 Holdsworth, op. cit. supra note 8, at 361-364. In 1794, Parliament rejected a proposal to abolish appeal of murder in Massachusetts. Appeal of murder was finally abolished in 1819, along with trial by battle. 59 Geo. III, c. 46 (1819).
was tried, he could not be tried again for the same offense. A most complete review of the law by Mr. Justice Story shows that this constitutional protection against double jeopardy had incorporated a common law doctrine, amorphous indeed, but nevertheless possessed of a hard center core. Today certainly the basic protection has been preserved and perhaps considerably more. In criminal matters, even more than in civil, there has been constant recognition that court proceedings demand repose.

(1) Multiplicity of Trials

First we must consider the primary meaning of the double jeopardy provision. Like the rest of the first eight Amendments it is a limitation on the Federal Government. Its direct and immediate function is as a protection against the individual being submitted to a multiplicity of trials for the same offense. Although a detailed analysis of the cases on multiple trials is beyond this undertaking, one point must be made clear about the leading

83. A. L. I., Administration of the Criminal Law, Official Draft, Subject: Double Jeopardy 8 (1935), states that conviction, or acquittal were required for a valid plea in bar at common law, and surmises that later notions of "jeopardy" attaching on the swearing of the jury arose from misunderstanding a supposed rule of Coke that the jury must be kept together until verdict delivered.

84. United States v. Gibert, 25 Fed. Cas. No. 15,204 (C.C.D. Mass. 1834). The lengthy opinion contains most of the learning on the subject up to that time. Story's dictum that the double jeopardy clause prohibited granting a new trial even at the defendants' motion was an extremely mechanical application of the maxim. District Judge Davis dissented from the dictum, but agreed that, assuming that the Court had the power, the defendants should not receive a new trial. See 1 Bishop, Commentaries on Criminal Law 728-729 (9th ed. 1923), to the effect that the American application has been, on the whole, much more strict on the prosecution than is the practice in British courts.

85. The extension of the meaning of "life and limb" to cover all forms of criminal punishment was accomplished at common law, prior to 1789. Indeed "life and limb" was used as a generic term for bodily security. 1 Bl. Comm. *130. 1 Bishop, op. cit. supra note 84, at 733-734, states the primary meaning as limited to treason, and felonies, but approves extension to misdemeanors. See note 108 infra.

86. Most of the cases involve questions of the following types:

(1) When the defendant seeks a new trial, does he waive the bar of the first trial, and if so, how extensive is the waiver? Harding v. United States, 1 Wall. Jr. 127 (3d Cir. 1846); Trono v. United States, 199 U. S. 521 (1905); Brantley v. Georgia, 217 U. S. 284 (1910); Stroud v. United States, 251 U. S. 15 (1919);

(2) when is the first trial void, so that jeopardy never attached? Coleman v. Tennessee, 97 U. S. 509 (1878); United States v. Ball, 163 U. S. 662 (1896);

(3) when, if ever, may the prosecution secure a reversal of a trial and subject the defendant to a second trial? Kepner v. United States, 195 U. S. 100 (1904); Fulk v. Connecticut, 302 U. S. 319 (1937);

(4) when, if ever, may a trial be interrupted before one tribunal prior
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decision in this area. *Palko v. Connecticut* decided no more than that the double jeopardy clause of the Fifth Amendment and the due process clause of the Fourteenth Amendment do not prohibit a state from trying again a defendant who was previously convicted of a lesser-included offense in a trial marred by error prejudicial to the prosecution. No opinion was expressed upon

"what the answer would have to be if the state were permitted after a trial free from error to try the accused over again or to bring another case against him..."  
Indeed the heavy reliance in Mr. Justice Cardozo's opinion upon the dissent of Mr. Justice Holmes in *Kepner v. United States* indicates that there might have been considerable doubt that the latter case was correctly decided. The test would seem to be whether the accused is being unduly harassed, a nice question to be decided from all the circumstances in an effort to see if there is a departure from "the very essence of a scheme of ordered liberty." But the distinction is wide between chasing a man down for trial on the same facts after once having finished the matter according to the forms of law, in a fair and errorless trial and merely rectifying an erroneous trial under one and the same indictment. And we shall see that there is considerable doubt that even the duplication of punishment for the same offense constitutes a,

88. Id. at 319, 328.  
89. Id. at 319, 322-23.  
90. 195 U. S. 100, 134 (1904). Justices White and McKenna joined in the dissenting opinion of Mr. Justice Holmes. Mr. Justice Brown also dissented in a separate opinion. Much of the Holmes dissent relies on the weakness of the rationale of the cases which had held that a defendant "waived" the prior jeopardy by seeking a new trial or taking an appeal. Note 86 (1) *supra*. It is certain that the dissenters spoke from great conviction, for the *Kepner, Dorr, and Mendezona* cases involved other serious questions as to the doctrine of expansion of the Constitution *ex proprio vigore*, and the proper method of construing the extension of constitutional limitations to territories by Act of Congress. See note 42 *supra*. That the latter questions were not allowed to obliterate the basic constitutional issue on double jeopardy indicates that the subject was considered with great care.  
92. See *Comley, Former Jeopardy*, 35 Yale L. J. 674, 678 et seq. (1926). The author was counsel for the State of Connecticut in the *Palko* case.
violation of the double jeopardy provision itself, however erroneous
the statutory interpretation may be, or however much other con-
stitutional provisions may be violated. 93

(2). Punishment by Different Sovereignties for
the Same Conduct

One of the great host of constitutional problems emanating
from our federal form of government is that which results from
the presence of power in both the state and the federal govern-
ments to prohibit certain conduct and to punish it as criminal.

The question whether simultaneous exercise of that dual power
violates the double jeopardy provision was first passed upon in
Fox v. Ohio. 94 A defendant who had been convicted of passing
counterfeit coin in violation of Ohio law contended unsuccessfully
that Congress had exclusive power to coin money and regulate
its value, and to punish for counterfeiting. Furthermore, it was
argued, even if the power were not exclusive since Congress still
had power to punish the same offense, the defendant might be
punished twice for one and the same crime, if the conviction
were allowed to stand. The Court denied that the Fifth Amend-
ment applied to the states and laid down the principle that even
should both state and federal governments punish the same con-
duct, there would be no violation of any constitutional right since
the double punishment was an inherent result of there being two
sovereign powers whose laws the defendant was obliged to obey. 95

The principle has been reapplied on several occasions, 96 and
in United States v. Lanza was held to apply even where the
alleged second jeopardy was being imposed in a federal court for
a federal offense to which undoubtedly the Fifth Amendment

93. Such an assertion requires rejection of old doctrine which has
been blindly followed. But of that, more anon. Text at note 105 et seq. infra.
94. 5 How. 410 (U.S. 1847).
95. Mr. Justice McLean dissented; and Mr. Justice Story, who died
before the reargument, expressed convictions similar to those held by
Justice McLean. See Houston v. Moore, 5 Wheat. 1, 72 (U.S. 1820) (dis-
senting opinion). Because of the conflict of opinion among the Court and
the absence of several justices, reargument was requested. See Fox v. Ohio
5 How. 410, 440 (U.S. 1847). The Court did not rely on the technical dis-
 distinction between counterfeiting and uttering, since both state and federal
law at the time prohibited uttering counterfeit coin.
96. Moore v. Illinois, 14 How. 13 (U.S. 1852) (state prosecution for
harboring fugitive slave); Hebert v. Louisiana, 272 U. S. 312 (1926) (state
prosecution for violation of prohibition law).

The rationale was the same when threatened incrimination under the
laws of a State was held no bar to compulsion of testimony by the Federal
expressly applied.\textsuperscript{97}

The converse principle—protecting defendants—has been applied as to criminal offenses made such by laws which derive their authority from the same sovereign power.\textsuperscript{98} There are contradictions in this doctrine, although at first glance it seems to be a simple application of analogy. Its complexities are analyzed \textit{infra}, where the author's thesis is that statutory interpretation is in issue and not the impact of the Constitution.\textsuperscript{99}

\textbf{(3) Punishment by Same Sovereignty for the Same Conduct}

When, at the behest of the same sovereignty, punishment for a single crime is incurred on two or more occasions, or in two or more tribunals, the defendant would seem (at least prima facie) to be placed in double jeopardy. The possible situations are quite numerous: (1) the statutes may authorize alternative punishments for the same offense, and both may be imposed;\textsuperscript{100} (2) the statutes may impose two or more punishments for the same offense;\textsuperscript{101} (3) the statutes may define and punish substantially the same acts as two or more separate crimes, although there is only a formal distinction between them;\textsuperscript{102} (4) the statutes may vary the punishment according to the number or character of

\textsuperscript{97} 260 U. S. 377 (1922) (federal prosecution for violation of prohibition laws followed upon state prosecution for the same offense). The opinion of Mr. Justice Taft reveals a fear that if prior jeopardy in state courts were a bar, convictions on guilty pleas, with light sentences from friendly judges, would provide substantial immunity from federal prosecution. Sumptuary laws such as the prohibition acts perhaps justify such a fear. At any rate, the constitutional doctrine is settled. See however, the strong criticism in Grant, \textit{The Lanza Rule of Successive Prosecutions}, 32 Col. L. Rev. 1309 (1932), based on the dubious proposition that the federal-state relationship is completely analogous to international sovereignty-to-sovereignty relationship.


Porto Rico v. Shell Co., 302 U. S. 253 (1937) (since prosecution for violation of territorial antitrust law followed by prosecution for violation of federal antitrust law would violate double jeopardy provision, territorial statute held valid). Usually no double jeopardy is found in cases involving prosecutions for violating both state criminal statutes and municipal ordinances, under analogous state constitutional provisions: Ogden v. City of Madison, 111 Wis. 413, 89 N. W. 568 (1901); Guinthers v. City of Milwaukee, 217 Wis. 334, 258 N. W. 865 (1935); Thomas v. City of Indianapolis, 195 Ind. 440, 145 N. E. 550 (1924); and cases collected in Annotation 31 L. R. A. (n.s.) 693 at 699.

\textsuperscript{99} See text at note 134 \textit{infra}.

\textsuperscript{100} Text at note 111 \textit{infra}.

\textsuperscript{101} Text at note 128 \textit{infra}.

\textsuperscript{102} Text at note 139 \textit{infra}.
previous offenses;\textsuperscript{103} and (5) the statutes may provide, as construed by the courts, that under certain circumstances punishment may be repeatedly inflicted.\textsuperscript{104}

Although it may seem that at least some of the above instances are classic examples of a “person [being] subject for the same offence to be twice put in jeopardy of life or limb,”\textsuperscript{105} it is submitted that none of the above should be construed to fall within the ban of the double jeopardy provision. The only sound application of that provision is when, although the second trial will impose no punishment different in kind upon the defendant, he is again put on trial for an offense constituted by the same set of facts after the first trial was completed and free from error.\textsuperscript{106}

This thesis is perhaps best stated in the proposition that double punishment for the same offense in no way violates the double jeopardy provision. First, the language of the Fifth Amendment bears this out: “twice put in jeopardy of life or limb.”\textsuperscript{107} Now it is clear that no man could possibly be punished twice by taking his life twice. It is not so clear that a man might not be deprived of two ears when the statute called for deprivation of one.\textsuperscript{108} But it is certain that the members of the proposing Congress were not so troubled about judges exceeding the statutory punishment as they were that cases would be tried again and again until the desired result was achieved. We must not forget that Bushell’s Case\textsuperscript{109} had given the jury its independence scarcely a century before. And it seems to need no argument to establish that there

\begin{itemize}
\item \textsuperscript{103} Text at note 144 infra.
\item \textsuperscript{104} Repetition of solitary confinement was involved in three cases cited in note 38 supra.
\item \textsuperscript{105} Fifth Amendment.
\item \textsuperscript{106} See text at note 76 supra, for a review of the history. Comley, \textit{Former Jeopardy}, 35 Yale L. J. 674, 679 (1926) shows clearly that the prohibition of appeal by the Federal Government (Kepner v. United States, 195 U. S. 100 (1904)) is explicable on common law procedural grounds but not as double jeopardy.
\item \textsuperscript{107} It must be remembered that the number of offenses which were not capital, or subject to embellishments upon capital punishment of worse kind, such as drawing or quartering, were still very few, 2 Wooddesson, \textit{op. cit. supra} note 82, at 494. Transportation, chief alternative punishment, was not employed to any great extent until the compulsory settlement of Australia was begun in 1776. See 1 Radzinowicz, \textit{History of English Criminal Law} 4, 31 (1948).
\item \textsuperscript{108} However, the words “life or limb” were said by Chief Judge Kent, in People v. Goodwin, 18 Johns. 187, 201 (N.Y. 1820) to indicate that class of crimes subject to deprivation of life or limb at common law, \textit{i.e.}, felonies. In no State were crimes still punished in 1791 by loss of members. See note 85 supra.
\item \textsuperscript{109} Vaughan 135 (C.P. 1670). 1 Holdsworth, \textit{op. cit. supra} note 8, at 344-345.
\end{itemize}
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was an intrinsic nexus between the twice-in-jeopardy provision of the Fifth Amendment and the Seventh Amendment guarantee that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Since the decisions in many of these areas stand the other way,110 there is profit in considering the cases for the light that can be shed on the error if there be one.

(A) Alternative Punishments

The leading case on the matter of alternative punishments is Ex parte Lange,111 an historic case, otherwise, for its extension of habeas corpus as a method of review of criminal causes.112 The petitioner had been convicted in federal circuit court of stealing mail bags. The statute set the punishment at imprisonment for one year or a fine. The court sentenced the defendant to serve one year and to pay the maximum fine. He was committed immediately.

On the following day the fine was paid and (apparently at the insistence of Lange's attorney) covered into the Treasury three days later. On the day after the funds had been covered in, the petitioner was brought into the sentencing court on a writ of habeas corpus, the original sentence vacated and petitioner sentenced once again to one year imprisonment to run from the time of resentencing.113 On an original writ of habeas corpus in the Supreme Court it was held that the effect of revising the sentence, as the Court had done, was to punish petitioner twice for the same offense in violation of the Fifth Amendment.114 Since the judgment of resentencing was unconstitutional, it was void, and the judgment

110. Perhaps the tools which ought to be used in construing the pattern of criminal statutes are based on the same psychological phenomena that lie behind the double jeopardy clause in the Constitution. It may be that many of the difficulties are merely verbal. If so, it is another case of correct decisions for the wrong reason. But, as we have been reminded, often the reasons given are more important than the decisions made, and when covering into the Treasury, or a matter of hours in payment of a fine, or five hours detention in an anteroom make for serious constitutional questions in the highest court of the land, there is room for suspicion of the doctrine.

111. 18 Wall. 163 (U.S. 1874).

112. See note 115 infra.

113. Resentencing to the maximum of one year after the defendant had already served five days, without allowing credit for time served, would have resulted in exceeding the statutory maximum. The effect of this failure to give credit was noted by the Court. However, whether there is an obligation to give credit remains unsettled. See cases cited in Notes, 12 U. of Detroit L. J. 135 (1949), and 45 Mich. L. Rev. 912 (1947). In re De Meerleer, 323 Mich. 287, 35 N. W. 2d 255 (1948), cert. denied, 336 U. S. 946, is an extreme example.

114. Ex parte Lange, 18 Wall. 163, 173 (U.S. 1874).
under which the petitioner was held being void, the petitioner was entitled to be discharged.115 The opinion of Mr. Justice Miller read in part:

"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 offense."116

"The 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 chances or danger of a second punishment on a second trial.

"The common law not only prohibited a second punishment for the same offense, but it went further and forbid a second trial for the same offense, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted."117

The fact that it had long been settled that there was no federal common law of crimes,118 and that any excess of sentence above the statutory provision was totally without foundation, seems not to have been considered or argued. The case could have easily been disposed of by holding that: (1) the statute required the sentencing judge to elect either imprisonment or fine; (2) the orderly administration of justice required that the judge be foreclosed from remedying an erroneous sentence after the defendant had paid the fine and so complied with one full limit of the law.119 It was admitted that the judge had the power at common law (which still controlled this and most aspects of federal criminal procedure)120 to rectify a sentence so long as it was at the same term of court.121 But such rectification, the Court said, could not

115. Although from 1789, state criminal cases could be reviewed in the United States Supreme Court on writ of error, no federal criminal case could be reviewed directly until 1879, except on a certificate of division of two judges in a circuit court. Orfield, Criminal Appeals in America 243 et seq. (1939); Frankfurter and Landis, The Business of the Supreme Court 109-113 (1927). This caused resort to habeas corpus in federal courts, and even in state courts, as a method of correcting errors in federal criminal cases. 2 Warren, Supreme Court in United States History 332 (1926). Ex parte Lange is the leading case in the development.
116. Ex parte Lange, 18 Wall. 163, 168 (U.S. 1874).
117. Id. at 169.
increase the punishment without violating the Fifth Amendment.

The dissent by Mr. Justice Clifford was grounded in large measure on the notion that the first erroneous sentence dropped entirely from the record when it was vacated, and that the payment of the fine was completely outside the case since the petitioner made it under a now non-existent judgment. He also suggested that the constitutional reasoning of the majority would require that a defendant who was erroneously condemned to death would be entitled to his discharge because he would be punished twice to the extent that he had been held in prison awaiting the reversal of the erroneous judgment.

Subsequent applications of the same doctrine are numerous, and they indicate how far its logic can be pushed. In *United States v. Chouteau*, the double jeopardy limitation was held to prevent the recovery of a judgment against sureties on a distiller's bond for compliance with the revenue laws. A $1,000 penalty had been paid by the distiller in settlement with the Secretary of the Treasury (as provided by the statute). It was held that the statute intended the penalty to be one of three punishments, and since one had already been imposed and fully completed, there was no further obligation of the distiller for which he or the sureties could be liable. In *re Bradley* involved a sentence of six months' imprisonment and a fine of five hundred dollars for contempt of court. Under the applicable statute the punishment was limited to either imprisonment or fine. The error was discovered on the same day that the fine was paid. The clerk of court tendered the repayment to the attorney for the defendant upon instruction from the court that the judgment had been vacated and changed to imprisonment only. Once again, the double jeopardy notions of the *Lange* case were repeated and the defendant discharged. Mr. Justice Stone dissented, stating that *Ex parte Lange* should be re-examined if it was to make a constitutional difference that the clerk had accepted the money and then tendered it back rather than refusing it when first offered.

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122. *Ex parte Lange*, 18 Wall. 163, 188 (U.S. 1874).
123. Id. at 197. The argument was made in a later case, and rejected. See note 38 supra.
124. 102 U. S. 603 (1880).
125. The statute provided for penalty and fine and imprisonment.
126. 318 U. S. 50 (1943). The contempt was committed during a hearing in the United States Court of Appeals for the Third Circuit, on review of an NLRB order.
127. Id. at 54.
(B) Multiple Punishments

There are many instances in which multiple punishments have been upheld, even though they involved the same offense. The most familiar—indeed so familiar as to make citation unnecessary—is where imprisonment and fine are provided. Normally these are imposed in the same proceeding. But there are many other approved combinations of two or more punishments imposed through separate proceedings: (1) penalties collected in civil suit or administrative proceedings, with fine and imprisonment upon criminal prosecution;128 (2) civil qui tam action by an informer with fine and imprisonment on criminal prosecution;129 (3) civil action for treble damages, forfeiture by admiralty libel, imprisonment and fine on criminal prosecution.130 These multiple remedies, sometimes alternative, sometimes cumulative or mandatory have been applied again and again without successful challenge on double jeopardy grounds. The sound rationale is that there is no question of harassment, no attack on a defendant as an afterthought, but rather several punishments constituting an integral whole.131

There is a necessity for re-examining the application of double jeopardy doctrine to punishment to determine if it is not better understood when viewed as a problem in statutory interpretation and control of criminal procedure, rather than as a matter of constitutional limitation. Glimpses of this attitude appear to some extent in Bozza v. United States,132 where the defendant was

128. *Matter of Leszynsky*, 16 Blatchf. 9 (2d Cir. 1879); *Helvering v. Mitchell*, 303 U. S. 391 (1938). Compare with the *Mitchell* case, *United States v. La Franca*, 282 U. S. 568 (1931), wherein constitutional doubts re double jeopardy forced construction of statute so as to prevent civil suit for penalty after fine on criminal prosecution. On the other hand in *Waterloo Distilling Co. v. United States*, 282 U. S. 577 (1931), common law notions of deodand were applied to show that a forfeiture did not impose a second punishment for crime.


130. *Id.* at 556, the concurring opinion of Mr. Justice Frankfurter cites these provisions of the Sherman Act.

131. *Ibid.* Mr. Justice Frankfurter shows the subtleties which the Court has employed to find that one of two remedies was indeed civil, and not criminal at all. It would make one wonder if possibly the notion is that proof beyond reasonable doubt is a constitutional requirement once the proceeding is dubbed "criminal."
The Court has been eager on the other hand, to call added punishments "criminal" in order to apply the ex post facto prohibition. See text at notes 175 and 190 infra.

One might also mention deportation and disbarment as added consequences of criminal conduct which have been held not to be punishment for crime at all, and hence not violative of the double jeopardy provision.

sentenced originally to imprisonment only for an offense which made imprisonment and fine mandatory. After the prisoner had been in an anteroom for five hours, the mistake was discovered; and he was recalled to the courtroom and sentenced to both fine and imprisonment. Dealing with the case as a matter of control of procedure in the federal courts—any constitutional objection within de minimis non curat lex—the Supreme Court rejected the contention that the defendant was subjected to double jeopardy. To find that the correct sentence could not be imposed would make sentencing a game in which only society stood to lose. Indeed, there would seem to be nothing but tradition standing in the way of having a sentence procedure which would provide for the statutory maximum automatically attaching to all judgments of guilt after conviction, unless the judgment otherwise lawfully specified the punishment. A further indication that statutory interpretation is the solution lies in Holiday v. Johnston, which rejected as premature on habeas corpus the petitioner's objection to multiplication of sentences for a single offense by laying separate counts under different, exclusive sections of the statute:

"The erroneous imposition of two sentences for a single offense of which the accused has been convicted, or as to which he has pleaded guilty, does not constitute double jeopardy."

Another problem arises when multiple punishments are imposed through jurisdictional elements of the same sovereignty. It is paradoxical to continue the explanation of the cases involving the corollary of the Lanza dual sovereignty rule upon a constitutional level. It would seem that the same rationale could as well apply to any of the several types of multiple punishment provisions. If the explanation is the constitutional double jeopardy provision, all are likewise unconstitutional. However, there is a sound explanation based on statutory interpretation which reaches generally the same result as the Court has thus far. When military authorities were empowered to punish by courts-martial under the

133. 313 U. S. 342, 349 (1941), reversing on other grounds.
134. Note 98 supra.
135. The opinion of Mr. Justice Brandeis, speaking for the Court in Helvering v. Mitchell, 303 U. S. 391 (1938), would seem to be predicated on this theory, at 399: "The question for decision is whether Sec. 293 (b) imposes criminal sanction. That question is one of statutory construction." However, the force of the suggestion is reduced by the preceding sentence which indicates that if both the criminal proceeding for evasion of income tax, and the proceeding for recovery of 50% fraud penalty are intended as punishments, then the former is a bar to the latter because of the double jeopardy clause.
Articles of War,\textsuperscript{136} the range of offenses and the range of punishments for the offenses were (and are) comparable with the usual gamut of criminal offenses in the states and indeed in the District of Columbia. Now to construe the statutes pertaining to courts-martial and to the District of Columbia, \textit{ex hypothesi}, so as to allow two coordinate tribunals to try one and the same individual for the same murder, and to allow both to sentence him to life imprisonment, would be stultifying. Consequently the only rational construction of the statutes is to make the first jurisdiction which attaches definitive or to give one or the other exclusive operation as to service personnel.\textsuperscript{137} The duplication which may be present between federal and territorial laws is resolvable in the same way, for Congress has a supervisory control over all territorial legislation. The controlling test would seem to be this: if the two criminal punishments cover much the same ground, in much the same way, Congress probably intended the two to be treated as alternative and not cumulative, even though it was not explicit in so providing. On the other hand, if there is a substantial difference in the manner in which the punishment takes effect, then there must be a presumption that Congress intended that they be cumulative.\textsuperscript{138} If they are cumulative, then the basic question must be considered: is the defendant being unfairly harassed?

(C) Same Acts—Separate Crimes

One problem which inevitably inheres in the application of the double jeopardy provision is that of deciding what constitutes "the same offense."\textsuperscript{139} Thus, where the Territory of Utah fined and imprisoned the defendant for polygamy and then prosecuted him again for adultery with the same plural wife, it was held that the

\textsuperscript{136} 10 U. S. C. §§ 1471-1593, especially §§ 1564, 1565, 1566 (1946) (Art. War 92, 93, and 94).

\textsuperscript{137} Cf. Williams v. United States, 327 U. S. 711, 724 (1946) (applying this approach to the Assimilative Crimes Act).

\textsuperscript{138} Consider \textit{In re Chapman}, 166 U. S. 661 (1897), which held that the same contempt of Congress could be punished by (1) a summary contempt proceeding by the House involved; and (2) a criminal prosecution under a statute making such contempt a crime. However, the contention that double jeopardy was involved was clearly premature.

Note the shift in emphasis between the \textit{Chapman} case and Fox v. Ohio, 5 How. 410 (U.S. 1847), and such later decisions as Shevlin-Carpenter Co. v. Minnesota, 218 U. S. 57 (1910); Holiday v. Johnston, 313 U. S. 342 (1941). The later cases refused consideration of the claim of double jeopardy, wherever it was premature.

\textsuperscript{139} By far the greatest number of cases applying double jeopardy limitations involve this problem. The decisions are collected in A. L. I., \textit{op. cit. supra} note 83.
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adultery was a lesser included part of the polygamy so that the two prosecutions were for the same offense, even though the proof required would not be the same.140 Since the double jeopardy provision was involved, the second judgment was unconstitutional and void; and the defendant could be discharged on habeas corpus.141 On the other hand, the slightest difference in the facts required to be proved makes the two offenses separate so that there is no double jeopardy.142 Furthermore, prosecution for conspiracy may be employed so as to multiply the offenses punishable; but there may be no double multiplication by charging several conspiracies, where defendants form a single conspiracy to commit numerous offenses.143

(D) Recidivist Statutes

When a state legislature decides that the habitual criminal is more dangerous to society and that the accomplishment of the many purposes of a criminal enforcement system demands that more severe punishment be imposed upon the repeater than upon the first offender, is the additional punishment a violation of the double jeopardy limitation?144 The question has been decided many times by the Supreme Court, always in the negative.145 The explanation is that there is no further punishment for the earlier offenses at all. What the statutes merely do is to increase the punishment for a repeated offense because of the character of the offender as revealed by his violations of the law. Such statutes have long been

140. *Ex parte* Neilsen, 131 U. S. 176 (1889). Plain statutory construction could reach the same result. It would not seem that the legislature would intend that a single individual be punished under one statute for cohabiting with a woman as her husband and under another statute for cohabiting with the same woman as her paramour.

141. Again *Ex parte* Lange, 18 Wall. 163 (U.S. 1874), was relied upon.

142. Ebeling v. Morgan, 237 U. S. 625 (1915) (where the number of crimes depended on the number of mail bags the defendant cut open); Blockburger v. United States, 284 U. S. 299 (1932) (sale of narcotics, not in or from original stamped package, was held an offense distinct from sale of narcotics without a written order from the buyer, although the same sale was involved).


144. See Waite, The Prevention of Repeated Crime (1943), where the criminological basis for the recidivist statutes is considered at length. Many authorities are collected in Comment, Toward Rehabilitation of Criminals: Appraisal of Statutory Treatment of Mentally Disordered Recidivists, 57 Yale L. J. 1085 (1948).

145. Moore v. Missouri, 159 U. S. 673 (1895); McDonald v. Massachusetts, 180 U. S. 311 (1901); Graham v. West Virginia, 224 U. S. 616 (1912); and notes 147, 148 infra.
employed both in England and in America. The constitutional result is sound; and the principle has been extended even to situations in which the earlier offenses were in violation of the laws of another sovereignty and had been pardoned, and in which the earlier offenses were committed prior to the enactment of the recidivist statute. Since the objective is to tailor the punishment to suit the offender so as to deter one not easily deterred, the criminal conduct of the offender is revealing as to his character, wherever and whenever it may have appeared.

An analogous, though more dramatic case, was Finley v. California, where a statute was upheld which imposed the death penalty for assault with intent to kill where such assault was committed by a prisoner under life sentence. The Court dealt with the case summarily as a matter of permissible classification within the limits of the equal protection clause. The real issue in the recidivist statute cases is the same. Since the discretion of the legislature in classifying is very broad, it is scarcely possible that an attack founded upon either the double jeopardy or the equal protection clauses will succeed.

III. Ex Post Facto Laws and Bills of Attainder

"No bill of attainder or ex post facto law shall be passed." "No state shall . . . pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts. . . ."

The constitutional provisions which we are next to consider form a logical whole, with a unified historical background in their original inclusion in the Constitution.

In England at the time of the adoption of our Constitution, a
bill of attainder was a legislative adjudication inflicting capital punishment; any lesser punishment under the same authority was imposed by a bill of pains and penalties. However, since the earliest decisions of the Supreme Court, it has been settled that "bill of attainder" as used in the Federal Constitution includes all such legislative condemnations, whether capital or not. It has even been contended that the dual terminology was unknown in the colonies and that a bill of attainder was a generic term for any type of legislative exercise of judicial power.

On the other hand, the term ex post facto law probably was employed in both England and America in the sense of any statute operating after the deed. The meaning of "ex post facto" was confused, as the records of the Constitutional Convention show, and it was undoubtedly to remove the confusion by limiting "ex post facto" to criminal statutes that the phrase prohibiting laws impairing the obligation of contracts was added to the provision limiting the States. There have been numerous assertions to the quickly agreed among the framers that a limitation must be placed upon both federal and state governments to prevent enactment of criminal statutes such as the anti-royalist legislation of the Revolutionary period. The division among them came on two points: (1) how far retrospective non-criminal legislation should be prevented to avoid repetition of debtor legislation such as was involved in the paper money craze; (2) whether the "ex post facto" prohibition would accomplish the desired effect as to non-criminal legislation. A statement by Mr. Dickinson to the effect that Blackstone limited "ex post facto" laws to those touching upon criminal matters, is the only explanation for the addition of the impairment of obligations clause. The author submits that it is impossible to read the entire minutes of Madison, and to compare the various drafts, without taking away the impression that the consensus of the convention was to set up an absolute prohibition against retrospective criminal statutes, while at the same time preserving contracts from legislative assault, without tying the hands of the legislatures by prohibiting all retrospective enactments.  

2 Farrand, The Records of the Federal Convention 368, 375, 378, 448, 617, 619 (1911); 3 Id. at 100, 328.

155. 2 Wooddesson, op. cit. supra note 82, at 621, 625, Lect. 41.
156. See Fletcher v. Peck, 6 Cranch 138 (U.S. 1810).
158. 1 Bl. Comm. 446, employed "ex post facto" in stating an example of criminal retrospective legislation. Perhaps it was this statement Dickinson found, note 154 supra. Madison seemed to be convinced that "ex post facto" was equally applicable to both criminal and civil matters. 2 Wooddesson, op. cit. supra note 82, at 621, 625, in a most thorough treatment of retrospective statutes, gives no indication that "ex post facto laws" had a peculiar meaning. He refers to "penal statutes passed ex post facto." 2 Id. at 641.
159. See note 154 supra, especially language of Sherman and Ellsworth, reporting to the Governor of Connecticut, referring to: "The restraint... respecting... impairing the obligation of contracts by ex post facto laws. " 3 Id. at 100.
160. The prohibition against laws impairing the obligation of contracts was added in the Committee on Style by Gouverneur Morris after general discussion had settled the desire of the Convention. See note 154
contrary even recently, but the settled doctrine is that the phrase "ex post facto law" does not comprehend retrospective legislation as to non-criminal matters.\textsuperscript{161}

The scope of the clauses must be observed particularly. The limitation is directed to \textit{bills} of attainder and to ex post facto \textit{laws}—\textit{i.e.}, to \textit{legislative action}. It does not relate to the activities of the other branches of government.\textsuperscript{162} Especially it does not inhibit the freedom of courts to alter legal doctrines or to change the construction of statutes. A policy consideration compels this conclusion just as much as does the wording and the history of the provision.

It is settled, in the distribution of the functions of state and federal courts—especially the Supreme Court—that construction of state statutes is primarily the business of the state courts.\textsuperscript{163} The federal court must take the construction as it finds it. Now if the Supreme Court, for example, were free to determine that a given construction of a state statute imposed greater punishment than would have been incurred under a construction existing at the time the prohibited conduct was committed; then it would necessarily follow that the Supreme Court could supplant the state construction of the statute with its own.\textsuperscript{164} The result of such a decision would be a determination that the later construction was correct and the earlier construction erroneous.

As to the interpretation of federal statutes, there is, of course,

\textsuperscript{161} Calder v. Bull, 3 Dallas 386 (U.S. 1798). Contrary views were expressed by Mr. Justice Johnson in memorandum following Satterlee v. Matthews, 2 Pet. 651 (1st ed., U.S. 1829); see also Farrar, \textit{op. cit. supra} note 154, at 577, 597.

\textsuperscript{162} Frank v. Mangum, 237 U. S. 309 (1915) denied applicability of the ex post facto provision to change of a judge-made rule of practice.


\textsuperscript{164} Ross v. Oregon, 227 U. S. 150, 161 (1913); Frank v. Mangum, 237 U. S. 309 (1915); see Brinkerhoff-Faris Co. v. Hill, 281 U. S. 673 (1930) (especially notes 7 and 8).
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no such limitation upon the revision of constructions made by federal courts so that any disapproval of a change in interpretation of a statute in a federal court is founded upon the power of the Supreme Court to correct erroneous decisions and not upon any constitutional limitation. Such has been the interpretation placed upon both the ex post facto law and impairment of obligation of contracts provisions.\textsuperscript{165}

In the application of the ex post facto provision a more difficult problem is to determine whether or not given legislation, passed after the fact, has the effect of making the condition of the offender worse than it would have been under the earlier law.\textsuperscript{166} There was a classification laid down in one of the very earliest decisions, \textit{Calder v. Bull},\textsuperscript{167} which is still a leading case. There, Mr. Justice Chase, who was later to fall under a cloud,\textsuperscript{168} set out the following classification of ex post facto laws:

\begin{quote}
"1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offence, in order to convict the offender."
\end{quote}

This dictum has been relied upon many times, sometimes as being an exhaustive categorization, sometimes as being illustrative only. At least it comprehends the most typical laws of that kind although the validity of the fourth class has become very dubious.

The first cases which involved a full consideration of the ex post facto provision by the Supreme Court arose in the very context that the framers of the Constitution anticipated. During the bitter times which followed the War between the States, Missouri was sharply divided.\textsuperscript{170} One of the results of the eventual Union

\begin{itemize}
\item \textsuperscript{165} New Orleans Waterworks Co. v. Louisiana Refining Co., 125 U. S. 18 (1888); Cross Lake Shooting and Fishing Club v. Louisiana, 224 U. S. 632 (1912). "Law" has been held in the cases cited above and elsewhere in this section to include statutes, constitutional provisions, and municipal ordinances.
\item \textsuperscript{166} Cooley, \textit{op. cit. supra} note 7, at 266.
\item \textsuperscript{167} 3 Dallas 386 (U.S. 1798).
\item \textsuperscript{168} Impeached by a Republican House in 1803, but conviction failed. The principal charge was partisanship, especially in Alien and Sedition cases.
\item \textsuperscript{169} Calder v. Bull, 3 Dallas 386, 390 (U.S. 1798). This classification appears to be a synthesis of illustrative acts cited in 2 Wooddesson, \textit{op. cit. supra}, note 82, at 631, 633, 638.
\item \textsuperscript{170} Bassett, \textit{A Short History of the United States} 517 (3d ed. 1939)
\end{itemize}
victory was the requirement of a test oath, according to Missouri's newly established constitution. The substance of the requirement was that before exercising any of innumerable civil and personal rights such as voting, running for office, practicing law, teaching, or acting as a priest or minister, each person must take an oath that he had not been a rebel or a rebel-sympathizer. In *Cummings v. Missouri* review was sought of the conviction of a Catholic priest for exercising his office without taking the required oath.  

In an opinion by Mr. Justice Field the Court held that the provision constituted a coercive bill of pains and penalties and was also an ex post facto law. The argument that the statute was a police power regulation of professions in an effort to protect the public and the state was rejected. Looking behind the form of regulation to its intended effect, the Court found a purpose to punish acts in a way in which they were not punishable when committed. The opinion also noted that in basing the test oaths upon past states of mind, Missouri had gone further than the most notorious requirements in England or France.

Decided the same day was *Ex parte Garland*, a case relating to the right of an attorney to practice before the United States Supreme Court. An oath was required by both an Act of Congress and a rule of court, much to the same effect as that which Missouri had required of Father Cummings. The petitioner, Garland, had been a member of the Congress of the Confederacy, clearly a rebel, but had been pardoned by the President.

The Court relied upon the following reasoning: the oath required went beyond appropriate qualifications of attorneys; since the act of Congress was intended to operate as punishment, it was an ex post facto law or a bill of attainder; since the rule of court was intended only to implement the unconstitutional statute, it was improvident in that it emphasized past conduct, whereas the

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171. 4 Wall. 277 (U.S. 1867). Pierce v. Carskadon, 16 Wall. 234 (U.S. 1872) condemned a similar oath required in West Virginia before being allowed to reopen a judgment obtained by attachment without notice.

172. Cummings v. Missouri, supra note 171, at 323-324. Many instances of coercion practiced by conditional bills of pains and penalties are collected in Wooddesson, op. cit. supra note 82, at 621. There was a close analogy between such bills and the practice of outlawry. Respublica v. Doan, 1 Dall. 86 (Pa. Sup. Ct. 1784).

173. Dissenting were Justices Miller, Swayne, Davis, and Chief Justice Chase, all recent Republican appointees. Mr. Justice Miller's dissenting opinion applies particularly to *Ex parte* Garland, 4 Wall. 333 (1867).


175. 4 Wall. 333 (1867), an original motion for leave to practice as an attorney of the Supreme Court without taking the oath as to past loyalty.

176. As to the effect of the pardon, see text at note 263 infra.
truly relevant qualification was future loyalty. Furthermore, we must observe, the effect of such a rule would be to deprive a large portion of the country of proper and convenient representation in the highest court of the land.

Four dissenting judges argued that the Court thus prevented the removal of a disloyal, and therefore unfit, attorney from the rolls. Furthermore, the Act in question was neither a bill of attainder nor an ex post facto law since no "attainder" such as the common law knew was involved, and there was no criminal trial by which punishment was being imposed in excess of that which previously existed.

The net result of the Cummings and Garland cases was to demonstrate the foresightedness of the framers of the Constitution in laying down such a limitation to prevent the excesses which revolutionary strife often produces. They further established at the outset a broad construction for the bill-of-attainder and ex-post-facto provisions in order to prevent the achievement by a mere change of form, of the evil apprehended.

Shortly thereafter, in Kring v. Missouri the Court had occasion to hold that a change effected by state constitutional amendment, by which a judicially created rule of law was abolished, to the defendant's disadvantage, was unconstitutional as an ex post facto law. At the time the offense was committed, conviction of murder in the second degree was an implied acquittal of murder in the first degree so that a second trial after reversal of the conviction of second degree murder could not result in conviction of murder in the first degree. The defendant did not fall within the terms of the earlier rule at any time, his plea of guilty to murder in the second degree coming after the constitutional amendment. However, the result of a long series of trials was a verdict of guilty of murder in the first degree (with the consequent death sentence)

178. Ex parte Garland, 4 Wall. 333, 385 (1867).
179. In contrast with these retributive measures was the provision sustained in Hawker v. New York, 170 U. S. 189 (1898), where the defendant was convicted, under an Act passed in 1893, of unlawful practice of medicine in 1895, because he had been convicted of abortion in 1878. The Court found (three Justices dissenting) that there was a rational relation between such past felonious conduct and present qualification for the medical profession. Cf. Dent v. West Virginia, 129 U. S. 114 (1889), holding it not an ex post facto law nor a bill of attainder to compel discontinuance of medical practice by a doctor who lacked by four years the ten years practice required of those who could not meet the new criterion of graduation from "reputable" medical schools.
180. 107 U. S. 221 (1882).
after defendant had entered a plea of guilty to murder in the second degree, which plea was later withdrawn and a plea of not guilty entered.\footnote{181}

The dissent was well reasoned. The earlier rule was a mere rule of evidence upon which the defendant had at no time relied; and the fact that it had been changed by constitutional amendment did not condemn the new rule when, in its nature, it was not \textit{ex post facto}.\footnote{182} Later decisions seem to have departed from the extreme position of the Court here; and a line closer to the distinction between change of substance, and change of remedy, which has become familiar as applied to laws impairing the obligation of contracts, has been established.\footnote{183}

\textit{Ex parte Medley}.\footnote{184} was the first case before the Court involving change of the \textit{punishment} only. A Colorado statute embellished the death penalty provisions existent at the time of the crime by adding (1) solitary confinement for a period of between two and four weeks prior to execution; (2) uncertainty as to time of death by requiring the warden to fix the time of execution without giving the prisoner advance warning. It was clear that the solitary confinement was here intended to be an auxiliary punishment and not a mere safe-keeping provision.\footnote{185} The statute was condemned as \textit{ex post facto}. At the next term a similar contention was made as to a statute in Minnesota.\footnote{186} Here the defendant failed to prove that it was the intention of the state officers to impose the added

\footnote{181. Altogether there were five trials prior to the instant review in the Supreme Court:
(1) Trial, followed by reversal on appeal; (2) Mistrial; (3) Mistrial; (4) Plea of guilty to murder in the second degree, followed by reversal on appeal on the ground the prosecuting attorney had agreed the sentence would be only ten years, instead of twenty-five years which the court imposed; (5) Conviction of murder in first degree, reviewed upon the instant writ of error.}

\footnote{182. Kring v. Missouri, 107 U. S. 221, 239-242 (1882). Dissenting were Justices Matthews, Bradley, and Gray, and Chief Justice Waite.}

\footnote{183. Two years later, Hopt v. Utah, 110 U. S. 574 (1884) began the retreat with a decision sustaining, against an \textit{ex post facto} contention, a statute making witnesses competent who had been incompetent at the time the crime was committed; see also Duncan v. Missouri, 152 U. S. 377 (1894), where the modification was in the personnel of the State Supreme Court. On the other hand, Thompson v. Utah, 170 U. S. 343 (1898) treated as \textit{ex post facto} the reduction of the petit jury from twelve to eight in non-capital criminal cases. But again in Mallett v. North Carolina, 181 U. S. 589 (1901), a statute revising the appellate procedure so as to allow an appeal by the state to the state supreme court, if the defendant appealed to an intermediate court was sustained. The trend has continued. Beazell v. Ohio, 269 U. S. 167 (1925) (joinder of defendants).}

\footnote{184. 134 U. S. 160 (1890).}

\footnote{185. Compare cases cited note 38 \textit{supra}.}

\footnote{186. Holden v. Minnesota, 137 U. S. 483 (1890).}
solitary confinement in the face of the recent condemnation of Colorado's statute. Consequently the Court refused to hold the statute ex post facto as applied to the petitioner. Certain changes made in the requirements as to time, place, and witnesses of the hanging were held to be within the maxim *de minimis non curat lex*.

In a later case the Court refused to find that a statute which extended by three months the period of prison confinement prior to execution was ex post facto. The purpose of the change was to afford a longer period for the condemned person to prosecute appeals and to seek executive clemency. Since his position was ameliorated, he had no standing to complain.

By 1915, twenty-five years after electrocution had been sustained as a humane manner of inflicting the death penalty, the modern form of punishment had become so well recognized as effective and instantaneous, that it was held that changing the death penalty from hanging to electrocution did not constitute an ex post facto law because the change reduced the severity of the punishment.

The interpretation of the constitutional limitation as we have traced it, thus has led to a moderately definite line between permissible incidental changes of criminal statutes and those substantial variations condemned as ex post facto. It is not surprising therefore that only two significant cases in this area have been decided by the Court in the past thirty-five years. One case held *ex post facto* an amendment of an indeterminate sentence statute which took from the sentencing judge the discretion to impose a maximum sentence less than the statutory maximum. The amendatory act made the statutory maximum mandatory, subject to downward revision of the sentence by the Board of Prison Terms and Paroles after a short period of observation. In other ways the statute worked to reduce the burden upon the defendant, but the *ex post facto* operation in one aspect was sufficient evil to require its condemnation.

The most recent case involving a bill of attainder or ex post

188. Malloy v. South Carolina, 237 U. S. 180 (1915). The opinion enumerated the following states which had adopted electrocution: New York, 1888; Ohio, 1896; Massachusetts, 1898; New Jersey, 1907; Virginia, 1908; North Carolina, 1909; Kentucky, 1910; South Carolina, 1912; Arkansas, Indiana, Pennsylvania, Nebraska, 1913. *Id.* at 185, n. 1. Some state courts have treated the innovation of the lethal gas chamber similarly. See note 25 *supra*.
facto law—United States v. Lovett—arose, as did the Cummings and Garland cases, in a context of factionalism attendant on war. During World War II, the activities and political sympathies of three executive department employees were inquired into by the House Committee on Un-American Activities and the Federal Bureau of Investigation. Subsequently the reports of those two agencies were considered by the House Appropriations Committee with the result that an Urgent Deficiency Appropriation Act of 1943 contained a proviso that no salary or other compensation for services could be paid to three named persons (except for services as juror or as member of the armed forces) unless reappointed by November 15, 1943, by the President with the advice and consent of the Senate.

The persons thus proscribed continued their work in the executive department and ultimately brought suit in the Court of Claims for their compensation. The Court of Claims, with the judges accepting widely diverse reasons, allowed recovery.

On certiorari in the Supreme Court it was held that the effect and intent of the statute was to bar the claimants from government service because of their political beliefs. The substantial interpretation of the Cummings and Garland cases was continued; and the statute was condemned as a bill of attainder, even though the Act in no way pronounced the claimants' conduct criminal. Two justices dissented on the ground that the same result could be obtained by construing the statute as doing no more than prohibiting payment to the named persons out of appropriations especially made. They found three serious constitutional doubts to be avoided: (1) whether the act was a bill of attainder; (2) whether the power of removal of such executive officers rested in the Congress or the President alone; (3) whether there was a denial of due process by discrimination against three employees. Mr. Justice Frankfurter drew a distinction between the broad constitutional standards of fairness such as due process of law and

190. 328 U. S. 303 (1946).
191. Id. at 308-313.
192. 57 Stat. 431, 450, c. 218, § 304 (1943). Elsewhere the Act provided substantial appropriations for prosecution of the war.
193. Lovett v. United States, 66 F. Supp. 142 (Ct. Cl. 1945). Four opinions were written on as many grounds: (1) narrow interpretation of the statute; (2) bill of attainder; (3) denial of equal protection; (4) deprivation of privilege without due process of law.
195. Id. at 315-314, 317-318.
196. Id. at 318, Justices Frankfurter and Reed.
equal protection, and the "specific provisions to deal with specific grievances" such as the bill of attainder prohibition. A flexible, expanding, substantial interpretation of the former, he considered proper because terms of specificity were deliberately avoided by the framers. On the other hand, the bill of attainder provision was couched in the narrowest possible terms.

Nevertheless, it would seem that the position of the majority was sound even though some technical elements of a bill of attainder or an ex post facto law, as understood in 1789, were not present. The Cummings and Garland cases involved the same ostensible form of removing an officer from his position. No purpose was shown here to eliminate the targets of the 1943 Act from office because of incompetence or lack of trustworthiness. Since the statute, as ultimately enacted, provided for discriminatory treatment, without explanation, it was necessary to look to the legislative background to find the purpose of its enactment. Even though the only prima facie similarity between the statute and the classical bill of attainder was the designation of individuals adversely affected, it is difficult if not impossible, in reading the legislative history, to believe that anything less than permanent removal from the government payroll was intended. To allow such an evasion as the dissenters would approve, would be to furnish a method of

197. Id. at 321.

198. However narrow the "bill of attainder" provision might have been, it seems that every bill of attainder must be regarded as an ex post facto law. Every bill of attainder case up to the instant decision has specifically treated the act as ex post facto also, and it would seem that such is correct on principle. The dissenting opinion seems to overlook, in stating that bills of attainder may or may not be ex post facto laws, the class of bill of attainder which was intended to make up for deficient proof. Id. at 323. Compare Wooddesson's classification of bills of attainder with Mr. Justice Chase's oft-repeated categorization. See note 169 supra. Of course, the ex post facto law provision is broader.

199. Perhaps the grossest overstatement of the dissenting opinion was this curious position: At common law, the usual bill of attainder was passed at the request of the Crown. On the contrary, this act was opposed by the Senate, and by the President; only the House approved it on its merits. Consequently it lacked one of the essential characteristics of the classical bill of attainder. Therefore, there was no repugnancy to the Constitution. Id. at 325.

200. See text at note 171 supra. The provisions there employed test oaths with which the targets of reprisal could not comply, in order to prevent resumption of official activity.

201. The crucial language of the statute was: "No part of any appropriation, allocation, or fund (1) which is made available under or pursuant to this Act or (2) which is now, or which is hereafter made, available under or pursuant to any other Act, to any department, agency, or instrumentality of the United States, shall be used, after November 15, 1943, to pay any part of the salary, . . ."
accomplishing the result of the bill of attainder by mere removal of all hint of punishment from the transaction.

That it is usually desirable to interpret and apply statutes so as to avoid constitutional questions cannot be denied. Nevertheless, when a constitutional limitation was directed specifically against the Congress;202 when the President had announced that he considered the statute unconstitutional, but found it impossible under the circumstances to exercise the constitutional counter-check of the veto; and when the Congress had announced its intention to strike at certain persons in the same after-the-fact manner that the framers of the Constitution feared; then the basis for self-restraint by the Court was gone. For a limitation upon the legislature only, can be effectively implemented only by the other branches of government and by the Court alone can that implementation be definitive. In such a situation it is not for the Court to withdraw in deference to the coordinate, popularly-elected branch, for fear that the interference will subvert the proper position of the branches. By limiting the legislature only, the Constitution has made it plain that in this matter the Congress and the state legislatures are not to be trusted.

Consequently, we have in this field of bills of attainder and ex post facto laws a curious inversion. Legislatures have been left free to alter criminal trial procedure and punishment procedure. On the other hand the limits of substance of definition and punishment of crime have been narrowly confined; and the legislature has been prevented from using variations of its own procedure and from selecting devious forms of statutory control, so as to reach the forbidden end of retrospective punishment. Furthermore, the legislature is not accorded the deference generally allowed in all matters pertaining to criminal punishment. If there is the appearance, in substance, of after-the-fact punishment, particularly by statutes operating against an individual or a narrow class, the Court is prompt to evaluate all the circumstances to find whether there has been a prohibited legislative condemnation.

IV. DUE PROCESS AND EQUAL PROTECTION OF THE LAWS

"No person . . . shall be deprived of life, liberty, or property, without due process of law . . . ."

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person

202. See text at note 162 supra.
within its jurisdiction the equal protection of the laws.\textsuperscript{203}

Already we have considered in some detail the attempts, by one theory or another, to apply to the states the specific limitations of the Bill of Rights, which directly operates only upon the Federal Government. Aside from the limited application of due process as a restraint on torture, closely akin to the restriction of the cruel and unusual punishment clause, such efforts have been singularly unsuccessful. As an omnibus for federal constitutional restraints upon the states, due process and equal protection have had no more success than the privileges and immunities clause. Nevertheless, in their primary capacities both provisions have had considerably wider application to punishment for crime.

The normal operation of criminal punishment statutes has long been extremely discriminatory. The modern notion of individualization of treatment for criminals, and the necessity for devising regulatory devices to meet the complexities of modern life have resulted in a multitude of narrow classifications of offenders and in delegation of broad discretionary powers to judges and to administrators.

We have already seen that recidivist statutes have been repeatedly sustained against constitutional arguments.\textsuperscript{204} And it has been noted that the Court has seldom found any punishment prescribed by the legislature not sustainable under the circumstances, save where torture was inflicted or punishment imposed retroactively.\textsuperscript{205} The claim of unfair discrimination has been rejected time and again. The presumption applied in favor of such legislation is well-nigh irrebuttable.\textsuperscript{206}

\textsuperscript{203} Amend. V, proposed September 25, 1789; ratified, December 15, 1791. Notions of equal protection are inherent in due process, and therefore, to an uncertain extent inhibit the federal government, even though there is no express equal protection provision in the Fifth Amendment. See Hirabayashi v. United States, 320 U. S. 81, 100 (1943); United States v. Lovett, 328 U. S. 303 (1946) (Frankfurter, J., dissenting).

Amend. XIV, proposed June 13, 1866; ratified July 21, 1868. "Due process of law" has been analogized to "according to the law of the land," a provision of Magna Carta. 1 Bl. Comm. *133; Gellhorn, Administrative Law, Cases and Comments 229 (2d ed. 1947).

\textsuperscript{204} Text at note 144 supra.

\textsuperscript{205} Weems v. United States, 217 U. S. 349 (1910); text at note 39 supra; and cases involving ex post facto laws and bills of attainder; Section III supra.

\textsuperscript{206} See cases involving allegedly excessive imprisonment, fines, and penalties, note 68 supra. Double damage provisions, Missouri-Pacific Railway Co. v. Humes, 115 U. S. 512 (1885); Shevlin-Carpenter Co. v. Minnesota, 218 U. S. 57 (1910); and \textit{qui tam} actions, Marvin v. Trout, 199 U. S. 212 (1905), have been sustained against due process and equal protection objections.

In Skinner v. Oklahoma \textit{ex rel.} Williamson, 316 U. S. 535 (1942), the
A further instance of the extremes to which punishment classification is permitted to go is where the statute fixes the sentence for escape from prison according to the length of term to which the escapee was originally sentenced. Thus in Pennsylvania ex rel. Sullivan v. Ashe, the Court upheld sentences of two cooperating escapees to additional terms of one-to-two, and three-to-five years, respectively, even though the two had participated in the same escape at the same time in equal degree of fault. The necessity for a stronger deterrent for the convict serving the longer term was the basis for the discrimination.

So also has the Court upheld the indeterminate sentence statutes providing for prison terms imposed with maximum and minimum limits set by the judge (often automatically those fixed by the statute itself) with the actual time to be served subject to determination by an administrative body. Such administrative agencies normally release prisoners under some form of conditioned restraint involving a parole period enduring not longer than the maximum sentence set by the court. Attacks on these indeterminate sentence statutes have been based upon alleged violation of separation or delegation of powers theories, on denial of due process of law, and on failure to accord equal protection under the laws. Of course, separation or delegation of powers within a state government presents no federal question, save perhaps, in an extreme situation wherein due process might be denied by delegation of adjudicating power to an interested party. However, such an exceptional situation is extremely improbable where imprisonment is involved. Furthermore, adequate standards pro-

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Court held that equal protection was denied by a police power statute under which a person convicted three times of grand larceny would have been rendered sterile, while similar "eugenic" sterilization would not be applied to a person convicted three times of embezzlement. While the holding was on the narrowest possible grounds, the language of all three opinions makes clear that sterilization imposed as punishment would be very difficult to sustain. None of the opinions treated the instant case as one of punishment. The opinions of Justices Stone and Jackson expressed conviction that the state of knowledge of heredity offered no hope that the legislature could classify with any tolerable degree of accuracy those whose criminal tendencies might be transmissible.

207. 302 U. S. 51 (1937).
208. In 1939, only three states lacked parole laws, but twelve jurisdictions (including the Federal System) had no indeterminate sentence law, 4 Att'y Gen. Survey of Release Procedures 20 (1939).
vided by the statute can end virtually all difficulty, whether federal or state statutes are involved.

This type of sentencing procedure inevitably leads to the imposition of unequal sentences for the same crime. But there is a rational basis for the differentiation in the social, and indeed the individual, advantage of reducing prison terms of those who can, with safety, be released early. And there would seem to be no denial of procedural due process, at least where there is a provision for the orderly determination of the definitive sentence within a reasonably short time after the term begins.

A more difficult issue, and one upon which the Court has been far from unanimous in opinion, is the extent to which the defendant is entitled to be informed of the process and information upon which the determination of sentence is based. Here, as elsewhere, recently the focus of the Court has been in distinguishing the function of state courts in construing state statutes and in exercising other judicial functions.

Thus, the Court recently held in Townsend v. Burke that there was a denial of due process where the defendant was offered no counsel, and the sentencing court erred by misreading or misunderstanding facts of record which were relevant to sentencing under Pennsylvania's procedure. But on the other hand, there was no constitutional violation in Gryger v. Burke, where the Pennsylvania state court erroneously construed the statute as denying it discretion to impose anything less than a life sentence. The latter case was decided by a closely divided Court, so that there can be no certainty that states will in the future be free from interference in such situations. It requires considerable nicety to draw the line between a state court's error in interpretation of a statute and error in its purely judicial capacity. Divorced from recognized legal theory, it is difficult to see why a court's misuse of discretion constitutes a violation of federal rights, while error in deciding that it has no discretion at all is a mere matter of state law. But here, as elsewhere in the field of punishment, we have another

213. In Ughbanks v. Armstrong, 208 U. S. 481 (1908), the court dealt with such a statute as a matter of favor only—particularly since the power to parole was placed in the hands of the Governor. Parole and probation statutes are discussed in text at notes 222 and 276 infra.

214. Cf. Hartung v. People, 22 N. Y. 95, 106 (1860); Ex parte Medley, 134 U. S. 160 (1890), where power to keep the defendant guessing was the objectionable feature in ex post facto laws.


example of the great deference accorded criminal statutes. Such deference could not exist at all if the state courts were not left free to interpret and construe the statutes themselves. Interference with the judicial power, which operates in the context of punishing a particular criminal, is more justifiable; for the Supreme Court thus acts as a deterrent to inescapable pressures on local judges—often generated by overzealous prosecutors. On the contrary, the question of how the statute should be read is usually viewed by the state appellate court, at least, with some recognition that it deserves detached consideration. Taken together with the fact that state independence of statutory enactment can remain inviolate only if the construction is not converted into a federal constitutional question, this additional element of greater probability of detachment explains the distinction.

At a recent term the Court decided a case which will revitalize the freedom of the legislatures to devise and implement various methods of individualizing punishment. In Williams v. New York, it rejected the argument that due process was denied a defendant who was sentenced to death after the jury which found him guilty of murder in the first degree recommended life imprisonment. In fixing the punishment, the judge considered probation officer's reports and other extra-judicial information with which the defendant was not confronted and which he was offered no opportunity to rebut. The sentencing judge stated his conclusion that the defendant was a chronic thief of debased character. Three attorneys requested clemency, but none contradicted the sentencing judge's basic assertions.

The Court's opinion by Mr. Justice Black (its spokesman in many cases on Civil Rights) made clear that the requirements of a fair hearing on the issue of guilt are far more stringent than the procedural demands in determining punishment:

"The type and extent of this information [bearing upon sentence] make totally impractical if not impossible open court testimony with cross-examination. Such a procedure could endlessly delay criminal administration in retrial of collateral issues. . . . And it is conceded that no federal constitutional objection would have been possible if the judge here had sentenced appellant to death because appellant's trial manner impressed the judge that appellant was a bad risk for society, or if the judge had sentenced him to death giving no reason at all."219

218. See In re Oliver, 333 U. S. 257 (1948).
Nevertheless, the Court stated clearly that the authority of the *Townsend* case was not being sapped.

Due process and equal protection there must be. But the words of Mr. Justice Field remain today a clear statement of the attitude of the Court to challenges of punishment statutes:

"The power of the State to impose fines and penalties for a violation of its statutory requirements is co-equal with government; and the mode in which they shall be enforced, whether at the suit of a private party, or at the suit of the public, and what disposition shall be made of the amounts collected, are merely matters of legislative discretion."

V. MITIGATION OF PUNISHMENT

A large part of the development of Anglo-American criminal law during the one hundred and sixty-one years since the adoption of our Constitution has revolved about devices for mitigation of punishment. Probation, parole, indeterminate sentences, and good-time credits are new developments. Pardon, reprieve, and commutation of sentence are old methods for allowing a little play in a penal system once virtually inflexible.

As we have seen, the indeterminate sentence laws have usually been integrated with a parole scheme of some kind. And, of course, there has been no successful attack upon their constitutionality. Although there has been a federal parole system since 1910, the Supreme Court has only twice passed upon it—both times as to matters of statutory construction. On the whole such an administratively-managed method of release-subject-to-control is an admirable experiment. The Court has been ready to encourage it, wisely recognizing that any judicial hostility would result in imposition of rigid sentences of much greater severity. Furthermore, no decision has involved good-time credit, another method of flexible punishment designed to encourage good prison demeanor.

Since the most serious constitutional issues have involved par-

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220. The *Williams* case, text at note 217 *supra*, was followed in *Solesbee v. Balkcom*, 339 U. S. 9, (1950), which approved a summary procedure employed by Georgia in determining whether a convict condemned to die was sane or insane.


222. Text at note 208 *supra*.

223. *Anderson v. Corall*, 263 U. S. 193 (1923) (denying credit for time on parole against imprisonment sentence parolee was required to serve out after revocation of parole); *Zerbst v. Kidwell*, 304 U. S. 359 (1938) (denying credit for time served under a second sentence for crime committed while on parole from first sentence).
don and probation, those subjects will now be considered in some detail.

(1) The Pardon Power

The power of the President to grant reprieves and pardons was adopted directly from the English system. There the notion of pardon had become well established as soon as the blood-feud was replaced by the “King’s peace,” for punishment was for the monarch to impose or withhold at his pleasure. When the sovereign ceased to sit in the King’s Bench, he retained this prerogative of extending clemency. Thus, during the period of some three or four centuries that criminal prosecution by the Crown was a concurrent remedy with familial revenge by appeal of the felon (that survival of tribal law), the King could pardon the criminal but could not relieve him of the bot or wer. For long centuries the King’s pardon was the chief mitigating force, along with benefit of clergy, in a strict and remorseless criminal law.

By 1787, executive clemency was taken for granted in the United States, so that the Federal Convention quarreled little save on one point: there was opposition to allowing pardon of treason by the President alone. Nevertheless, after considerable discussion it was agreed that there was less to be feared of possible abuse by the Chief Executive (who was subject always to impeachment) than by one or both elected branches, subject as they must be to the passing emotions of the moment. The vacillations attendant on Shays’ Rebellion in Massachusetts only the year before were lesson enough to persuade the doubters to enlarge the power of the executive branch. Public opinion could be depended upon, it was thought, to keep the President from softheartedness while the sense of sole responsibility would assure a moderately sensitive


225. 2 Holdsworth, op. cit. supra, note 8, at 54; 3 id. at 312-313. Parliament, once its supremacy was achieved in the seventeenth century, also asserted its power to pardon; as to Congress, see text at notes 242 and 262 infra.

226. 1 Farrand, op. cit. supra note 154, at 292; 2 Id. at 146, 171, 185, 411, 419, 575, 599, 626. Of the states represented in the Convention, in four, the pardoning power was in the Governor alone; in five in the governor and council; in two, in the legislature. 3 Att’y Gen. Survey of Release Procedures 1, 91 (1939).

227. Opposition was led by Randolph, Mason, and Madison. The most persuasive supporter of granting the President the sole power was Wilson. A proposal to require advice and consent of the Senate in cases of treason was rejected after serious consideration.
spirit of compassion. Thus the clause passed into the Constitution, after many versions had been discussed, substantially un-

changed from that proposed by Charles Pinckney.

"The president . . . shall have power to grant reprieves and

pardons for offences against the United States, except in cases

of impeachment."

There being no ready method for obtaining review of a federal
criminal case, it was nearly half a century before the pardon
power came before the Supreme Court for consideration. An

opinion by Chief Justice Marshall in United States v. Wilson laid down a principle which stood (as did so many of the prin-
ciples stated by the Marshall-led Court) for nearly a century. The

question was whether a trial court could take cognizance of a par-
don which the defendant refused to set up. The Chief Justice said:

"A pardon is an act of grace, proceeding from the power en-

trusted with the execution of the laws, which exempts the indi-

viduals, on whom it is bestowed, from the punishment the law

inflicts for a crime he has committed." Such a pardon was not transmitted to the Court with the intention of controlling its action, but to the individual as the means of his personal benefit. Especially since a pardon might be conditional (a practice long approved in England), the individual must, the Court felt, have the option of deciding for himself whether the conditions were more onerous than the original punishment. The distinction was noted between an executive pardon and pardon by Act of Parliament. The latter was a public act of which the Court must take judicial notice. However, the President’s pardon—being a private executive act—must be proved.

Two decades later in Ex parte Wells, the Court held that a

pardon on condition (by which the sentence was commuted from
death to life imprisonment) was within the historic scope of the

pardon power. The applicant argued that the condition was not

228. The Federalist, No. 74 (Hamilton). In cases of treason one of the

expected advantages of such unified power to pardon was the promptness with

which an opportunity of the moment could be seized.

229. The first draft of the Pinckney Plan read: "Art. 8 . . . He shall

have power to grant pardons and reprieves, except in impeachment . . . ." 3 Farrand, op. cit. supra note 154, at 599. "For offences against the United States" was inserted by the Committee on Style, in order to prevent exten-
sion of the power to state offenses. See note 253, infra.


231. See note 115 supra.

232. 7 Pet. 150 (U.S. 1833).

233. Id. at 160.

234. Id. at 161.

235. Id. at 163.

236. 18 How. 307 (U.S. 1856) (an original habeas corpus petition by a

prisoner convicted in the District of Columbia).
authorized by the Constitution and since the condition was subsequent, the pardon was absolute. This perverse contention was rejected. The Court eschewed the suggestion that there was a violation of the separation of powers doctrine in that the effect of the pardon was to invade the power of the Congress to prescribe punishments. Only one justice accepted the prisoner’s argument, but two failed to find any authority for reviewing a federal criminal case.

As might be expected, the historical practice continued to control the scope of the pardon power. Thus in 1885, the power of the Secretary of the Treasury to remit fines and pecuniary penalties and forfeitures was sustained by reason of acquiescence in the practice, under various statutes, for nearly a century.

Although the possibility had been recognized before the Constitution was drafted, the use of the pardon device to immunize witnesses from crimination, in order to prevent the exercise of the privilege against self-incrimination so as to avoid testifying was not considered by the Court until over a century later. An early attempt (under a statute enacted in 1868) failed because the statutory immunity was not as broad as the constitutional protection against self-incrimination. But in 1896, in Brown v. Walker the power of Congress to grant an immunity from prosecution, absolute in scope, in order to allow compulsion of testimony from an unwilling witness was affirmed.

The separation of powers objection fell because of the historic function of the legislature in defining crimes and granting amnes-
ties. The contention that there might be a state prosecution on the same matter, which the federal immunity provision could not prevent, was rejected as too unlikely to be given weight. The device has been employed again and again in aid of many different kinds of federal controls, and the pardon power of the President has never been regarded as an obstacle to its use.

In 1915, there was a most questionable decision. In Burdick v. United States the Court considered an attempt to use the immunity device through a Presidential pardon. In a grand jury inquiry into customs frauds, testimony was desired from newspapermen whose writing had, in part, precipitated the investigation. The witnesses refused to answer crucial questions, especially as to the sources of their information. To prevent this retreat behind the privilege against self-incrimination, the prosecuting attorney obtained unconditional pardons from President Wilson. These pardons covered all offenses about which the witnesses might testify. When the pardons were tendered at a second session of the grand jury, the witnesses again refused to answer and stated that they rejected the pardons. Sentences for contempt followed. In reversing, the Court relied upon an extremely dubious implication drawn from the Wilson case: that all pardons are ineffective until accepted by the person upon whom they are bestowed. Furthermore, the Court said that the pardoned person could not be forced to suffer in invitum the ignominy of the “imputation of guilt” inherent in executive clemency. It noted that legislative immunity, such as had been approved in Brown v. Walker, carried with it no such implication. Of course, since the pardons in question stated unequivocally that their purpose was to obtain the witnesses’ testimony, it scarcely seems that there was any opprobrium attaching to them.

Unfortunately, it seems that the following discussion in the

243. See note 225 supra; compare the Civil War presidential amnesty cases, text at note 263 infra.

244. United States v. Murdock, 284 U. S. 141 (1931) settled the doctrine that possible prosecution by a state is no threat of crimination such as will prevent compulsion of testimony by the federal government. See note 96 supra.


246. 236 U. S. 79 (1915). Burdick was city editor of the New York Tribune. In a companion case the contempt conviction of a reporter was also reversed. Curtin v. United States, 236 U. S. 96 (1915). Their claim was fear of prosecution for conspiracy to defraud the United States and for bribery of an official to betray information.

247. 7 Pet. 150 (U.S. 1833). The language of Marshall had gone far beyond the narrow question of pleading involved in the decision.
Federal Convention was not called to the Court's attention:

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"Mr. L. Martin moved to insert the words, 'after conviction,' after the words, 'reprieves and pardons.'

"Mr. Wilson objected, that pardons before conviction might be necessary, in order to obtain the testimony of accomplices. He stated the case of forgeries, in which this might particularly happen.

"Mr. L. Martin withdrew his motion."248

Thus the proposing convention foresaw and thought it had authorized the use of this very device. Of course, it may be that the Court indulged the spurious analogy to the Wilson case in order to protect "the newspaperman's source"—an adjunct of a then-developing consciousness of rights of privacy and free speech.249 Furthermore, it cannot be denied that such a device for procuring testimony might be subject, in unscrupulous hands, to abuses.250 Nevertheless, the offices of President and prosecuting attorney are essentially positions demanding independence as much as integrity.

It was not long, however, before the Court limited the Burdick decision considerably. In Biddle v. Perovich251 Marshall's concept of the pardon as a private act was rejected. Since the President had commuted the punishment from death to life imprisonment, the substituted sentence certainly was less burdensome than the orig-

248. 2 Farrand, op. cit. supra note 154, at 426. A thorough examination of the briefs and opinions in all courts reveals no reference to this colloquy. It is a cause for wondrous admiration that the framers could have been so far-sighted in their considerations. Judge Learned Hand in the District Court mentioned the precedent in 1 Burr's Trial, 244 (Coombs), reported as United States v. Burr, 25 Fed. Cas. 55, 63-64, No. 14, 693 (C.C. D. Va. 1807). United States v. Burdick, 211 Fed. 492 (S.D. N.Y. 1914).

249. E.g., Warren and Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890); Pound, Interests of Personality, 28 Harv. L. Rev. 445, 453 (1915). The argument was made for the defendants, Supplemental Brief for Plaintiffs-in-Error, pp. 8-23, Burdick v. United States, 236 U. S. 79 (1915), but the Court's opinion does not advert to it.

250. Abuses galore in England and in the states are recounted in 3 Att'y Gen. Survey of Release Procedures 1-53 (1939) passim; id. at 81-84.

251. 274 U. S. 480 (1927).

The Government offered in its brief a statement which attempted to synthesize the doctrine:

"The correct rule is that no exercise of the pardoning power requires acceptance except a true conditional pardon, which imposes a condition not known to the law and which requires voluntary action by the prisoner, but such an individual pardon by executive action is a private act of which the courts may not take judicial notice, a failure of the accused and of the prosecution to bring it properly to the attention of the Court may make it ineffective, and in that limited way only may it be said the accused can reject it." Brief for the Warden, p. 7, Biddle v. Perovich, 274 U. S. 480, 482 (1927).

The Court did not definitely espouse it (the case being heard only on a certified question).
inal. Consequently, there was no justification for requiring acceptance of the commutation before the conditional pardon could be effective. The Court, departing from Marshall's view, treated the pardon as a mandate to the entire government not to inflict the death penalty.

It seems that nothing less could have been afoot here than an attempt to force the President (now morally estopped from allowing death to be imposed by withdrawing the conditional pardon) to reduce the punishment even more.\textsuperscript{262} To allow the embarrassment of an already overburdened Chief Executive by a convict's "refusal" of a clearly lesser sentence would be intolerable.

Another long stride in the advance of the President's pardon power was taken in Ex parte Grossman.\textsuperscript{263} It was held that even a criminal contempt could be pardoned.\textsuperscript{264} Notions of the absolute sanctity of our tripartite form of government were cast aside. In an extremely farsighted opinion by Chief Justice Taft the Court noted that the adjustment of injustices for which the pardoning power was provided were needed in contempt cases as much if not more than in run-of-the-mill criminal cases.\textsuperscript{265} Where the prisoner has been held in contempt, it is more than possible that such is the result of the action of an irascible judge who has departed from

\begin{itemize}
  \item \textsuperscript{252} The brief for the prisoner expressly stated that the prisoner realized that the acceptance of his contention as to the invalidity of the pardon should lead to his execution, but strongly implied that if execution were later to be attempted, his argument would be that double punishment violative of the Fifth Amendment was being inflicted. See text at notes 106 and 132 \textit{supra}.
  \item \textsuperscript{253} \textit{267 U. S. 87} (1923). The language "offences against the United States" was held to encompass criminal contempt, since its purpose was to limit the President's power to federal, as distinguished from state offenses, and not to restrict the power to statutory crimes. See note 229 \textit{supra}.
  \item \textsuperscript{254} The contrary result was expected by some of the authorities: e.g., Farrar, \textit{op. cit. supra} note 157, at 447. The Court has not yet spoken on two related matters which are probably beyond the reach of the President's pardon power: Civil contempt and contempt of Congress. See 2 Story, \textit{op. cit. supra} note 23, § 1503; 2 Willoughby, \textit{The Constitutional Law of the United States} 1270 (1910). \textit{But compare} 1 Kent, Commentaries *284 (Holmes ed. 1873).
  \item \textsuperscript{255} \textit{Ex parte} Grossman, \textit{267 U. S. 87}, 120 (1928). It is likely that had there not been a former President on the Court at the time, this case might easily have gone the other way. It was Chief Justice Taft (then President) who had commuted the sentence of Perovich, Biddle v. Perovich, \textit{274 U. S. 480} (1927).
  \item The \textit{Grossman} litigation was of that awkward kind involving conflict among the branches of the government. Attorney General Stone (later Chief Justice) appeared as amicus curiae, urging the validity of the pardon. Special counsel appeared for the jailer. \textit{Compare} United States v. Lovett, \textit{328 U. S. 303} (1946).
\end{itemize}
Any danger of subversion of the judicial system was, the Court felt, no greater in contempts than in other crimes. A general jail delivery would destroy respect for courts as quickly in one case as in the other.

The executive-judicial phase of the separation of powers problem was thus disposed of rather neatly on the broadest of grounds with the pardon power achieving clear dominance. The other segment of the triangle—the executive-legislative phase—resulted in a longer series of cases, fought out in a spirit of great hostility. This interrelation between the pardoning power of the President and the legislative power of Congress was the issue involved in a number of cases arising out of the War between the States.

There were three general Civil War amnesty proclamations. The first, by President Lincoln in 1863, was conditioned on the recipient swearing loyalty to the Union and accepting various provisions as to slavery. Large classes of Confederate leaders were excluded from the compass of the amnesty. Shortly after the close of the war a second proclamation by President Johnson was issued. This was essentially the same, but excluded from its operation persons of great wealth as well as many former leaders. However, specific pardons could be granted to those excepted. The third, most general, amnesty was granted in 1868, but still excluded some 160,000 persons. Not until 1872, were nearly all of the rebels relieved of the consequences of their treason; and then it was by


257. Conflict of the branches of government as to the pardoning power may occur in three phases: executive-judicial, executive-legislative, and legislative-judicial; and in three ways: (1) by two branches exercising the pardon power, (2) by one branch exercising its pardon power in such a manner as to trench upon the active powers of the other, (3) by one branch exercising its active powers in such a way as to trench upon the pardon power.

E.g., Sorrells v. United States, 287 U. S. 435, 449 (1932), held that the judiciary could not sua sponte mitigate a criminal statute without interfering with both legislature and executive.

258. 13 Stat. 737 (1863); “authorized” by 12 Stat. 592 (1862). The conditions were modified by proclamation, March 26, 1864, 13 Stat. 741. The opinions in United States v. Klein, 13 Wall. 128 (U.S. 1871); and Carlisle v. United States, 16 Wall. 147, 153 (U.S. 1872) recite the terms of the various confiscation acts and general amnesties involved in this series of cases.

The political motives behind the proclamations varied with the fortunes of war and reconstruction. See Bassett, op. cit. supra note 170, at 596 et seq.

259. 13 Stat. 758 (1865).

260. 15 Stat. 711 (1868).

261. Bassett, op. cit. supra note 170, at 634-635.
PUNISHMENT FOR CRIME

The first issue settled was the effect of a special presidential pardon. In a case we have seen before, Ex parte Garland, the Court held that the statute which deprived an attorney of his standing in federal courts, by requiring an oath as to past loyalty which he could not take, was ex post facto. However, the Court accepted as an alternative ground of decision the contention that the requirement was unconstitutional because it clogged the effectiveness of the special pardon which the President had granted. Shortly afterwards, the Fourteenth Amendment was ratified (it had already been proposed by Congress) with a provision which made necessary approval of two-thirds of each house of Congress before atraitorous officer of the United States could resume such an office. However, Garland was unaffected by the Amendment. This alteration of the extent of the pardon power as to treason recalls the doubts of the framers of the Constitution. However, no basic constitutional reformation was afoot. The underlying motives for the provision were two-fold: punishment of the rebel leaders and political advantage for the Republican party.

The rest of the cases stemmed from the operation of the confiscation acts of 1861 and 1862 (which were little enforced until the end of the war) and the Abandoned and Captured Property Act. The Congressional aim here was to strike at the rebels

262. 17 Stat. 142, c. 193 (1872). Still politically disabled were rebel Congressmen, federal, judicial, military, and naval officers, heads of federal departments, and foreign ministers.
263. 4 Wall. 333 (U.S. 1867), discussed in text at note 175 supra.
264. Id. at 380.
265. Amend. XIV, § 3:
"No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability."

Garland's pardon had been granted on July 15, 1865. The Congress had proposed the Fourteenth Amendment, June 13, 1866; ratification was not achieved until July 21, 1868. The decision was announced in the interim on January 14, 1867.
266. Text at note 227 supra.
267. Flack, The Adoption of the Fourteenth Amendment 127 et seq. (1908). The first proposals were to disenfranchise the rebels completely. One primary concern was to make the Amendment unpalatable enough to prevent the Southern states from accepting it in time to participate in the presidential election of 1868.
without depriving loyal citizens of their property. The legislation was both coercive and punitive, and not purely confiscatory. Beginning in 1867, the Court held repeatedly that a presidential pardon relieved the owner of such property of the effects of the loss, unless the proceeds had been covered into the Treasury so that an appropriation was needed to sustain repayment or rights of third persons had intervened. Thus in Padelford's case, it was held that a pardoned rebel could recover the proceeds of captured property just as though he had been constantly a loyal subject. The pardon operated to remove all taint of guilt. Shortly thereafter, Congress determined that the spirit of the various confiscation acts was not being carried out by this interpretation. A statute was therefore passed which declared that no pardon could be admitted in the Court of Claims (wherein claims for confiscated property were heard) as proof of loyalty; conversely however, the unqualified acceptance in writing of a pardon which recited that the recipient had engaged in the rebellion was admissible as proof of disloyalty. In United States v. Klein, the Court held that such a provision was an attempt to interfere with the functions of the executive by limiting the effect of a pardon and with the judiciary by directing the Court how cases should be decided.

The breadth of the Court's decision is indicated in the language of Mr. Justice Field in Carlisle v. United States:

"... the pardon of the President, whether granted by special letters or by general proclamation, relieves claimants of the proceeds of captured and abandoned property from the consequences of participation in the rebellion, and from the necessity of establishing their loyalty in order to prosecute their claims. This result follows whether we regard the pardon as effacing the offence, blotting it out, in the language of the cases, as though it had never existed, or regard persons pardoned as necessarily excepted from the general language of the act, which requires claimants to make proof of their adhesion during the rebellion, to the United States. It is not to be supposed that Congress intended by the general language of the act to encroach upon any of the prerogatives of the President, and especially that benign prerogative of mercy which lies in the pardoning power."

Thus, here also, the President's pardon power was held to

268. Armstrong's Foundry, 6 Wall. 766 (U.S. 1867) (property seized under Act of August 6, 1861); cases cited notes 269-275 infra.
269. United States v. Padelford, 9 Wall. 531 (U.S. 1871); Armstrong v. United States, 13 Wall. 154 (U.S. 1871).
270. 16 Stat. 235 (July 12, 1870).
271. 13 Wall. 128 (1871).
272. 16 Wall. 147, 153 (1872).
dominate the power of Congress to punish, just as it was later held, as we have seen, to dominate the power of federal courts to punish for contempt. Nevertheless, the power of Congress to exercise its functions other than punishment was held free from limitation by the pardon power. Once title to land was vested in the United States under the confiscation acts, the President could not undo what had been done and in effect repeal the confiscation act ab initio.273 Nor could the pardon extend the two-year statute of limitations on such confiscation claims.274 Furthermore, Congress retained the power to restrict the use of a special appropriation to payment of pre-war claims to those who had actually remained loyal.275

The Court, therefore has accorded to the pardon power complete primacy. Congress and the President, severally, can pardon without hindrance from any other branch of our government. No more clearly could responsibility for justice be thrown completely upon the shoulders of a single branch.

(2) Probation

The modern trend to individualize punishment of criminals has developed a most flexible and beneficial device of saving the convicted person from the rigors of imprisonment, provided he conducts himself properly for a probationary period. The object of probation is to economize the social loss inherent in the use of imprisonment. Fanning out over the country from Massachusetts, the device has received general acceptance.276 Beginning about the middle of the nineteenth century, the earliest and crudest practice was developed by courts acting without legislative backing. Sentences were suspended, either as to imposition or execution; and defendants were allowed to depart, subject to continued good conduct.277

273. The Confiscation Cases (Slidell's Land), 20 Wall. 92 (U.S. 1873); Wallach v. Van Riswick, 92 U. S. 202 (1875); compare Osborn v. United States, 91 U. S. 474 (1875) (where the claimant recouped the proceeds of sale of confiscated property from the registry of the court of condemnation). 274. Haycroft v. United States, 22 Wall. 81 (U.S. 1874). 275. Hart v. United States, 118 U. S. 62 (1886); Knote v. United States, 95 U. S. 149 (1877) (held that a pardon could not be used to obtain funds from the treasury to pay a claim for which no appropriation had been made). 276. 2 Att'y Gen. Survey of Release Procedures 15 (1939). 277. The first probation officers were volunteers, such as John Augustus, the shoemaker, who, at Boston during the 1840's, undertook to stand surety for the good conduct of defendants. Chute, Development of Probation in the United States in Glueck, Probation and Criminal Justice 228 (1933).
The Supreme Court first considered the practice in Ex parte United States. A federal district judge in Ohio suspended execution of a five-year sentence during the defendant's good behavior. The order kept the term of court open for purposes of the case. The prosecuting attorney objected to the disposition on the ground that the sentencing court lacked such power. An original application for mandamus to compel the vacation of the order was granted. Arguments in favor of the practice were tendered from all sides. In the First Circuit, especially in Massachusetts, the federal courts had made a practice, for some sixty years, of "laying the case on file."

In an opinion by Chief Justice White, the Court unanimously asserted that the action of the judge violated first principles of separation of powers. It was for Congress to fix punishment; and for the President to relieve from punishment. Recognizing that power had been exercised at common law to suspend sentences, the Court insisted that the practice was limited to judicial reprieve—temporary suspension to permit motions for new trial, appeal, and executive clemency. There had been no practice of relieving the defendant of punishment altogether. It was made clear, however, that a statute could authorize such a practice, if Congress desired so to modify the punishment.

Thereafter, attempts were made to induce Congress to establish a probationary system. However, not until 1925, was the Federal Probation Act passed. At first it was little used, for lack of funds. No effective system was instituted until 1930.

278. 242 U. S. 27 (1916). The Judge was the Honorable John M. Killits, and the case has since been known as the Killits case.

279. The mandamus was made effective at the end of the current term of the Court, in order that there would be an opportunity for the President, if he saw fit, to grant executive clemency. Id. at 52. Thereupon pardons were granted to some five thousand such probationers. Grinnell, Probation as an Orthodox Common Law Practice in Massachusetts Prior to the Statutory System, 2 Mass. L. Q. 591 (1917).

280. The New York State Probation Commission appeared as amicus curiae.

281. One of the counsel who offered a brief presenting the views of the Bar of the First Circuit was Frank W. Grinnell, Esq., whose investigations of the early Massachusetts devices are set out in Grinnell, supra note 279.


283. The efforts are described by Bates, The Growth of the Federal Probation System in Glueck, op. cit. supra note 277, at 231. During the interim in Massachusetts, Federal District Judge Lowell followed the lead of the state courts, and continued cases for several months while keeping defendants under restrictions. Ibid.


285. Sutherland, E. H., Principles of Criminology 383 (1947). In 1929, there were only eight federal probation officers; in 1940, two hundred.
Nevertheless, the courts did occasionally suspend sentences under its provisions.

The Court first construed the new act in United States v. Murray. After the defendant had begun service of his term, the sentencing court undertook to place him on probation. The Court held that power to grant probation was not power to pardon or parole the prisoner. It refused to believe that Congress intended by the Probation Act to subject the courts to the task of considering sentences twice or more on what were, in effect, applications for parole. Moreover, such belated probation was opposed to the basic theory of the statute, which sought to permit defendants to escape prison entirely.

Nevertheless, only three years later the Court sustained the power of the sentencing court, within the same term, to vacate the original sentence and substitute one of shorter duration. Here the Court saw the action of the judge as correction of an erroneous (though discretionary) decision rather than allowance of clemency.

In 1932, Burns v. United States raised the delicate question as to the type of hearing that the prisoner is entitled to have upon revocation of probation. Chief Justice Hughes then characterized probation as "a matter of favor, not of contract." The Court found that there were no formal requirements of notice and hearing. Since the defendant knew the charge, was represented by counsel, and the court heard witnesses and considered the defendant's own admissions, there had been no arbitrary action. But, nevertheless, the opinion said:

"While probation is a matter of grace, the probationer is entitled to fair treatment, and is not to be made the victim of whim or caprice."

Shortly thereafter, the Court, in Escoe v. Zerbst, held that

286. 275 U. S. 347 (1928).
287. It is also contrary to the theory of the device to imprison a defendant on one count and grant probation on another, but the courts have found that such disposition is a convenient way of adjusting punishment to suit the necessity of the case. See Burns v. United States, 287 U. S. 216 (1932).
288. United States v. Benz, 282 U. S. 304 (1931). The term-of-court rule has been abolished from the federal law as an anachronism. See note 121 supra.
289. 287 U. S. 216 (1932).
290. Id. at 220.
291. Id. at 223.
292. 295 U. S. 490 (1935). The probationer was accused by his father of drunkenness and forgery. After an ex parte hearing of the probation officer, the judge revoked probation. The probationer was arrested, and taken directly to the prison at Leavenworth.
revocation of probation without any hearing at all was not authorized by the statute. But it made clear that the statute and not the Constitution made necessary a hearing upon withdrawal of the privilege.

"Probation or suspension of sentence comes as an act of grace to one convicted of crime, and may be coupled with such conditions in respect of its duration as Congress may impose."\textsuperscript{293}
This presaged the extreme liberality which the Court has recently shown toward sentencing procedure, though approbation of a summary hearing, in great measure \textit{ex parte}, is less extreme than this dictum sanctioning total denial of hearing.

Attempts to suspend sentences outside the power of the statute were continued. The doctrine of \textit{Ex parte United States} was applied once again, and the Court reiterated the invalidity of an indefinite suspension.\textsuperscript{294} The defendant whose sentence had been improperly suspended was subject to be sentenced at a later term. The "term of court" rule was held inapplicable because the suspension was void, so that the case stood over to the new term as unfinished business. The defendant could not complain about the continuance of uncertainty because he had made no request for the court to impose sentence promptly.

A most serious constitutional problem was presented to the Court recently in \textit{Roberts v. United States}.\textsuperscript{295} The defendant had been sentenced to a fine and imprisonment for two years. The execution of the sentence was suspended upon payment of the fine, and the defendant was placed on probation for five years. Four years later, after due hearing, probation was revoked, the sentence vacated, and the defendant sentenced to three years imprisonment. The Court rejected the government's contention that the statute literally meant that the court which revoked probation could "impose any sentence which might originally have been imposed."\textsuperscript{296}

The statute had always indicated that the original sentencing court could either suspend imposition of sentence, or suspend execu-

\textsuperscript{293} Id. at 492. The doctrine of "legislative grace" is a peculiar notion to emanate from portals marked: "Equal Justice Under Law." See the excellent discussion of the need for equality on the favor, as well on the coercive side of the law in 3 \textit{Atty Gen. Survey of Release Procedures} 61 (1939).

\textsuperscript{294} Miller v. Aderhold, 288 U. S. 206 (1933).

\textsuperscript{295} 320 U. S. 264 (1943).

\textsuperscript{296} The position of the Department of Justice had vacillated considerably over the years. \textit{Id.} at 271-272.
tion of sentence. If the government's reasoning were accepted, the effect of every suspension would be to postpone imposition of sentence. Of course, once the Court accepted the construction urged by the defendant, it became clear that the only safe course for the sentencing court and for society would be to suspend imposition of sentence, or sentence the defendant to the maximum term and suspend execution.297

The constitutional issue thus avoided was whether it violated the double jeopardy provision to sentence a man twice (the first sentence being valid, and the second sentence being greater than the first). Here again, Ex parte Lange298 played a major role in the defendant's argument. Three justices dissented,299 on the ground that there was no real constitutional doubt to be avoided, and that the construction, rejecting as it did the literal language of the statute, would discourage sentencing courts from imposing tentative sentences. Consequently, a desirable feature of the probation system of considerable psychological value was lost: the probationer could not know the probable cost of misconduct. Subsequently Congress, in enacting the new Criminal Code, amended the statute to agree with the construction adopted by the majority.300

It would seem that the implications of Ex parte Lange—even if that troublesome decision continues to stand—would not render invalid the tentative-sentence plan if Congress had wished to make clear that such a device was to be used. After all, the original sentence never could be final, and the probationer never would serve a single day under it. The only punishment inflicted would be under the new sentence, imposed after revocation of probation. It hardly appears that there is a constitutional right to be free of two recitations of sentence, when admittedly there is no violation

297. See Roberts v. United States, 320 U. S. 264, 275 (1943) (dissenting opinion).
298. A dictum in United States v. Benz, 282 U. S. 304, 307 (1931) had noted the alleged constitutional distinction between increase and reduction of sentences.
299. Justices Frankfurter, Reed, and Chief Justice Stone. Refusing to accept the construction of the statute which the majority adopted, they passed to the constitutional issue. The dissent of Mr. Justice Holmes in Kepner v. United States, 195 U. S. 100, 134 (1904) was much relied upon. Perhaps its vindication in the Palko case, 302 U. S. 319 (1937), and its use here indicate that the Lange case, 18 Wall. 163 (U.S. 1874) is open for reconsideration.
"Such probationer shall forthwith be taken before the court and the court may revoke the probation and require him to serve the sentence imposed, or any lesser sentence, and, if imposition of sentence was suspended, may impose any sentence which might originally have been imposed." (Italics added.)
of the Constitution by suspension of the imposition of sentence altogether.

In view of the continuance of the Court's desire to erect no constitutional obstacles to the employment of flexible punishments, as the very recent Williams and Solesbee\textsuperscript{301} cases have shown, it appears that there will be continued leniency toward the various probationary schemes.

The adamantly conservative position of the Court in Ex parte United States thus has shifted to extreme tolerance. It well may be that the refusal of the Court in that case, to permit judicial creation of mitigating devices advanced the whole process immeasurably. By placing the responsibility upon the Congress, it left the development in the hands of the agency equipped to implement the system with funds, and personnel, and to establish a uniformity beyond the power of the judiciary to achieve.

**Conclusion**

The preceding discussion indicates one fundamental difficulty impregnating most constitutional issues involving punishment. Formalism and conceptualism still war with analysis and common sense. Paradoxically, substantial interpretations have been applied almost constantly to the protections against cruel and unusual punishments, bills of attainder, and ex post facto laws, to claims of denial of due process and equal protection, and even to the exercise of the pardon power. On the other hand, it is only recently that double jeopardy questions have been treated as matters requiring balancing of interests rather than slot-machine application of maxims and precedents. And yet the liberal doctrinaire which has found its way into many Civil Rights areas has not, on the whole, been communicated to criminal punishment decisions. Any loose talk and expansive dicta have been withdrawn almost as soon as uttered.

It is in the exegesis of the double jeopardy protection that the Court has been least consistent. There re-examination of the Court's interpretation is needed, if the constitutional guarantee is to be a firm barrier against harassment by multiple trials rather than a technical ground for escaping just punishment. Furthermore, the inferior courts who are required to deal with claims of double jeopardy as part of each day's calendar need guidance if they

\textsuperscript{301} Text at note 217 supra.
are to act with reasonable certainty and with the appearance of fairness.

This much is sure: today the constitutional guarantees controlling administration of criminal punishment retain an effectiveness commensurate with their fundamental importance.