

## **Bible Reading in Public Schools; Pupil Assignment in the South; Uphold Prayer in Public Schools; Indeterminant Sentencing; Punishment of the Habitual Criminal**

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## RECENT DECISIONS AND DEVELOPMENTS

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### Bible Reading in Public Schools

The constitutionality of Bible reading in public schools has not yet been passed upon by the United States Supreme Court.<sup>1</sup> A recent case in a Pennsylvania district court highlighted the problem of the constitutionality of a statute authorizing Bible reading in the public school system.<sup>2</sup> Plaintiffs, as members of the Unitarian faith, sought to enjoin the reading of ten verses of the Bible and the recitation of the Lord's Prayer in a school attended by their children. The defendant school district contended that such reading without comment does not constitute an establishment of religion or a prohibition of the free exercise thereof, supporting the argument by citing the fact that attendance was not compulsory. Defendant argued further that the reading of the Bible is a substantial aid in developing the minds and morals of school children and that the state has a constitu-

tional right to employ such practice in its educational program. Limiting its discussion to the issue of Bible reading<sup>3</sup> the Court stated that the Bible is a religious document and to characterize it as a work of art with solely literary or historical significance is unrealistic. Relying solely on the religious nature of the Bible, the Court held that the Pennsylvania statute is an unconstitutional aid to religion.

In 1878 the Supreme Court of the United States in affirming a conviction of a Mormon for bigamy under an act of Congress stated that the Fourteenth Amendment created a "wall of separation between Church and State."<sup>4</sup> In *Everson v. Board of Educ.*,<sup>5</sup> the Court reiterated this separation doctrine with regard to its limitation upon the states through the Fourteenth Amendment maintaining, however, that reimbursing for fares paid for the transportation by public carrier of children attending parochial schools did not breach this "impregnable wall." The doctrine was again set forth in *Illinois ex rel. McCollum v. Board of Educ.*<sup>6</sup> The Court here relied on dicta in the *Everson* case in holding that the Illinois released-time provision allowing public school prop-

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<sup>1</sup> *Certiorari* was denied in *Tudor v. Board of Educ.*, 14 N.J. 31, 100 A.2d 857 (1953), *cert. denied sub nom.* Gideons Int'l v. Tudor, 348 U.S. 816 (1954) (involving the distribution of the Gideon Bible in public schools). Because the question had become moot since the party in interest had graduated, the Supreme Court also refused to review *Doremus v. Board of Educ.*, 5 N.J. 435, 75 A.2d 880 (1950), *appeal dismissed*, 342 U.S. 429 (1952).

<sup>2</sup> *Schempp v. School Dist. of Abington Township*, 177 F. Supp. 398 (E.D. Pa. 1959).

<sup>3</sup> *Id.* at 404.

<sup>4</sup> *Reynolds v. United States*, 98 U.S. 145, 164 (1878).

<sup>5</sup> 330 U.S. 1 (1947).

<sup>6</sup> 333 U.S. 203 (1948).

erty to be used for religious instruction was unconstitutional as violative of the First and Fourteenth Amendments. The strict separation doctrine as announced in the *McCullum* case was later modified somewhat by the Court's decision in *Zorach v. Clauson*.<sup>7</sup> Distinguishing *McCullum* where public school property was employed in the program, the Court upheld the constitutionality of a New York statute providing for a released-time program where the instruction was not given on public school property. While reaffirming its decision in *McCullum*, the Court in *Zorach* maintained that such a program was a permissible state "accommodation" of the religious needs of the people.<sup>8</sup>

The constitutional limitation as previously discussed provided for a rather sharp cleavage with respect to church-state relationships, maintaining that neither the state nor the federal government ". . . can pass laws which aid one religion, aid all religions, or prefer one religion over another."<sup>9</sup> With respect to the issue raised by the principal case, however, some authorities contend that an analysis of the intent of the legislators at the time of the passage of the First Amendment demonstrates that Bible reading was not intended to be excluded from the public schools. In *Carden v. Bland*,<sup>10</sup> the court stated that the separation doctrine should "not be tortured into a meaning that was never intended by the Founders of this Republic, with the result that the public school system of the several states is to be made a Godless institution as a matter of law."<sup>11</sup> Similarly, other state

courts, relying on an historic interpretation of the separation of Church and State have held Bible reading in public schools not to be violative of their constitutions.<sup>12</sup> In a recent New York case,<sup>13</sup> the court in an extensive analysis of the times and events surrounding the adoption of the First and Fourteenth Amendments stated "that such separation did not extend to the exclusion of prayer or the reading of the Bible from public school routine."<sup>14</sup> The court emphasized that although the separation doctrine is traced back to Jefferson and Madison, it was their view also that the sense of the nation and the times must be consulted in defining the extent of this separation doctrine.<sup>15</sup>

The Supreme Court of the United States has used a strict interpretation of the Constitution in holding that the First and Fourteenth Amendments prohibit not only preferences but also aid to any and all religions. The *Zorach* decision modifies this approach somewhat and now the government can without violation *accommodate* all religions.<sup>16</sup> Particularizing these general rules with regard to Bible reading, it would seem that under a strict approach, such a practice would fall within the purview of the First and Fourteenth Amendments. Accepting this premise, it must then be decided whether the Bible is a sectarian instrument in such a sense that its use would constitute a preference to a particular religion.

<sup>7</sup> 343 U.S. 306 (1952).

<sup>8</sup> *Id.* at 315.

<sup>9</sup> *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947).

<sup>10</sup> 199 Tenn. 665, 288 S.W.2d 718 (1956).

<sup>11</sup> *Id.* at \_\_\_\_\_, 288 S.W.2d at 724.

<sup>12</sup> *People ex rel. Vollmar v. Stanley*, 81 Colo. 276, 255 Pac. 610 (1927); *Pfeiffer v. Board of Educ.*, 118 Mich. 560, 77 N. W. 250 (1898).

<sup>13</sup> *Engel v. Vitale*, 18 Misc.2d 659, 191 N.Y.S.2d 453 (Sup. Ct. 1959).

<sup>14</sup> *Id.* at 675, 191 N.Y.S.2d at 472.

<sup>15</sup> *Id.* at 673, 191 N.Y.S.2d at 471.

<sup>16</sup> *Zorach v. Clauson*, 343 U.S. 306 (1952).

Much controversy has arisen over the sectarian nature of the Bible. Those courts which have found the Bible to be sectarian have based this result on one of two theories: first, divergence of views as to doctrine although taken from the same source book;<sup>17</sup> and secondly, the lack of universal acceptance, not of doctrine but of version.<sup>18</sup> Conversely, those courts which have held the Bible to be nonsectarian have reasoned that the Bible transcends all creeds and consequently does not constitute either aid or preference to religion.<sup>19</sup>

Where the Bible has been held non-sectarian, the Bible in question generally consisted only of the Old Testament.<sup>20</sup> The problem becomes more acute, however, where both the Old and New Testaments are employed since this might be considered prejudicial to those of the Jewish faith.<sup>21</sup>

This problem was highlighted by two New Jersey cases.<sup>22</sup> In *Doremus v. Board of Educ.*<sup>23</sup> the constitutionality of two New Jersey statutes dealing with the reading of

the Old Testament in the public schools was questioned. The contention advanced was that such reading was an aid to religion. The court rejected this claim and decided that the Constitution only forbids aid to sectarian religions and that the Old Testament is not sectarian when read without comment. In *Tudor v. Board of Educ.*,<sup>24</sup> decided four years later, there was involved the distribution of the Gideon Bible in the public school system. The New Jersey Supreme Court disallowed the practice maintaining that this was not a permissible accommodation of religion. The rationale of the court was that the Gideon Bible is a sectarian document, the distribution of which would amount to a preference of one religious sect over another.

Although *Tudor* on its face seems to be inconsistent with *Doremus*, a closer analysis points up this distinction: the Gideon Bible in the *Tudor* case includes the New Testament, which is unacceptable to Jews and other minority groups. The Bible in the *Doremus* case consisted only of the Old Testament, and the court emphasized that it was concerned only with the Old Testament which is generally acceptable to both Christians and Jews.<sup>25</sup>

Another facet of the problem often considered by the courts is the compulsory aspect of Bible reading, that is, whether the child is required to remain in the room during such reading or may absent himself at the request of his parents. Thus, some decisions have upheld the practice where

<sup>17</sup>State *ex rel.* Weiss v. District Bd., 76 Wis. 177, 44 N.W. 967 (1890).

<sup>18</sup>People *ex rel.* Ring v. Board of Educ., 245 Ill. 334, 92 N.E. 251 (1910).

<sup>19</sup>See Hackett v. Brooksville Graded School Dist., 120 Ky. 608, 87 S.W. 792 (1905); Herold v. Parish Bd. of School Directors, 136 La. 1034, 68 So. 116 (1915) (dictum). It has even been said that "the suggestion that the Bible in either version is a sectarian book borders on sacrilege." Stevenson v. Hanyon, 7 Pa. Dist. 585, 590 (1898), as found in 40 CORNELL L.Q. 474, 475 (1955).

<sup>20</sup>See generally *Doremus v. Board of Educ.*, 5 N.J. 435, 75 A.2d 880 (1950), *appeal dismissed*, 342 U.S. 429 (1952).

<sup>21</sup>But see Wilkerson v. City of Rome, 152 Ga. 762, 110 S.E. 895 (1922).

<sup>22</sup>*Tudor v. Board of Educ.*, 14 N.J. 31, 100 A.2d 857 (1953), *cert. denied sub nom.* Gideons Int'l v. Tudor, 348 U.S. 816 (1954); *Doremus v. Board of Educ.*, *supra* note 20.

<sup>23</sup>See note 20 *supra*.

<sup>24</sup>See note 22 *supra*.

<sup>25</sup>Although this distinction has been termed superficial by text writers, see, e.g., Cushman, *The Holy Bible and the Public Schools*, 40 CORNELL L.Q. 475, 486 (1955), the distinction appears to be valid if the first premise is accepted, i.e., the Old Testament is nonsectarian.

provision was made for the child being excused during such exercises, reasoning that the child's freedom of conscience is not violated where attendance is not compulsory.<sup>26</sup> However, other courts have refused to recognize as a valid defense the contention that the practice was non-compulsory, reasoning that the students were being discriminated against not only if they stayed in the room, but also when they chose to absent themselves.<sup>27</sup> The Supreme Court of Illinois has stated:

The exclusion of a pupil from this part of the school exercises in which the rest of the school joins, separates him from his fellows, puts him in a class by himself, deprives him of his equality with the other pupils, subjects him to a religious stigma and places him at a disadvantage in the school, which the law never contemplated. All this is because of his religious belief.<sup>28</sup>

Psychological factors have been considered to overcome the argument that non-compulsory Bible reading is not an infringement on the child's freedom of conscience. It has been said that the child has a need to belong and to be identified with the group.<sup>29</sup> In the *Tudor* case, testimony of experts in the field of psychology and education indicated that the distribution of the Gideon Bible would cause a feeling of difference and ostracism in those children

whose parents, because of religious convictions, compelled them to refuse the Bible.<sup>30</sup>

The Supreme Court of the United States has also recognized and considered the coercive element attached to programs of religious instruction. In the *McCullum* case, Justice Frankfurter stated:

that a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend.<sup>31</sup>

In the same case however, Justice Jackson in a concurring opinion thought that the Constitution was not designed to protect one from the embarrassment that always attends non-conformity, whether in religion, politics, behavior or dress.<sup>32</sup> It is well to note, however, that these remarks were made not in relation to Bible reading but in connection with the Illinois released-time program. The possible validity of the defense of divisiveness is conditioned on the acceptance of the premise that the Bible is non-sectarian by nature. If the Bible is held to be a sectarian instrument then the practice, whether compulsory or not, is proscribed by the First and Fourteenth Amendments as an unconstitutional aid to religion.

The population of the United States being predominantly Protestant, a Protestant version of the Bible was invariably employed where the practice of Bible read-

<sup>26</sup> See *People ex rel. Vollmar v. Stanley*, 81 Colo. 276, 255 Pac. 610 (1927); *Kaplan v. Independent School Dist.*, 171 Minn. 142, 214 N.W. 18 (1927); *State ex rel. Finger v. Weedman*, 55 S.D. 343, 226 N.W. 348 (1929).

<sup>27</sup> See *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 227 (1948) (concurring opinion); *People ex rel. Ring v. Board of Educ.*, 245 Ill. 334, 92 N.E. 251 (1910); *State ex rel. Weiss v. District Bd.*, 76 Wis. 177, 44 N.W. 967 (1890).

<sup>28</sup> *People ex rel. Ring v. Board of Educ.*, 245 Ill. 334, 92 N.E. 251, 256 (1910).

<sup>29</sup> PRESCOTT, EMOTION AND THE EDUCATIVE PROCESS 117 (1938).

<sup>30</sup> *Tudor v. Board of Educ.*, 14 N.J. 31, 50-51, 100 A.2d 857, 867 (1953), *cert. denied sub nom. Gideons Int'l v. Tudor*, 348 U.S. 816 (1954).

<sup>31</sup> *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 227 (1948) (concurring opinion).

<sup>32</sup> *Id.* at 233 (concurring opinion).

ing was authorized.<sup>33</sup> Consequently, Catholic parents were often the complainants in actions brought to exclude the practice from public schools.<sup>34</sup> The present Catholic position is not easy of definition. In *Hackett v. Brookville Graded School Dist.*,<sup>35</sup> the testimony of a Catholic priest pointed the way somewhat when he distinguished the attitude of the Catholic from that of the Protestant religion on the matter. Whereas Protestants advocate individual interpretation, Catholics maintain that the Church is the interpreter of the Bible.<sup>36</sup> The court in the *Tudor* case went even further in defining the Catholic position, concluding from the evidence introduced that:

the canon law of the Catholic Church provides that "Editions of the original text of the sacred scriptures published by non-Catholics are forbidden *ipso jure*."<sup>37</sup>

Thus, it is extremely doubtful that Catholic authorities would sanction the reading of a non-Catholic version of the Bible to Catholic children in public schools. Perhaps *People ex rel. Ring v. Board of Educ.*<sup>38</sup> contains the most lucid analysis of the view which considers the Bible to be sectarian. In concluding that the King James version is sectarian the court said:

Christianity is a religion. The Catholic Church and the various Protestant

Churches are sects of that religion. These two versions of the Scriptures are the bases of the religion of the respective sects. Protestants will not accept the Douay Bible as representing the inspired word of God. As to them, it is a sectarian book containing errors and matter which is not entitled to their respect as a part of the Scriptures. It is consistent with the Catholic faith but not the Protestant. Conversely, Catholics will not accept King James' version. As to them, it is a sectarian book inconsistent in many particulars with their faith, teaching what they do not believe. The differences may seem to many so slight as to be immaterial, yet . . . sectarian aversions, bitter animosities, and religious persecutions have had their origin in apparently slender distinctions.<sup>39</sup>

In striking down the statute in the instant case as unconstitutional, the Court departed from prior state court decisions. In discussing the issue, the Court concluded that the practice of Bible reading was within the purview of the First and Fourteenth Amendments. Maintaining that the religious nature of the Bible required no demonstration, the Court considered that its decision applied regardless of the version used and the non-compulsory nature of the exercise.<sup>40</sup>

The decision appears to be the only sound solution to a difficult problem. There is undoubtedly a public interest involved in the inculcation of a moral sense and of a knowledge of God in the minds of school children. However, in regard to religious practices, ours is a heterogeneous nation, and each individual is guaranteed the right to know and to worship God in his own way. This freedom might well be violated by the inclusion of Bible reading

<sup>33</sup> See, e.g., *Herold v. Parish Bd. of School Directors*, 136 La. 1034, 68 So. 116 (1915); *Hackett v. Brookville Graded School Dist.*, 120 Ky. 608, 87 S.W. 792 (1905); *Donahoe v. Richards*, 38 Me. 379 (1854).

<sup>34</sup> See generally *Engel v. Vitale*, 18 Misc.2d 659, 675, 191 N.Y.S.2d 453, 472-73 (Sup. Ct. 1959).

<sup>35</sup> See note 33 *supra*.

<sup>36</sup> See *Hackett v. Brookville Graded School Dist.*, *supra* note 33 at —, 87 S.W. at 794.

<sup>37</sup> *Tudor v. Board of Educ.*, 14 N.J. 31, 47, 100 A.2d 857, 865 (1953), *cert. denied sub nom. Gideons Int'l v. Tudor*, 348 U.S. 816 (1954).

<sup>38</sup> 245 Ill. 334, 92 N.E. 251 (1910).

<sup>39</sup> *Id.* at 344-45, 92 N.E. at 254.

<sup>40</sup> *Schempp v. School Dist. of Abington Township*, 177 F. Supp. 398, 405 (E.D. Pa. 1959).

in the public school curriculum. Thus, the practical result of this decision in leaving religious instruction in the home and the Church appears to be the most reasonable under all the circumstances.

### Pupil Assignment in the South

The *Brown*<sup>1</sup> decisions of the United States Supreme Court have definitively declared that a state may not deny to any person because of race the right to attend any of its schools. The Court in those cases did not order integration, but forbade discrimination.<sup>2</sup> The recent case of *Parham v. Dove*<sup>3</sup> is one of the many decisions which illustrate the dramatic impact of this determination on the legislative and judicial climate of the Southern states. Here, three Negro petitioners in a class action sought to compel the members of the defendant school board to admit them to white schools within their district. The District Court found the Arkansas Pupil Assignment Act to be constitutional on its face, but upon a finding that its present application was invalid, the court ordered the admittance of the petitioners to the requested schools.<sup>4</sup> The Eighth Circuit, on appeal, affirmed the constitutionality of the act but reversed the order of admittance on the ground that the petitioners had not exhausted the administrative remedies available pursuant to the act.<sup>5</sup>

<sup>1</sup> *Brown v. Board of Educ.*, 349 U.S. 294 (1955); *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

<sup>2</sup> See *Avery v. Wichita Falls Independent School Dist.*, 241 F.2d 230, 233 (5th Cir. 1957), *cert. denied*, 353 U.S. 938 (1957); Meador, *The Constitution and the Assignment of Pupils to Public Schools*, 45 VA.L.REV. 517, 524 (1959).

<sup>3</sup> 271 F.2d 132 (8th Cir. 1959), *reversing in part* 176 F. Supp. 242 (E.D. Ark. 1959).

<sup>4</sup> *Dove v. Parham*, 176 F. Supp. 242 (E.D. Ark. 1959).

<sup>5</sup> *Parham v. Dove*, 271 F.2d 132 (8th Cir. 1959).

Pupil assignment laws, like most of the post-*Brown* legislation in the South, have for their primary objective the protection of the traditional Southern educational system from the adverse effects of the *Brown* decisions.<sup>6</sup> Such laws have emerged as the most successful method of effecting the South's determination not to comply with the Supreme Court's segregation prohibition.<sup>7</sup> Their prominence stems from the wide use to which the Southern legislatures have put them<sup>8</sup> and their success is attributable to the fact that they may be drafted in such manner as to withstand direct constitutional attack.<sup>9</sup>

A primary consideration in evaluating these assignment plans is their definitively expressed purpose to continue the Southern educational system as it was before the *Brown* decisions.<sup>10</sup> Here again, some courts have stated that the motivating forces behind the statutes in no way affect their constitutional validity.<sup>11</sup> In re-examining the elimination of good faith as a prerequisite for constitutional validity, it would be well to consider this caveat of the Supreme Court:

In short, the constitutional rights of children not to be discriminated against in school ad-

<sup>6</sup> See *Shuttlesworth v. Birmingham Bd. of Educ.*, 162 F. Supp. 372, 380 n. 9 (N.D. Ala. 1958); Meador, *supra* note 2, at 528.

<sup>7</sup> Meador, *The Constitution and the Assignment of Pupils to Public Schools*, 45 VA.L.REV. 517, 526 (1959).

<sup>8</sup> *Id.* at 526-32.

<sup>9</sup> See *Carson v. Warlick*, 238 F.2d 724 (4th Cir. 1956), *cert. denied*, 353 U.S. 910 (1957); *Shuttlesworth v. Birmingham Bd. of Educ.*, 162 F. Supp. 372 (N.D. Ala.), *aff'd per curiam*, 358 U.S. 101 (1958).

<sup>10</sup> See note 6 *supra*.

<sup>11</sup> *Doyle v. Continental Ins. Co.*, 94 U.S. 535 (1876); *Shuttlesworth v. Birmingham Bd. of Educ.*, *supra* note 9.

mission on grounds of race or color declared by this Court in the *Brown* case can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted "ingeniously or ingenuously."<sup>12</sup>

Apart from the consideration of good faith, some assignment plans, while complying with the strict letter of the law, seem to be simultaneously defying the spirit of that law.

In general, pupil assignment laws authorize school boards to assign individual students to schools, such assignment to be based on numerous factor tests. No racial criterion may be included.<sup>13</sup>

There are three basic tests which determine the validity or invalidity of assignment plans.<sup>14</sup> The first and *sine qua non* is that the exclusion of any racial factor in the assignment procedure must be clear.<sup>15</sup> Secondly, the statute itself must supply adequate standards to guide the board in making the assignments.<sup>16</sup> These standards usually consist of the physical and educational facilities of the school system, the mental, physical, educational, psychological and moral qualifications of the applicant, and the resulting effects of re-assignment on a particular school or the community itself.<sup>17</sup> Thirdly, the assignment

plan must not be an integral part of an overall legislative scheme which is on its face and in its entirety unconstitutional.<sup>18</sup> For example, Virginia, while adopting what might have been a constitutional plan, destroyed any chance of validity by simultaneously enacting an Appropriations Act, which would have closed any integrated school by refusing it any funds.<sup>19</sup> There is, of course, a fourth requirement that the administrative procedure of the act should not be unreasonable nor dilatory or impeding.<sup>20</sup> The pertinent requirement in the principal case was that of adequate standards.<sup>21</sup>

The requirement of adequate standards is demanded by the courts in order to eliminate arbitrary rulings which a school board might make. In the Arkansas Act,<sup>22</sup> the factor tests, like the whole act, were modelled on the Alabama School Placement Law,<sup>23</sup> whose constitutional validity had been already tested and upheld in *Shuttlesworth v. Birmingham Bd. of Educ.*<sup>24</sup> The difficulty, however, is that some of the adopted and accepted standards seem to effectuate the very purpose which they were supposedly designed to

<sup>18</sup> *Adkins v. School Bd.*, 148 F. Supp. 430 (E.D. Va.), *aff'd*, 246 F.2d 325 (4th Cir.), *cert. denied*, 355 U.S. 855 (1957).

<sup>19</sup> *Ibid.*

<sup>20</sup> See *Adkins v. School Bd.*, *supra* note 18; *Carson v. Warlick*, *supra* note 16.

<sup>21</sup> The Arkansas plan excluded racial criteria. Further, it did not suffer from the defect which undermined the Virginia Plan. See *Parham v. Dove*, 271 F.2d 132 (8th Cir. 1959).

<sup>22</sup> ARK. STAT. ANN. tit. 80, §§ 1522, 1527 (Supp. 1960). For an analysis of the statute see *Dove v. Parham*, 176 F. Supp. 242, 244-47 n. 4 (E.D. Ark. 1959).

<sup>23</sup> ALA. CODE tit. 52, § 61(4) (Supp. 1957).

<sup>24</sup> 162 F. Supp. 372 (N.D. Ala.), *aff'd per curiam*, 358 U.S. 101 (1958).

<sup>12</sup> *Cooper v. Aaron*, 358 U.S. 1, 17 (1958). (Emphasis added.)

<sup>13</sup> LEFLAR, WITH ALL DELIBERATE SPEED 1, 12 (1957).

<sup>14</sup> See Meador, *The Constitution and the Assignment of Pupils to Public Schools*, 45 VA.L.REV. 517, 543 (1959).

<sup>15</sup> *Orleans Parish School Bd. v. Bush*, 242 F.2d 156, 165 (5th Cir.), *cert. denied*, 354 U.S. 921 (1957).

<sup>16</sup> See *Carson v. Warlick*, 238 F.2d 724, 728 (4th Cir. 1956), *cert. denied*, 353 U.S. 910 (1957).

<sup>17</sup> Note, 57 COLUM.L.REV. 537, 540 (1957).



prevent, that is, arbitrary rulings. For example, consider the following factor tests incorporated into the Arkansas Act:

. . . the psychological effect upon the pupil of attendance at a particular school; the possibility of breaches of the peace or ill will or economic retaliation within the community . . . the maintenance or severance of established social and psychological relationships with other pupils and with teachers. . . .<sup>25</sup>

It is fairly obvious that there are few Negro children who could not be barred by the strict application of such broad factor tests, with the result that a controlled segregation program may be maintained.

The procedural requirements of the Act were found to be adequate in the principal case. However, the District Court held that after the petitioners' parents had made three oral requests for re-assignment, which were refused, any further application to the school board for a hearing pursuant to the act would have been futile.<sup>26</sup> Upon this ground the court ordered the immediate admittance of the petitioners to the new schools. The Eighth Circuit reversed this order relying on *Carson v. Board of Educ.*,<sup>27</sup> wherein it was stated:

Where the state law provides adequate administrative procedure for the protection of such rights, the federal courts manifestly should not interfere with the operation of the schools until such administrative procedure has been exhausted and the intervention of the federal courts is shown to be necessary.<sup>28</sup>

Even though its decision was bottomed

upon this admittedly valid rule, the Court's final determination in the *Parham* case is questionable. *Although the administrative procedure is adequate, when the prosecution of one's claim through the administrative machinery would be futile, the doctrine of exhaustion of administrative remedies is inapplicable.*<sup>29</sup> The lower court found as a fact that further application by the petitioners would be futile. The Circuit Court disagreed with this conclusion not, seemingly, on the ground that it was clearly erroneous,<sup>30</sup> but that it felt that the court could not say ". . . as a matter of legal certainty what the result of an application . . . would be . . ." <sup>31</sup> on the basis of the testimony adduced. It is submitted that such legal certainty is not required of the finder of the fact.

The District Court held that after three oral requests for re-assignment were rejected, it would have been futile for the petitioners to request a hearing. This was not an arbitrary conclusion but one based on the particular circumstances of the case. The continued operation of a segregated school program, the three rejections and the avowed purpose to prevent any integration plan led the District Court to its determination that it would be futile for petitioners to try once again. It is submitted that the Eighth Circuit made a determination based largely on the form of a statute rather than looking to its substance and circumstances.

Pupil assignment plans have strong advantages and equally strong disadvantages. They can accomplish great good, if, when

<sup>25</sup> See note 22, *supra*.

<sup>26</sup> *Dove v. Parham*, 176 F. Supp. 242, 250 (E.D. Ark. 1959).

<sup>27</sup> 227 F.2d 789 (4th Cir. 1955) (per curiam).

<sup>28</sup> *Carson v. Board of Educ.*, 227 F.2d 789, 790 (4th Cir. 1955) (per curiam).

<sup>29</sup> *Bush v. Orleans Parish School Bd.*, 138 F. Supp. 337 (E.D. La. 1956), *aff'd*, 242 F.2d 156 (5th Cir.), *cert. denied*, 354 U.S. 921 (1957).

<sup>30</sup> FED R. CIV. P. 52(e).

<sup>31</sup> *Parham v. Dove*, 271 F.2d 132 (8th Cir. 1959).

properly administered, they are supplemented by a more affirmative plan for integration.<sup>32</sup> In this way they can help to satisfy the *Brown* decisions by positively effecting integration while controlling this action so as to prevent a cultural upheaval.

On the other hand, the disadvantages of such plans must be carefully taken into consideration because of the wide use to which these plans are presently being put in the South. By unscrupulous administration or by carefully worded escape clauses, they may be used as a scheme to perpetuate the segregational policies of the South. Also, even though factor tests are included in such plans, the breadth of the tests lends wide power to school boards which may enable them to arbitrarily violate constitutionally protected rights under the guise of a constitutional law.

In every aspect of human rights the natural law has as its working basis the dignity of man as man.<sup>33</sup> This dignity antedates the very formation of a state and would therefore require of a state recognition and adherence to the principle.<sup>34</sup> The Supreme Court in the *Brown* cases gave this principle increased effect as it relates to educational organization. But neither

<sup>32</sup> One of the suggested affirmative plans is a stratal desegregation. For example, in the first year senior high school, classes would be desegregated and by annual retrogressions there would ultimately result a completely integrated system. See *Cooper v. Aaron*, 358 U.S. 1 (1958). Of course, this plan could easily be reversed by beginning the program in the first grade of the grammar schools. The latter would probably better effectuate the overall purpose of the plan because it would accustom the young to the new system.

<sup>33</sup> Kenealy, *Segregation — A Challenge to the Legal Profession*, 3 CATHOLIC LAWYER 37, 38 (1957).

<sup>34</sup> *Id.* at 38, 42.

legislative fiat nor judicial construction and order alone can accomplish adherence to principles of natural justice. The general problem is synthesized with remarkable legal and moral implications by District Judge Wright:

The problems attendant desegregation in the deep South are considerably more serious than generally appreciated in some sections of our country. The problem of changing a people's mores, particularly those with an emotional overlay, is not to be taken lightly. It is a problem which will require the utmost patience, understanding, generosity and forbearance from all of us, of whatever race. But the magnitude of the problem may not nullify the principle. And that principle is that we are, all of us, freeborn Americans, with a right to make our way, unfettered by sanctions imposed by man because of the work of God.<sup>35</sup>

The pupil assignment plans have been declared to be within the strict letter of the law, while they appear to be without the spirit of that same law. In content and administration they leave much to be desired and until some better plan is initiated to augment their slow and sometimes non-existent movement towards integration they should be judged firmly in order to prevent the inequities of a decision such as *Parham v. Dove*.

### Uphold Prayer in Public Schools

Petitioners in the case of *Engel v. Vitale*<sup>1</sup> sought an order compelling the local school district to discontinue the practice of opening class with a non-sectarian prayer, adopted pursuant to a resolution of the

<sup>35</sup> *Bush v. Orleans Parish School Bd.*, 138 F. Supp. 337, 341-42 (E.D. La. 1956), *aff'd*, 242 F.2d 156 (5th Cir.), *cert. denied*, 354 U.S. 921 (1957).

<sup>1</sup> 191 N.Y.S.2d 453 (Sup. Ct. 1959).

State Board of Regents.<sup>2</sup> The Special Term in answer to the complaint held that the "establishment" clause of the First Amendment does not prohibit the non-compulsory saying of the prayer in public schools, but the "free exercise" clause requires that steps be taken to protect the rights of those who do not wish to participate.<sup>3</sup>

Mr. Justice Meyer's opinion is a fine example of legal analysis as well as judicial restraint. Cognizant of the emotionalism involved in such a controversy, Justice Meyer made a most thorough study<sup>4</sup> of the scope and comprehension of the First Amendment "to decide how those who . . . passed the 'enactment' [First Amendment] would have dealt with the 'particulars' before him. . . ."<sup>5</sup> All time-worn emotional and crusading contentions of the respondents were immediately rejected.<sup>6</sup>

<sup>2</sup> On Nov. 30, 1951 the New York State Board of Regents recommended the following non-sectarian prayer to be said in conjunction with the pledge of allegiance to the flag: Almighty God, we acknowledge our dependence on Thee and we beg Thy blessings upon us, our parents, our teachers and our Country. *Engel v. Vitale*, 191 N.Y.S.2d 453, 459, 461 (Sup. Ct. 1959).

<sup>3</sup> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. CONST. amend. I. While there were no allegations of coercion, the wording of the Regent's resolution constituted at least a technical violation of the latter clause of the amendment.

<sup>4</sup> Justice Meyer's decision consists of thirty-eight pages as reported with one hundred and eighty-seven explanatory footnotes.

<sup>5</sup> *Engel v. Vitale*, *supra* note 2, at 456. Quoted from HAND, *THE SPIRIT OF LIBERTY* 216 (1952).

<sup>6</sup> "Juvenile delinquency" and the "specter of Godless schools" were typical of the emotional contentions rejected by the Court. *Engel v. Vitale*, *supra* note 2, at 466-67. "[T]he constitutional line to be drawn can only be determined by an analysis of the fact situation involved, the history of the constitutional provisions, and the holdings . . . of judicial decisions construing the . . . provisions. . . ." *Ibid*.

The Court then took judicial notice of the fact that as a mode of worship, the religious nature of prayer has already been well established.<sup>7</sup> After resolving the procedural issues,<sup>8</sup> the constitutional question was before the Court: What is the relationship of prayer and the First Amendment? Justice Meyer began first with an historical approach to the issue.

At the time of the adoption of the Fourteenth Amendment,<sup>9</sup> public sentiment was in favor of the separation of Church and State, but the Court found no evidence that this separation was ever extended to the exclusion of prayer from public school routines, and it was generally accepted that schools open with a prayer.<sup>10</sup> It was inevitably concluded therefore that, "the sense

<sup>7</sup> The Supreme Court recognized the religious nature of prayer in *Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892) (dictum).

<sup>8</sup> The case arose under Article 78 of the New York Civil Practice Act "to compel performance of a duty specifically enjoined by law. . . ." N.Y. CIV. PRAC. ACT § 1286.

<sup>9</sup> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV. It would be through the Fourteenth Amendment that the First Amendment would apply to the states, involving a provision ". . . implicit in the concept of ordered liberty. . . ." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). See also *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

<sup>10</sup> During its infancy, the educational system in the United States was conducted mainly by the various religious denominations. A gradual departure from this colonial method began in New York in 1805 with the formation of our present day public school system. Among the aims of this newly formed N.Y. Public School Society were the principles of religion and morality. CONNORS, *CHURCH-STATE RELATIONSHIPS IN EDUCATION IN NEW YORK* 1, 3 (1951). See generally PARSONS, *THE FIRST FREEDOM* (1948).

of the nation'. . . could not be read as indicating . . . the exclusion of prayer from the public schools."<sup>11</sup>

Turning to the First Amendment itself, Justice Meyer, after his examination of both the history of the period and of the individual views of the Founding Fathers themselves,<sup>12</sup> concluded that the First Amendment's relationship to prayer "was general, in the sense that there should be no compulsion to recite a prescribed form of prayer, rather than specific. . . ."<sup>13</sup> There is nothing to exclude the routine of prayer provided that it is not compulsory.

The Court found the resolution of the Board of Regents objectionable to the extent that it did not provide officially for the individual's preference as to participation and was in fact framed in mandatory terms.<sup>14</sup> Subject to modification allowing objectors to abstain from participation in

the prayer, the resolution may constitutionally permit the saying of a non-sectarian prayer before class.

In First Amendment cases, problems arising under the "free exercise" clause seem readily discernible and solutions, as seen in the instant case, are easily reached. The major difficulty in this area appears with a consideration of the "establishment" clause. Supreme Court cases dealing with education, religion and the First Amendment have involved to a great extent relations or aid in some form to one or more of the various recognized sects.<sup>15</sup> On this consideration, *Engel v. Vitale* has no counterpart. Assuming that the modification of the Regent's resolution obviates the "free exercise" objection, and accepting the premise that a non-sectarian prayer can be or has been formulated in the instant case, *Engel v. Vitale* appearing before the Supreme Court will present an issue not of preferential treatment for one religion,<sup>16</sup> but the recognition of religion per se, as a heritage of this country. Such an issue will call for a concrete definition of this "wall" between Church and State.

Constitutionally, there seems to be no

<sup>11</sup> *Engel v. Vitale*, 191 N.Y.S.2d 453,474 (Sup. Ct. 1959).

<sup>12</sup> The writings of Jefferson and Madison seem always involved in First Amendment controversies. Jefferson, who first coined the phrase "wall between Church and State" was serving abroad as Minister to France and did not participate in the constitutional convention. Madison, despite his "Remonstrance" interpreted the First Amendment to mean "that Congress should not establish a religion and enforce the legal observation of it by law. . . ." PARSONS, *THE FIRST FREEDOM* 37 (1948). Both Jefferson and Madison participated in the adoption of the 1824 regulations for the University of Virginia, which provided *inter alia*, "that students of the University . . ." are "expected to attend religious worship. . . ." *Engel v. Vitale*, *supra* note 11, at 476. For a discussion of Jefferson, Madison and the First Amendment, see BRADY, *CONFUSION TWICE CONFOUNDED* (1954).

<sup>13</sup> *Engel v. Vitale*, *supra* note 11, at 476.

<sup>14</sup> *Id.* at 491. The First Amendment is to be used as a shield, not as a sword. Although petitioner could not use the amendment to strike down the resolution, it could protect itself from a real interference with petitioner's rights.

<sup>15</sup> *Zorach v. Clauson*, 343 U.S. 306 (1952); *McCullum v. Board of Educ.*, 333 U.S. 203 (1948); *Everson v. Board of Educ.*, 330 U.S. 1 (1947). Aid to Catholic parochial schools was involved in the *Everson* case and both *McCullum* and *Zorach* involved religious instruction. Gideons International, Jehovah's Witnesses and Mormons are other specific sects which have been involved in First Amendment litigation.

<sup>16</sup> It is the preferential treatment of one religion over another that is prohibited by the "establishment" clause. See COOLEY, *THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES* 259 (1931). For a comprehensive discussion of this area see BRADY, *CONFUSION TWICE CONFOUNDED* (1954).

wall.<sup>17</sup> That wall which is so often asserted today appears more to be a dubious monument constructed judicially,<sup>18</sup> unmindful of our heritage and of the intentions of the Founding Fathers. While the *Zorach v. Clauson* decision, strongest foundation of the instant case, appears as a concession to this judicial structure, its impregnability at the same time was denied.<sup>19</sup>

A review of the *Engel* case will present the issue of recognition of religion qua religion as opposed to no recognition. The Supreme Court will be called upon to state whether this judicial wall is really a "spite fence."

Mr. Justice Meyer's position seems eminently proper.<sup>20</sup> If this jurist's position is accepted, future problems relating to state aid to religion from a non-sectarian position will be more easily reconciled than was the case in *Zorach*.

<sup>17</sup> See note 16 *supra*. "Otherwise the state and religion would be aliens to each other — hostile, suspicious, and even unfriendly." *Zorach v. Clauson*, *supra* note 15, at 312. The First Amendment does not say that in every and all respects there shall be a separation of Church and State. "[T]he First Amendment . . . was conceived to prevent and prohibit the establishment of a *State Religion* . . . not . . . the growth and development of a *Religious State*." *Lewis v. Allen*, 5 Misc.2d 68, 73, 159 N.Y.S.2d 807, 812 (Sup. Ct. 1957). "[T]his is a religious nation." *Church of the Holy Trinity v. United States*, 143 U.S. 457, 470 (1892).

<sup>18</sup> "The wall which the Court was professing to erect between Church and State has become . . . warped. . . ." *Zorach v. Clauson*, 343 U.S. 306, 325 (1952) (Jackson, J., dissenting) (emphasis added). "[I]n the relation between Church and State 'good fences make good neighbors'." *McCullum v. Board of Educ.*, 333 U.S. 203, 232 (1948).

<sup>19</sup> "We follow the *McCullum* case." *Zorach v. Clauson*, *supra* note 18, at 315.

<sup>20</sup> "Justice and reason forbid a state to be atheistic or to be what comes to the same thing as being atheistic, to have the same attitude towards various, so-called 'religions' and indifferently to grant the same rights to all of them." Leonis XIII

## Indeterminate Sentencing

Section 1048 of the New York Penal Law provides that "Murder in the second degree is punishable by imprisonment under an indeterminate sentence, the minimum of which shall be not less than twenty years and the maximum of which shall be for the offender's natural life. . . ." It is mandatory that the sentence be not fixed or determined.

Convicted of murder in the second degree, the defendant, at the age of twenty-nine and with a life expectancy of thirty-five years as determined by the Actuaries or Combined Experience Tables of Mortality, was given an indeterminate sentence of fifty-five years to life imprisonment. Since an appeal had not been taken within the requisite thirty days, the defendant, having served twenty-one years, sought relief under a writ of error coram nobis. The Columbia County Court ruled that the sentence was excessive and imposed a new sentence, the minimum of which shall be twenty-five years and the maximum the rest of the defendant's natural life.<sup>1</sup>

Clearly, the prime objective of any system of criminal law is the over-all protection of the society which gave birth to that system. Unhappily, however, the methods to be employed in achieving that end are not always perceived with any such degree of clarity.<sup>2</sup> For, while man

Pontificis Maxima Acta, V, 123; quoted in BAIERL, *THE CATHOLIC CHURCH AND THE MODERN STATE* 223 (1955).

<sup>1</sup> *People v. Gilmore*, 17 Misc.2d 14, 186 N.Y.S.2d 161 (Columbia County Ct. 1959).

<sup>2</sup> HALL & GLUECK, *CRIMINAL LAW AND ENFORCEMENT* 14-15 (2d ed. 1958).

may be in complete accord as to the end to be attained, his means to that end are characterized chiefly by discord. Various, and to a certain extent conflicting theories of punishment have been proffered. The following are perhaps among the foremost:

1.) The *retributive* theory represents the primitive concept of punishment for the sake of punishment with emphasis on the crime itself rather than on the criminal. While it is undeniably true that society in a proper case possesses the absolute right to inflict punishment upon its offending members, nevertheless to appreciate the ineffectiveness of any such system based solely on societal vengeance or retribution one need only glance at some of the statistical compilations on recidivism.<sup>3</sup>

2.) The doctrine of *deterrence* relies for effectiveness on appeal to the fear instinct. Fear of severe punishment, it is believed, will deter an individual so inclined from engaging in criminal activity. The possibility of error in such a doctrine is sharply illustrated in the instant case by Judge Connor's reference to the classic example of the high incidence of pick-pocketing at public executions of pick-pockets several centuries ago in England.<sup>4</sup>

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<sup>3</sup> "Of the offenders committed to prisons and reformatories in 1946, 51 percent had been committed previously to such institutions, and 6 percent had been committed three or more times. . . . Sixty-one percent of the prisoners committed to federal institutions under sentence of more than one year in 1952 had one or more previous commitments. Of the persons whose fingerprints were taken by the Federal Bureau of Investigation in 1952, 60.6 percent had prior records on file." SUTHERLAND, *PRINCIPLES OF CRIMINOLOGY* 591 (5th ed. 1955).

<sup>4</sup> "There are still judges who honestly believe that

3.) The reasoning behind the theory of *disablement* is that once removed from society the individual will no longer be able to inflict injury upon it. The obvious truth of the basic premise cannot be denied; yet if carried to its logical conclusion its absurdity is readily seen. For, if the protection of society depends on the removal from it of those individuals possessed of criminal inclination, why not remove them once and for all? Surely when the emphasis is laid primarily on the social well-being the most convenient way to dispose of criminals would be either to execute them all or to institutionalize them for life.

While it cannot be successfully controverted that society should be permitted to take advantage of every scientific method for self protection against destructive elements, neither can it be denied that in so doing there must be a minimum of interference with the free life of society's members as is consistent with such social self protection.<sup>5</sup> Recognizing this, the more enlightened modern philosophy of penology looks not only for the protection of society in general but also for the individualization of the penalty and rehabilitation of the offender in particular.<sup>6</sup> Progressive penal systems must accept both of these objectives as goals to be attained, for any system which concentrates on the one to

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deterrent effect of punishment for crime is measured by the severity of the punishment. And this, notwithstanding the recorded facts of history that when pickpocketing in England was punishable by public hanging, the sight of the public execution was frequently the scene of pickpocketing operations." *People v. Gilmore*, 17 Misc. 2d 14, 15, 186 N.Y.S. 2d 161, 164 (Columbia County Ct. 1959).

<sup>5</sup> Glueck, *Principles of a Rational Penal Code*, 41 HARV. L. REV. 453, 455 (1928).

<sup>6</sup> See generally, TARDE, *PENAL PHILOSOPHY* (1912).

the exclusion of the other would be palpably inequitable. Any arbitrary overemphasis on

social interest in the general security to the undue interference with the social and individual interests in the life and well-being of each person, is unjust, for it unnecessarily enslaves human beings.<sup>7</sup>

The practice of fixed sentencing, more often than not, fell far short of both objectives as the period needed to rehabilitate a particular offender might be more or less than the duration of the sentence. Conceivably, an individual could be set free at the end of the fixed term completely unrehabilitated, thereby posing a definite menace to the society to which he was returning or, conversely, be incarcerated long beyond the necessary time.

It was partially to remedy this basic defect that the indeterminate sentence was devised.<sup>8</sup> With it came a shift in emphasis, with the stress laid on the criminal rather than on the crime. The new system provided for a term of imprisonment with minimum and maximum limits with the power vested in parole boards to release the rehabilitated offender at any time within those limits.<sup>9</sup> No longer would incarceration and its duration depend upon an arbitrary statutory prescription, but rather would remain within the discretion of competent authorities. The rationale behind the system is that although murder is always murder, not all murderers are identical in the motivation of their crimes, in their emotional makeup, or in their social,

economic and educational backgrounds. To accord them like treatment would be scientifically unsound. The offender must be treated as a distinct personality. He must be "individualized," which means

first, to differentiate him from other offenders in personality, character, socio-cultural background, the motivation of his crime and his particular potentialities for reform or recidivism and, secondly, to determine which, among a range of punitive, corrective psychiatric and social measures, is best adapted to solve the individualized set of problems presented by that offender in such a way as materially to reduce the probability of his committing crimes in the future.<sup>10</sup>

It was early recognized that the efficacy of the system depended upon a reformatory discipline

with a marking or grading system for estimating the convict's response thereto, parole for a further period outside the prison with supervision of some sort over the conduct of the paroled prisoner and return to prison in case such conduct was not satisfactory or a violation of parole.<sup>11</sup>

Since such a program obviously required an institution completely different from the old type prison, the indeterminate sentence was intended to be applied to one particular category of offenders, that is, those sentenced to reformatories.<sup>12</sup> Gradually, however, it spread to the state prisons, some of which even adopted various reformatory features.<sup>13</sup>

Ideally, the indeterminate sentence

<sup>7</sup> Glueck, *supra* note 4, at 456.

<sup>8</sup> Note *Indeterminate Sentencing — Half Step Toward Science in Law*, 10 W. RES. L. REV. 574, 575 (1959).

<sup>9</sup> *Ibid.*

<sup>10</sup> Glueck, *The Sentencing Problem*, 20 FED. PROB. 15, 16 (Dec. 1956).

<sup>11</sup> Lindsey, *Historical Sketch of the Indeterminate Sentence and Parole System*, 16 J. CRIM. L. & CRIMINOLOGY 9, 70 (1925).

<sup>12</sup> *Id.* at 70-71.

<sup>13</sup> *Id.* at 72.

should be an absolute one, leaving the decision as to time of release up to the judgment of prison officials or special boards of penologists. Practically, however, the present day indeterminate sentence appears to be the result of a compromise between the advocates of the deterrent and those of the retributive theories of punishment. It is ordinarily indeterminate only between fixed limits, the extent of which depends upon the nature of the crime. In New York, for instance, in a case of murder in the second degree, confinement is for a term indeterminate between twenty years and life,<sup>14</sup> while a less serious crime such as first degree burglary is punishable by an indeterminate sentence with a minimum of ten years and a maximum of thirty years.<sup>15</sup> There is, however, one truly indeterminate sentence in New York. For conviction of certain sex offenses the offender is subject to imprisonment for a minimum term of one day and a maximum of life.<sup>16</sup>

The very nature of the indeterminate sentence presupposes some sort of presentencing investigation, however cursory. For it is impossible to see how one offender could be differentiated from others "in personality, character, socio-cultural background, the motivation of his crime and his particular potentialities for reform or recidivism"<sup>17</sup> without looking into the individual's past. It is, therefore, of no little significance that in his opinion Judge Connor inserted the testimony of the at-

torney who defended Gilmore to the effect that

the trial court, contrary to the usual practice then prevailing, did not confer with me . . . before imposing sentence upon this defendant, nor to my knowledge was any pre-sentence investigation or examination directed to the end that the court might have sufficient information to aid the court in determining the proper sentence to be imposed.<sup>18</sup>

From the foregoing it would seem to be a valid conclusion that the sentence was imposed on the defendant arbitrarily and in direct violation of known legislative intent. In essence it was as effective as definitely confining the defendant to life imprisonment under a law where "a sentence to straight life imprisonment would be illegal."<sup>19</sup> As was pointed out in *People v. McCann*, with reference to indeterminate sentencing, "the legislation has for its object moral reformation rather than punishment, and it is therefore 'wholesome in its character, and the courts should be reluctant to thwart or impede its efficiency'.<sup>20</sup> To allow such a sentence to stand would be to ignore completely the tremendous advancements made in the field of penology. It would, in effect, constitute a return to the antiquated policy of punishment for the sake of punishment.

<sup>14</sup> N. Y. PENAL LAW § 1048.

<sup>15</sup> N. Y. PENAL LAW § 407.

<sup>16</sup> N. Y. PENAL LAW § 2010. He may also be sentenced to a definite term of up to twenty years.

<sup>17</sup> Glueck, *The Sentencing Problem*, 20 FED. PROB. 15, 16 (Dec. 1956).

<sup>18</sup> *People v. Gilmore*, 17 Misc. 2d 14, 15, 186 N.Y.S. 2d 161, 163 (Columbia County Ct. 1959).

<sup>19</sup> *Id.* at 17, 186 N.Y.S. 2d at 165.

<sup>20</sup> 199 App. Div. 30, 38, 191 N.Y. Supp. 574, 579 (1st Dep't), *aff'd*, 234 N.Y. 502, 138 N.E. 422 (1922).



### Punishment of the Habitual Criminal

The problem of the habitual criminal and the treatment he should receive from society has long been a subject of penal theory. Increased severity of punishment for recidivists was recognized early in our state penal systems,<sup>1</sup> and under the impetus of the investigations of various crime commissions established following World War I the habitual criminal statute became the dominant method of sentencing those convicted of repeated crimes.<sup>2</sup> A recent case in the United States Court of Appeals for the Seventh Circuit<sup>3</sup> sustained the Indiana Habitual Criminal Act<sup>4</sup> against a challenge that it violated the ban on involuntary servitude contained in the Thirteenth Amendment. The statute provided that:

Every person who, after having been twice convicted . . . for felony . . . shall be convicted . . . for a felony hereafter committed, shall be deemed and taken to be an habitual criminal, and he or she shall be sentenced to imprisonment in the state prison for and during his or her life.<sup>5</sup>

Petitioner, in a habeas corpus proceeding, contended that because of the wording of the statute, the increased punishment was being imposed because of his status as an habitual criminal, rather than for crime as prescribed in the Thirteenth Amendment. The Court affirmed the dis-

missal of the petition with separate opinions for the majority, and held that imprisonment under the Act was for crime within the meaning of the Thirteenth Amendment.<sup>6</sup>

The constitutionality of habitual offender laws generally has been attacked on several grounds. The courts have held that an habitual criminal act was not an *ex post facto* law nor retroactive in effect. They do not create a new offense, but only increase the severity of the punishment imposed upon the conviction for a subsequent offense because of the offender's past conduct.<sup>7</sup> Nor is a statute enhancing the punishment for a subsequent offense unconstitutional as putting the accused twice in jeopardy of life or liberty.<sup>8</sup> The argument of cruel and unusual punishment has likewise been consistently rejected by the courts.<sup>9</sup> Due process and equal protection of the laws contentions have met a similar fate.<sup>10</sup> In *McDonald v. Massachusetts*,<sup>11</sup>

<sup>6</sup> One judge dissented, feeling that the statute was a violation of the Thirteenth Amendment as a punishment for status. *United States ex rel. Smith v. Dowd*, note 3 *supra*, at 297 (Parkinson, J., dissenting).

<sup>7</sup> *Ex parte Brazel*, 293 Mich. 632, 292 N.W. 664 (1940); *Blackburn v. State*, 50 Ohio St. 428, 36 N.E. 18 (1893). See 1 COOLEY, CONSTITUTIONAL LIMITATIONS 553-54 (8th ed. 1927).

<sup>8</sup> *State v. Holder*, 49 Idaho 514, 290 Pac. 387 (1930); *Coleman v. Commonwealth*, 276 Ky. 802, 125 S.W. 2d 728 (1939) (dictum).

<sup>9</sup> *State v. Zywicki*, 175 Minn. 508, 221 N.W. 900 (1928); see *Graham v. West Virginia*, 224 U.S. 616 (1912).

<sup>10</sup> *Graham v. West Virginia*, *supra* note 9; *Davis v. O'Grady*, 137 Neb. 708, 291 N.W. 82, *cert. denied*, 311 U.S. 682 (1940).

<sup>11</sup> 180 U.S. 311 (1901). The procedural fairness of the common method of indictment under the habitual offender laws which presents allegations of prior convictions to a jury which must decide

<sup>1</sup> See, e.g., MASS. LAWS OF 1817, ch. 176, § 6.

<sup>2</sup> The most famous of these were the "Baumes Laws" adopted in New York State. See *Brown, The Treatment of the Recidivist in the United States*, 23 CAN. B. REV. 640, 642 (1945).

<sup>3</sup> *United States ex rel. Smith v. Dowd*, 271 F. 2d 292 (7th Cir. 1959).

<sup>4</sup> IND. ANN. STAT. § 9-2207 (1956).

<sup>5</sup> *Ibid.*

the United States Supreme Court held that an habitual offender law made a reasonable classification and operated equally on all persons within the class.

With regard to the issue raised in the principal case, that of punishment for crime versus punishment for status, the problem is largely one of semantics. One judge's opinion, in rejecting petitioner's contention, took the position that the punishment was for the new crime only.<sup>12</sup> Accepting the definition of "crime" in its normal sense, *i.e.*, certain specific conduct usually with a defined required intent, and no more, such reasoning is unrealistic and unnecessary. The additional punishment is not, in fact, being imposed for what the defendant *did*, *i.e.*, the crime, because what he did is the same, be he a first or a third offender. The additional punishment is imposed for what he *is*, *i.e.*, an habitual criminal demonstrably dangerous to society. Both sound legal philosophy and substantive due process demand that one can't be convicted for what one is, just for what one does: criminal conduct is necessary. Since conviction is prerequisite to punishment, manifestly, criminal conduct is also a *sine qua non* to the imposition of any punishment. But the mandate of the Thirteenth Amendment that involuntary

servitude shall not exist "except as punishment for crime, whereof the party shall have been duly convicted"<sup>13</sup> merely requires that a crime be the occasion of punishment, the degree of which is permissibly affected by other, passive factors such as a proven habit of criminality. Indeed, this must be so if the modern penal approach of moulding the punishment to fit the criminal is to be sustained.

Apart from the legality of habitual offender laws under human, positive law, different considerations present themselves when such laws are examined in light of the position of punishment in diverse theories of the legal order. It is the Thomistic position that, while the primary efficacy of law is due to the rational acceptance of its mandates by men who recognize the justice of the prescribed conduct and conform to it out of that recognition,<sup>14</sup> men are also free and have it in their power to disregard the rights of their fellowmen. Thus sanction must exist as a line of defense to maintain the social order against the unfettered transgressions to which it would otherwise be subject.<sup>15</sup> Thomistic jurisprudence recognizes the modern penal theories of how punishment operates for the common good; disablement,<sup>16</sup> reformation,<sup>17</sup> and deterrence.<sup>18</sup> Indeed, even the basic approach of the habitual offender law can be found in the words of St. Thomas: "The punishments of the present life are medicinal, and therefore when one punishment does not suffice

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the guilt or innocence of the defendant of the principal charge has been criticized. *State v. Ferrone*, 96 Conn. 160, 113 Atl. 452 (1921). While the constitutionality of such a procedure has been admitted, *Graham v. West Virginia*, 224 U.S. 616, 629 (1912), the so-called English method whereby the charge of prior convictions is made known to the jury only after a verdict of guilty is returned for the principal offence, appears to better protect the defendant against prejudice. See Note, 11 RUTGERS L. REV. 654, 663 (1957).

<sup>12</sup> *United States ex rel. Smith v. Dowd*, 271 F. 2d 292, 295-96 (1959) (opinion of Castle, J.).

<sup>13</sup> U. S. CONST. amend. XIII.

<sup>14</sup> AQUINAS, SUMMA THEOLOGICA I-II q. 92, art. 2.

<sup>15</sup> ROONEY, LAWLESSNESS, LAW, AND SANCTION 20 (1937).

<sup>16</sup> SUMMA THEOLOGICA, II-II, q. 68, art. 1.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Id.* at II-II, q. 108, art. 3.

to compel a man, another is added: just as physicians employ several body medicines when one has no effect."<sup>19</sup>

While Thomistic jurisprudence recognizes that sanction must be directed toward man's sensitive nature,<sup>20</sup> it maintains that the initial command is necessarily directed toward his rational nature.<sup>21</sup> This latter concept is denied by the jurisprudence of positivism as expounded by such men as Mr. Justice Holmes, who would mould law to the gratification of as many of man's sensitive appetites and instincts as possible without regard to the reasonableness of the prescribed conduct.<sup>22</sup> Thus, since the command is not bottomed in right reason, Holmes cannot rely on man's observance, out of intellectual accord with its rectitude, of a rule that protects the interests of others at the cost of his own convenience in a given situation. So force, actual or potential, is seen as the sole motivation for compliance. While sanctions are justified under the Thomistic concept of law, and indeed seen as necessary to its successful existence, their position as the determinant of societal tranquility is not accepted. The common phenomenon of a clamorous demand for greater punishments during periods of extensive community disorder is a natural outgrowth of the "bad-man" theory of the law as expressed by Holmes, where respect for the law is coterminous with fear of punishment. The Thomist sees such fear as a most inefficient means of securing

compliance with the law. With the basic postulate that man, as a reasonable being, will comply with a just law simply because his reason sees it as such, efforts at promulgation and education appear most productive. However, with regard to the particular segment of the community at which habitual offender laws are aimed, all will agree that this group constitutes the least likely to follow the dictates of reason and is most affected by sanctions which threaten the removal of sensitive pleasures; so precious have those goods become to those individuals as to displace habits of right conduct. From this standpoint, and on this ground, both theories appear to be in accord with the approach expressed in the habitual offender statutes.

While the legal justification and, in a general way, the value of existing recidivist laws are not to be denied, there exists a progressive school of penology, which, in studying such laws on the level of their social desirability, is impatient with the uniform inflexible treatment applied to a class such as recidivists and regards a highly individualized treatment of all offenders as the desideratum of penal method. In an application of the ancient principle of *epikeia* this group seeks to mitigate the rigors of the abstract rule in the individual case by the use of the indeterminate sentence,<sup>23</sup> sentencing boards,<sup>24</sup> and even the abandonment of the punitive method and the adoption of other, humanized corrective treatments.<sup>25</sup> However, the

<sup>19</sup> *Id.* at II-II, q. 39, art. 4, ad 3.

<sup>20</sup> *Id.* at II-II, q. 108, art. 3.

<sup>21</sup> A law is first and foremost an ordinance of reason. *Id.* at I-II, q. 90, art. 4.

<sup>22</sup> "The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community whether right or wrong." HOLMES, *THE COMMON LAW* 41 (1946).

<sup>23</sup> Metcalf, *Recidivism and the Courts*, 26 J. CRIM. L. & CRIMINOLOGY 367 (1936).

<sup>24</sup> Timasheff, *The Treatment of Persistent Offenders Outside of the United States*, 30 J. CRIM. L. & CRIMINOLOGY 455 (1939).

<sup>25</sup> WAITE, *THE PREVENTION OF REPEATED CRIME* 86-89 (1943).

fact that we are apt to have more reliable knowledge about classes than about individuals, the possibility of abuses of discretion, and the practical difficulties of administration are certainly factors to be weighed in evaluating a penology of individualization.<sup>26</sup>

Undoubtedly debate will continue concerning the methods that best approach perfection in the treatment of habitual of-

fenders. In the absence of the perfect statute to apply, it but remains for the courts to apply the imperfect as justly as possible. The treatment of the Indiana Habitual Criminal Act by the Court in the principal case is such an application in view of the context in history of the Thirteenth Amendment, the purpose of which was the declaration of newly enforced freedoms, not the imposition of a subtle and stultifying restriction of the penal treatment of those who stand convicted of criminal conduct.

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<sup>26</sup> Cohen, *Moral Aspects of the Criminal Law*, 49 YALE L. J. 987, 1022 (1940).