The Catholic Lawyer

Volume 6
Number 3 *Volume 6, Summer 1960, Number 3*

Article 9

Censorship of Obscene Books; Conditional Release of the Criminally Insane; Rights of Prisoners; Full Disclosure by Attorneys

RECENT DECISIONS AND DEVELOPMENTS

Censorship of Obscene Books

The difficulty of forming and applying an effective statute designed to limit the distribution of obscenity was recently illustrated by the United States Supreme Court decision in *Smith v. California*.[1] Defendant was convicted of violating a Los Angeles City ordinance which, dispensing with the element of knowledge, imposed strict criminal liability for possession of an obscene book in any place where books are sold.[2] On certiorari, the United States Supreme Court, while not indicating what mental element is required to constitutionally prosecute, held that the statute had such a tendency to inhibit constitutionally protected expression that it could not stand. Recognizing that the states have a limited power to create strict criminal liability, the Court reasoned that whenever dispensing with the element of knowledge may tend to work substantial restrictions on freedom of expression the statute is unconstitutional. The rationale is based on the supposition that if the seller is liable without knowledge he will tend to restrict the books he sells to those he has inspected, and therefore the distribution of all books, obscene and not obscene, would be limited.

The freedom of expression[3] which is protected from abridgement by Congress has long been recognized as also protected from impairment by the states by the due process clause of the Fourteenth Amendment.[4] The principal reason for this protection is to guarantee the free interchange of ideas for desirable political and social changes[5] by preventing the prior restraints on publications which had been practiced by other governments.[6] However, this protection extends not only to exposition of ideas but also to purely entertaining publications of no possible value to society.[7] Also, the protection is not limited to prior restraints but also protects from punishment subsequent to expression,[8] although the former is the more jealously guarded.[9]

[1] 361 U.S. 147 (1959).

[2] The ordinance is set out in full in the decision. *Id.* at 148 n. 1.

[3] Freedom of the press and freedom of speech generally are the same, being distinguished only by the form of expression, and the term freedom of expression will be used where pertinent to include both.

[4] Lovell v. City of Griffin, 303 U.S. 444 (1938); Near v. Minnesota, 283 U.S. 697 (1931); Stromberg v. California, 283 U.S. 359 (1931); Whitney v. California, 274 U.S. 357 (1927); Gitlow v. New York, 268 U.S. 652 (1925).

[5] See Terminiello v. Chicago, 337 U.S. 1, 4 (1949); Thornhill v. Alabama, 310 U.S. 88, 95 (1940); Stromberg v. California, *supra* note 4, at 368-69.

[6] See Patterson v. Colorado, 205 U.S. 454, 462 (1907); Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROB. 648, 650-52 (1955).

[7] Winters v. New York, 333 U.S. 507, 510 (1948). Nor is the protection limited because the publication is a commercial one. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); Grosjean v. American Press Co., 297 U.S. 233 (1936).

[8] See Roth v. United States, 354 U.S. 476, 492 (1957); Chaplinsky v. New Hampshire, 315 U.S. 568, 572, n. 3 (1942); Emerson, *supra* note 6, at 652; 2 EMERSON & HABER, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES, 872-76 (2d ed. 1958).

[9] See Near v. Minnesota, 283 U.S. 697, 714-15 (1931).

Freedom of expression, although a basic constitutional guarantee, is not an absolute right and in exceptional cases limitations are recognized on the expression of those who would abuse the freedom. The state under the police power has the right to limit freedom of constitutionally protected expression not only by subsequent punishment[10] but also by prior restraint[11] where there is a clear and present danger that the expression will produce a serious substantive evil which the state has a right to prevent.[12] When the expression is not within the area of constitutionally protected speech, it has been held that proof of a clear and present danger is not necessary to the limitation.[13]

Much debate has centered on attempted limitations on the publication and distribution of obscenity. Apart from the difficulty of application, few would argue with the principle behind statutes punishing the distribution of obscenity.[14] However, it has been maintained that any prior restraint on the publication or distribution of obscenity would be unconstitutional.[15] Others, admitting that some prior restraint may be constitutional, object to prior restraint of obscenity because the vagueness of the standard gives those applying it too much discretion.[16] Until recently the Supreme Court had never directly passed on whether obscenity was within the area of constitutionally protected speech, and whether it could be enjoined prior to distribution.[17] However, Supreme Court dicta indicated that prior restraint of obscenity might be permissible.[18]

Probably one of the reasons for the absence of decisions finally determining these issues was the inability of the states to form a definition of obscenity in their statutes which would satisfy the precision of definition required by the Supreme Court to comply with the due process clause of the Fourteenth Amendment.[19]

[10] Terminiello v. Chicago, 337 U.S. 1 (1949); Stromberg v. California, 283 U.S. 359 (1931); Whitney v. California, 274 U.S. 357 (1927).

[11] See Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (dictum); Near v. Minnesota, *supra* note 9, at 716 (1931) (dictum).

[12] Schenck v. United States, 249 U.S. 47, 52 (1919); see Whitney v. California, 274 U.S. 357, 372-80 (1927) (concurring opinion).

[13] Roth v. United States, 354 U.S. 476 (1957); Beauharnais v. Illinois, 343 U.S. 250 (1952).

[14] See Comment, 52 MICH. L. REV. 575, 577 n. 14 (1954) for a listing of state obscenity statutes imposing criminal sanctions.

[15] See concurring opinion of Mr. Justice Black in Smith v. California, 361 U.S. 147, 155 (1959); see also dissenting opinion of Mr. Chief Justice Warren and dissenting opinion of Mr. Justice Douglas joined by Mr. Justice Black in Kingsley Books, Inc. v. Brown, 354 U.S. 436, 445-47 (1957).

[16] Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROB. 648, 670 (1955).

[17] See text accompanying notes 22 and 23 *infra*.

[18] Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene. . . ." *Id.* at 571-72. In Near v. Minnesota, 283 U.S. 697 (1931), the Court, recognizing in dictum the constitutionality of wartime censorship based on the clear and present danger test, added that "on similar grounds, the primary requirements of decency may be enforced against obscene publications." *Id.* at 716. See also Beauharnais v. Illinois, 343 U.S. 250 (1952), holding that libel is not within the area of constitutionally protected speech and therefore the clear and present danger test need not be met for prior restraint. In dictum the Court added: "Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances [i.e., clear and present danger]." *Id.* at 266.

[19] There have been many obscenity tests, the most widely used early test was "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a pub-

There was no real indication of what would satisfy constitutional requirements until the decision in *Roth v. United States,*[20] where the Supreme Court defined the test of obscenity to be "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[21] In the same case the Court held that obscenity was not within the area of constitutionally protected speech and rejected the application of the clear and present danger test as a necessary requirement for limiting the publication and distribution of obscenity.[22] On the same day the Court decided *Kingsley Books, Inc. v. Brown,*[23] holding that Section 22-a of the New York Code of Criminal Procedure, authorizing a city to enjoin the distribution of obscenity and giving the distributor a right to trial of the issue of obscenity within a day and a decision within two days after trial, was not unconstitutional as a prior restraint interfering with freedom of expression.

States now had a definition of obscenity with which to mold their statutes and they also had the power to enjoin prior to distribution. The decisions were an indication of a more sympathetic attitude towards attempts to protect the public from obscenity.

Smith v. California[24] represents a new approach to striking down state obscenity statutes. As noted, prior objections had been based primarily on the vagueness of the obscenity definitions and a series of cases was necessary before a satisfactory definition was declared. The Court held

---

lication of this sort may fall." The Queen v. Hicklin, [1868] 3 Q.B. 360, 371. This test was generally superseded by the test laid down in United States v. One Book Entitled Ulysses, 72 F.2d 705, 708 (2d Cir. 1934), which judged a book by its dominant effect and literary and social value, and not by the tendency of the passages to deprave the minds of those open to such influences into whose hands the book might fall. See United States v. Kennerley, 209 Fed. 119 (S.D.N.Y. 1913). For other definitions see People v. Vanguard Press, Inc., 192 Misc. 127, 129-30, 84 N.Y.S.2d 427, 430 (Mag. Ct. 1947); Commonwealth v. Isenstadt, 318 Mass. 543, 62 N.E.2d 840, 844 (1945); People v. Wepplo, 78 Cal. App. 2d 959, 178 P.2d 853, 855 (1947); Commonwealth v. Feigenbaum, 166 Pa. Sup. 120, 70 A.2d 389, 390 (1950) (per curiam). Despite the many definitions and tests for obscenity, the states did not meet the precision of definition in their statutes which the Supreme Court required. In Winters v. New York, 333 U.S. 507 (1948), a statute which imposed criminal liability for distributing magazines containing stories of crime, bloodshed, and lust, massed to incite crime was held unconstitutional. The case of Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952), holding that barring a movie because it was sacrilegious was too vague a standard to comply with procedural due process, was used along with the *Winters* case as a precedent for reversing decisions based on state obscenity statutes. In Gelling v. Texas, 343 U.S. 960 (1952) (per curiam), the Court reversed the application of a statute forbidding exhibition of a movie prejudicial to the best interests of the people, giving no reasons and citing the *Burstyn* and *Winters* cases. In Commercial Pictures Corp. v. Regents, 305 N.Y. 336, 113 N.E.2d 502 (1953), *rev'd per curiam sub nom.* Superior Films, Inc. v. Department of Educ., 346 U.S. 587 (1954), refusal to license a movie because immoral or tending to corrupt morals was reversed with no reasons, citing the *Burstyn* case. In Holmby Products, Inc. v. Vaughn, 177 Kan. 728, 282 P.2d 412, *rev'd per curiam,* 350 U.S. 870 (1955), Kansas upheld the censorship of a picture under a statute forbidding pictures cruel, obscene, indecent, or immoral, or such as tend to debase or corrupt morals. The Supreme Court reversed, citing the *Superior Films* and *Burstyn* cases. It would seem that the basis for reversing these cases was the vagueness of the test applied. See Note, 31 ST. JOHN'S L. REV. 93, 96-98 (1956).

[20] 354 U.S. 476 (1957).

[21] *Id.* at 489.

[22] *Id.* at 486-87.

[23] 354 U.S. 436 (1957).

[24] 361 U.S. 147 (1959).

that a statute which completely eliminates the requirement of knowledge could not stand but gave no definite indication of what degree of knowledge would satisfy constitutional standards.[25] The situation caused by the lack of a satisfactory constitutional norm for the definition of obscenity is repeated, since now the states have no criteria by which to judge the degree of knowledge required.

The Court in the *Smith* case recognized that the state can create strict criminal liability in other areas, specifically mentioning pure food and drug acts which the Court recognized as justified by the great danger posed by contaminated food.[26] The pure food and drug acts are only one example of many statutes creating strict liability.[27] The emphasis in these statutes is the achievement of some social betterment through regulatory measures in the exercise of police power rather than punishment of crimes,[28] and the protection of the public against the principal consequences of acts capable of injuring society.[29] These evil consequences to society are in no degree increased by the offender's knowledge or decreased by his ignorance,[30] and where the requirement of proof of guilty knowledge would render enforcement difficult, if not impossible, the legislative intent to dispense with the element of knowledge has justifiable basis.[31] The mere fact that a state police statute punishes an offense actually committed without regard to the offender's knowledge does not per se render the statute unconstitutional under the due process clause of the Fourteenth Amendment.[32] The Court in *Smith v. California*[33] did not object to the imposition of strict liability per se but struck down the statute because as a collateral effect it would tend to restrict the dissemination of books not obscene. The Court recognized that even a statute requiring some mental element will have a tendency to inhibit dissemination of material not obscene but it gave no definition of the degree of knowledge required, or what relation the degree of knowledge should bear to the tendency to restrict distribution of material not obscene. It would seem that, as a necessary corollary to the Court's reasoning, the more knowledge required, the less tendency the statute should

[25] "We need not and most definitely do not pass today on what sort of mental element is requisite to a constitutionally permissable prosecution of a bookseller for carrying an obscene book in stock; whether honest mistake as to whether its contents in fact constituted obscenity need be an excuse; whether there might be circumstances under which the State constitutionally might require that a bookseller investigate further, or might put on him the burden of explaining why he did not, and what such circumstances might be." Smith v. California, 361 U.S. 147, 154 (1959).

[26] Smith v. California, *supra* note 25, at 152.

[27] One author has classified offenses not requiring knowledge into illegal sales of liquor, adulterated foods, misbranded articles, violations of traffic regulations, motor vehicle laws, and general police regulations for the safety, health and well being of the community. See Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 72-73, 84-88 (1933). Specific examples of offenses where knowledge is not required are: Williams v. North Carolina, 325 U.S. 226 (1945) (good faith belief in capacity to marry is no defense to bigamy); Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57 (1910) (cutting timber on state land); City of Birmingham v. Reed, 35 Ala. App. 31, 44 So.2d 607 (1949) (possession of lottery tickets); State v. Dunn, 202 Iowa 1188, 211 N.W. 850 (1927) (possession of auto with changed serial number).

[28] United States v. Balint, 258 U.S. 250 (1922).

[29] United States v. Dotterweich, 320 U.S. 277 (1943); State v. Newton, 50 N.J.L. 534, 14 Atl. 604 (1888).

[30] Groff v. State, 171 Ind. 547, 85 N.E. 769 (1908).

[31] State v. Rogers, 95 Me. 94, 49 Atl. 564 (1901).

[32] Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57 (1910); See United States v. Balint, 258 U.S. 250, 251-52 (1922).

[33] 361 U.S. 147 (1959).

have to limit distribution since a greater degree of knowledge calls for an increase in proof necessary for conviction. This in turn results in a difficulty of enforcement which ultimately results in a lower degree of care on the seller's part as to the nature of the materials offered for sale. Although not explicitly stated in the decision, it would seem that the degree of knowledge constitutionally required will lie somewhere between the two extremes, namely, strict criminal liability without knowledge, which makes enforcement easier, and no criminal liability without knowledge, which makes enforcement just about impossible. The determination of the degree of knowledge required should be based on a balancing of the state's right to protect the public from the dangers of obscenity by enforcement of its penal statutes, and the limitation on the freedom of expression which the Court assumes will tend to increase as the required degree of knowledge is decreased. Although the difficulty of enforcement resulting from a high degree of requisite knowledge is a reality, the alternative, that limitation on protected expression will increase by a decrease in requisite knowledge, is not certain. The Court considers food and drug strict liability justified by the great danger to society from contaminated foods. It is submitted that although the danger to society from obscenity is of a different kind, it is no less real.[34] The danger of obscenity subtly destroying the moral values of society may seem remote in comparison to the immediate effects of a mass attack of ptomaine poisoning. However, the danger is still there and the argument that pure bodies are more important than pure minds, although apparently valid in the immediate from the point of view of the state, may ultimately prove erroneous.[35]

California argued that without strict liability, enforcement would be ineffective since sellers would disclaim knowledge of the contents of their books. The Court answered that eyewitness testimony of a seller reading the book would not be necessary to prove awareness of its contents, since the circumstances may warrant an inference that he was aware of the contents despite his denial.[36] Mr. Justice Frankfurter in a concurring opinion states:

> Obviously the Court is not holding that a bookseller must familiarize himself with the contents of every book in his shop. No less obviously, the Court does not hold that a bookseller who insulates himself against knowledge about an offending book is thereby free to maintain an emporium for smut.[37]

Mr. Justice Frankfurter continues: "A bookseller may, of course, be well aware of the nature of a book and its appeal without having opened its cover, or, in any true sense, having knowledge of the book."[38] In a recent New York case[39] defendant booksellers were charged with possessing obscene books with intent to sell. Defen-

[34] See 1955 LEG. DOC. NO. 37, REPORT OF THE NEW YORK STATE JOINT LEGISLATIVE COMMITTEE TO STUDY THE PUBLICATION OF COMICS, showing an established causal connection between what a young thrill-killer read and what he did. Kempel & Wall, *Extralegal Censorship of Literature,* 33 N.Y.U.L. REV. 989 n. 4 (1958).

[35] See 1954 LEG. DOC. NO. 37, REPORT OF THE NEW YORK STATE JOINT LEGISLATIVE COMMITTEE TO STUDY THE PUBLICATION OF COMICS, illustrating how the availability of pornographic and obscene literature at low prices has caused grave concern among parents, psychiatrists, police, and educators.

[36] Smith v. California, 361 U.S. 147, 154 (1959).

[37] *Id.* at 161.

[38] *Id.* at 164.

[39] People v. Schenkman, 20 Misc. 2d 1093, 195 N.Y.S. 2d 570 (Ct. Spec. Sess. 1960).

dants contended that there was no evidence that they had read the books and therefore under the *Smith* case the prosecution had not established knowledge. The four books involved were paper covered, of the type that usually sells for twenty-five cents, were relatively short in content length, and two of them had suggestive statements as to the contents on the back cover. Defendants were offering them for sale at five dollars each. Relying heavily on Justice Frankfurter's concurring opinion in the *Smith* case, the court held that when paper covered books such as these are sold for five dollars, the seller knows the sale is induced by the obscenity of the contents.[40] Whether this degree of knowledge will suffice to satisfy constitutional standards remains to be seen.

Section 542 of the New York Penal Law, imposing criminal liability on one who knowingly distributes obscene material to persons under eighteen, defines "knowingly" as: "having knowledge of the character and content of the publication or failure to exercise reasonable inspection which would disclose the content and character of the same."[41] Personal or direct knowledge of the content of the matter distributed is not required and the section imposes a duty upon the vendor to make a reasonable inspection before the sale to one under eighteen.[42] The Court in the *Smith* case stated that it did not decide "whether there might be circumstances under which the State constitutionally might require that a bookseller investigate further, or might put on him the burden of explaining why he did not, and what such circumstances might be."[43] The Court seems to admit that there might be such circumstances, and surely in a statute such as this the state's right to protect youth from the dangers of obscenity outbalances the speculative tendency of such a statute to limit the dissemination of books not obscene. As Justice Frankfurter said: "the constitutional protection of non-obscene speech cannot absorb the constitutional power of the States to deal with obscenity."[44]

Section 1141 of the New York Penal Law imposes criminal liability for possessing obscene matter. The statute does not make knowledge a necessary element, but by *construction* requires proof that the seller knew the matter was obscene.[45] In *People v. Shapiro,*[46] where the defendant had considerable experience as a magazine distributor, was aware of section 1141, and had to unwrap and re-wrap magazines before distributing them, he could not avoid liability by claiming lack of knowledge since a casual inspection of the magazine covers put him on notice of the probable contents. Again, it is not clear if under the *Smith* case this degree of knowledge would satisfy constitutional requirements.

Declaring a strict liability obscenity statute unconstitutional because of its supposed tendency to limit the dissemination of all books does not seem well founded when the argument is balanced with the state's constitutional right to protect its citizens from obscenity. Even if such a statute did tend to limit distribution somewhat, it would seem justified by the danger obscenity poses.

---

[40] *Id.* at 1098-99, 195 N.Y.S.2d at 575-76.
[41] N.Y. PENAL LAW § 542 (Supp. 1959).
[42] People v. Finkelstein, 156 N.Y.S.2d 104 (Magis. Ct. 1955).
[43] Smith v. California, 361 U.S. 147, 154 (1959).
[44] *Id.* at 162-63.
[45] People v. Brooklyn News Co., 12 Misc. 2d 768, 174 N.Y.S.2d 813 (Kings County Ct. 1958).
[46] 6 App. Div. 2d 271, 177 N.Y.S.2d 670 (2d Dep't 1958).

It is unlikely that the decision will be changed. However, the Court should define the degree of knowledge constitutionally required to prosecute a bookseller, and not leave the issue to a trial-and-error determination. The definition should entail a minor degree of requisite knowledge, thereby making effective enforcement possible.

Conditional Release of the Criminally Insane

In the District of Columbia, a person tried for a criminal offense and found not guilty by reason of insanity is required by statute[1] to be committed to a mental hospital.[2] Release from the institution is dependent upon approval of the superintendent and the court.[3] In a recent case, *Hough v. United States,*[4] the conditional release provisions[5] of the statute were tested. The Circuit Court, on an appeal following denial of the release by the District Court, held that recovery of sanity need not be proved in the case of a conditional release, but that it only need be established that, under the conditions imposed, such person will not be dangerous to himself or others. It also held that the hospital authorities, in permitting appellant to leave the hospital for several hours per day as part of the rehabilitation program, had acted improperly in that this constituted a conditional release without court approval.

The decision emphasizes the problem of the disposition of those found not guilty of crime by reason of insanity. Such persons are distinguished on the one hand from those who have been convicted of crime and who are subject to punishment, and, on the other hand, from the insane who have never been indicted for a crime.[6]

A determination by a jury that a defendant is not guilty by reason of insanity is not a determination of his present mental condition, but only of the mental condition at the time of the alleged crime.[7] A provision making commitment of such person mandatory without any additional hearing thus has the effect of compelling confinement of one who has been found not deserving of punishment and who has not been found presently in need of treatment. Assuming that he is in need of treatment, under the ruling of the instant case the treatment itself, insofar as it involves any degree of freedom from confinement, is dependent upon the approval of the court.

---

[1] D.C. CODE ANN. §24-301(d) (Supp. VII, 1959).

[2] The District of Columbia is not the only jurisdiction to have such a statute. Mandatory commitment is also a feature of the laws of the following: *Colorado* – COLO. REV. STAT. ANN. §39-8-4 (1954); *Georgia* – GA. CODE ANN. §27-1503 (1953); *Kansas* – KAN. GEN. STAT. ANN. §62-1532 (1950); *Minnesota* – MINN. STAT. ANN. §631.19 (Supp. 1959); *Nebraska* – NEB. REV. STAT. §29-2203 (1948); *Nevada* – NEV. REV. STAT. §175.445 (1956); *Ohio* – OHIO REV. CODE ANN. §2945.39 (Baldwin 1953); *Wisconsin* – WIS. STAT. ANN. §957.11 (West 1957).

[3] The superintendent first certifies that the patient has recovered his sanity, that he will not, in the opinion of the superintendent, be dangerous to himself or to others in the reasonable future and that he is entitled to his release. Upon objection by the prosecutor's office the court *must,* or, upon its own initiative, it *may* hold a hearing to determine the issue. D.C. CODE ANN. §24-301(e) (Sup. VII, 1959). In the Hough case, the hearing followed objection by the United States Attorney.

For a synopsis of the commitment and release provisions in other jurisdictions, see Note, 68 YALE L.J. 306-07 (app.) (1958).

[4] 271 F.2d 458 (D.C. Cir. 1959).

[5] D.C. CODE ANN. §24-301(e) (Supp. VII, 1959).

[6] *Compare* D.C. CODE ANN. §24-301 (Supp. VII, 1959), *with* D.C. CODE ANN. §21-311 (1951).

[7] Underwood v. People, 32 Mich. 1, 20 Am. Rep. 633, 634 (1876).

Thus, from the moment of the verdict, his future liberty rests primarily with the court and only secondarily with medical authorities.[8]

The Court in the *Hough* case rejected any suggestion that the confinement was in the nature of punishment.[9] Nevertheless, there is no denial of the fact that a finding of not guilty by reason of insanity is regarded as giving authorities a power over the defendant which they would not have if, for example, an unqualified verdict of not guilty had been rendered and the defendant had been later thought insane:

> The test of this statute is not whether a particular individual, engaged in the ordinary pursuits of life, is committable to a mental institution under the law governing civil commitments. . . . This statute applies to an exceptional class of people. . . . People in that category are treated by Congress in a different fashion from persons who have somewhat similar mental conditions, but who have not committed offenses or obtained verdicts of not guilty by reason of insanity. . . .[10]

The punishment of the mentally ill would appear to be without justification either morally[11] or legally.[12] As retribution it is indefensible because the mentally ill by definition are not criminally responsible for their behavior.[13] Nor can any deterrent effect be offered in support of punishment, for legal insanity comprehends only those whose abnormality makes any deterrence impossible.[14]

Statutes compelling prompt commitment without further judicial injury were once held unconstitutional as violations of due process.[15] More recent cases, relying on a continuing presumption of insanity and the availability of habeas corpus proceedings to challenge illegal detention, have held that such a statute does not deprive the defendant of due process.[16] In effect, the jury's finding that the defendant was insane at the time of the alleged crime becomes a substitute for the civil hearing on the issue of sanity. A presumption of continuance of the insanity from the time of the crime then arises,[17] just as it does from the time of the finding of insanity in the case of a civil proceeding.[18] In both cases, the issue of the continuance of insanity may be tried in a habeas corpus proceeding.[19]

A fallacy can be found in the treatment of the jury's finding of insanity as if

[8] In effect, the function of the hospital superintendent is simply to initiate the release proceedings. See D.C. CODE ANN. §24-301(e) (Supp. VII, 1959). In the absence of certification by the superintendent of the patient's recovery, the patient may initiate proceedings himself by filing for a writ of habeas corpus. D. C. CODE ANN. §24-301(g) (Supp. VII, 1959).

[9] Hough v. United States, 271 F.2d 458, 462 (D.C. Cir. 1959).

[10] Overholser v. Leach, 257 F.2d 667, 669-70 (D.C. Cir. 1958).

[11] "Punishments are directed not to irrational and irresponsible beings . . . but to men who voluntarily do harm to others." ROONEY, LAWLESSNESS, LAW, AND SANCTION 66 (1937).

[12] *In re* Boyett, 136 N.C. 415, 48 S.E. 789, 791 (1904).

[13] Note, 68 YALE L.J. 293, 300-01 (1958).

[14] *Id.* at 301.

[15] Brown v. Urquhart, 139 Fed. 846 (C.C.W.D. Wash. 1905) (dictum), *rev'd on other grounds*, 205 U.S. 179 (1907); Underwood v. People, 32 Mich. 1, 20 Am. Rep. 633 (1876); *In re* Boyett, 136 N.C. 415, 48 S.E. 789 (1904).

[16] *Ex parte* Slayback, 209 Cal. 480, 288 Pac. 769 (1930); *Ex parte* Clark, 86 Kan. 539, 121 Pac. 492 (1912); People v. Dubina, 304 Mich. 363, 8 N.W.2d 99 (1943); State v. Saffron, 146 Wash. 202, 262 Pac. 970 (1927).

[17] *Ex parte* Clark, 86 Kan. 539, 121 Pac. 492, 495 (1930).

[18] National Life Ins. Co. v. Jayne, 132 F.2d 358 (10th Cir. 1942).

[19] See Overholser v. Boddie, 184 F.2d 240 (D.C. Cir. 1950).

it were based on a test of civil committability,[20] when in fact there is no finding that the defendant, even at the time of the alleged crime, was committable.[21] The test of criminal responsibility simply is not conterminous with the civil test of commitability.[22] It is error to presume that it is, and to superimpose the presumption that the insanity continues to the time of commitment is to compound the error.

It has been said that the statute is an indispensable crutch[23] for the *Durham*[24] rule; that it has in view the closing of the avenue of escape from punishment opened by the vague and uncertain test of *Durham* to those who, in reality, are not insane.[25] The statute, in this view, was designed to ensure that anyone who took that avenue of escape would find that it led to an indefinite term in a mental hospital.[26] This is clearly invalid as a motive. Any defects in the test of insanity should be remedied by an alteration of the test, rather than by indefinite confinement of those found not guilty under it. As a substitute punishment for those who succeed in evading the law by feigned pleas of insanity, the statute would appear clearly to be open to the further constitutional objection that the punishment is "cruel and unusual."[27]

The protection of the public and of the individual is less clearly invalid as a motive for the statute. Indeed, the police power and the role of the state as *parens patriae* are the basic justifications for civil commitments.[28] But both motives, of necessity, presuppose a finding that the person is presently a danger. It is very questionable that public safety requires or supports the confinement of a person simply because of a failure to establish that he is *not* a danger. The logical implications of such thinking present a far greater threat to the public than does a person found not guilty by reason of insanity.[29]

A defendant, having been acquitted, is

---

[20] Such a test has been advocated by the Group for the Advancement of Psychiatry. Reid, *Understanding the New Hampshire Doctrine of Criminal Insanity,* 69 YALE L.J. 367, 397-98 (1960).

[21] The quantum of evidence which supports a finding of not guilty by reason of insanity is commonly much less than would be required for a commitment. In the District of Columbia, once the issue of insanity is raised the burden is on the prosecution to prove sanity beyond a reasonable doubt, or to prove that the act was not a product of the insanity. Therefore, there is never an affirmative finding of insanity; the verdict merely reflects the failure of the prosecution to sustain its burden. See Carter v. United States, 252 F.2d 608, 614-15 (D.C. Cir. 1957). Likewise, it would appear that, in some jurisdictions at least, a finding that a person is committable is not conclusive on the question of criminal responsibility. Thus, in People v. Willard, 150 Cal. 543, 89 Pac. 124 (1907), the defendant had been taken before the Superior Court for a commitment hearing. Following testimony that he was insane, homicidal, and dangerous, he was adjudged insane. As the judge began to sign the order of commitment, defendant drew a pistol and shot and killed the complaining witness. The court sustained a conviction for first degree murder.

[22] "The immediate issue . . . is fundamentally an ethical one and the test is of responsibility, not of medical insanity." *Proposed Revisions of the M'Naghten Rule,* 4 CATHOLIC LAWYER 297, 309 (Autumn 1958).

[23] McGee, *Defense Problems Under the Durham Rule,* 5 CATHOLIC LAWYER 35, 42 n.40 (Winter 1959). This, of course, would not explain the presence of such statutes in jurisdictions other than the District of Columbia. See note 2 *supra.*

[24] Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).

[25] McGee, *supra* note 23, at 42.

[26] McGee, *supra* note 23, at 35.

[27] See U.S. CONST. amend. VIII.

[28] Ross, *Commitment of the Mentally Ill; Problems of Law and Policy,* 57 MICH. L. REV. 945, 955-60 (1959).

[29] "The terms 'star chamber' and *lettre de cachet* describe no imaginary evils dreamed up by cautious lawyers, but very real practices current not so many hundreds of years ago, and hardly exceeded in arbitrariness, tyranny and injustice

entitled to all the privileges of an innocent man. The fact that his innocence derived from his mental incapacity to form the requisite criminal intent makes him no less innocent and no less entitled to all of the protection of the law than if acquitted on any other ground.[30] The protection of the individual demands some determination of the necessity for confinement *prior to the confinement.* These protections could be provided without increasing the danger to the public by employing the emergency commitment procedures available in almost every state.[31] The procedure of such a commitment is summary and permits detention for only a short period.[32] If necessary, before the end of that period there could be a formal commitment, which involves a judicial hearing in which the prospective patient is given an opportunity to contest the need for hospitalization and which is followed, upon adjudication of insanity, by commitment for an indeterminate period.[33] Thus, the rights of both the public and the individual are protected throughout the course of the proceedings.

Since the confinement is for the purpose of treatment rather than punishment, the question of its duration is a medical problem and should be treated as such. The authority to release should therefore be left either to the hospital authorities[34] or to an administrative board which is better equipped to pass on the success of the treatment than are the courts.[35]

Rights of Prisoners

The problem of the rights of those incarcerated in penal institutions has again been brought into sharp focus. In *Bailleaux v. Holmes,*[1] petitioners, prisoners in the Oregon State Penitentiary, charged that defendant prison officials interfered with their study of law and acquisition of legal materials, and thereby limited the exercise of their constitutional right to free and speedy access to the courts.[2] The United States District Court held, *inter alia,* that prison officials may not unreasonably impose restraints on prisoners' study of law in the interest of administrative efficiency.

"A citizen is still a citizen, though guilty

by practices rampant in Germany and elsewhere in our own times.

"Safeguards designed to guarantee fair procedure and to prevent the abuse of commitment laws . . . are therefore not mere technicalities and formalities to be lightly brushed aside. . . ." Weihofen and Overholser, *Commitment of the Mentally Ill,* 24 TEX. L. REV. 307, 337 (1946).

30 See *In re* Boyett, 136 N.C. 415, 48 S.E. 789, 791 (1904).

31 Ross, *supra* note 28, at 953.

32 *Ibid.*

33 See Ross, *Commitment of the Mentally Ill: Problems of Law and Policy,* 57 MICH. L. REV. 945, 954 (1959).

34 Two states which formerly required court approval have recently substituted hospital release. *Compare* ARK. STAT. ANN. §59-242 (Supp. 1959), *with* Ark. Acts 1947, No. 241, §16. *Compare* TEX. CODE CRIM. PROC. ANN. art. 932 b, §2 (Supp. 1959), *with* Tex. Laws 1937, ch. 466, §3.

35 It has been suggested that this method is preferable to hospital release, in that hospital authorities are more likely to be influenced by crowded hospital conditions and by public opinion. See Note, 68 YALE L.J. 293, 303-06 (1958).

1 177 F. Supp. 361 (D. Ore. 1959).

2 U.S. CONST. amend. VI. The action was brought under the Civil Rights Act, 28 U.S.C. §1343 (1958), which provides: "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

. . .

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States. . . ."

of crime and visited with punishment"[3] – so states the United States Supreme Court. There exists, however, the basic problem of determining just what rights this citizen possesses, or what rights this citizen has relinquished as a result of his conviction. It is not presumed that a man convicted of a crime and sentenced to prison gives up all rights except those specifically left with him.[4] On the contrary, it is assumed that he keeps all rights except those taken away expressly or by necessary implication. This rule was established in the leading case of *Coffin v. Reichard.*[5] The rule was therein stated:

> A prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law. While the law does take his liberty and imposes a duty of servitude and observance of discipline for his regulation and that of other prisoners, it does not deny his right to personal security against unlawful invasion.
>
> When a man possesses a substantial right, the courts will be diligent in finding a way to protect it. The fact that a person is legally in prison does not prevent the use of habeas corpus to protect his other inherent rights.[6]

The expression "substantial right" is of significance because the courts will only concern themselves with cases involving a breach of constitutional rights.[7] On the other hand, courts have been reluctant to supervise the administration of prison discipline,[8] although at times the two seem inseparable. The mere censoring of mail constitutes no violation,[9] nor does a warden's refusal to mail a prisoner's love letters[10] or his clothing.[11]

The right involved in the principal case was the right of prisoners to have access to the courts. The Constitution guarantees every man his day in court and an opportunity to be heard.[12] The petitioners alleged that their study of law was an integral part of their right of access, and that therefore, prison officials could not unlawfully interfere with that study. Specifically, petitioners complained of several restraints: (1) prisoners could not study or prepare legal documents in their cells; (2) prisoners were restricted in their ability to purchase law books or statutes; (3) special censorship was imposed on legal documents and communications with courts and attorneys; (4) legal documents found in prisoners' possession outside the prison library were confiscated; (5) prisoners in isolation were denied access to the courts, counsel and

---

[3] See White v. Hart, 80 U.S. (13 Wall.) 646, 651 (1871).

[4] This view, although it predominates today, was not always accepted. See, *e.g.*, Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790 (1871) (Convicted prisoner considered a "slave" and only entitled to those rights specifically given to him – the exact opposite of the prevailing view today.).

[5] 143 F.2d 443 (6th Cir. 1944), *cert. denied,* 325 U.S. 887 (1945).

[6] *Id.* at 445.

[7] See 28 U.S.C. §1343 (3) (1958); 17 Stat. 13 (1871), 42 U.S.C. §1983 (1958); Dowd v. United States *ex rel.* Cook, 340 U.S. 206 (1951); *Ex parte* Hull, 312 U.S. 546 (1941).

[8] See Miller v. Overholser, 206 F.2d 415, 419 (D.C. Cir. 1953); Shepherd v. Hunter, 163 F.2d 872 (10th Cir. 1947); Sarshik v. Sanford, 142 F.2d 676 (5th Cir. 1944) (per curiam).

[9] See United States *ex rel.* Vranick v. Randolph, 161 F. Supp. 553, 559 (E.D. Ill. 1958); Green v. Maine, 113 F. Supp. 253, 256 (S.D. Me. 1953).

[10] Dayton v. Hunter, 176 F.2d 108 (10th Cir.), *cert. denied,* 338 U.S. 888 (1949).

[11] Platek v. Aderhold, 73 F.2d 173 (5th Cir. 1934).

[12] U.S. CONST. amend. VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . ." *Ibid.* City of Buffalo v. Hawks, 226 App. Div. 480, 236 N.Y. Supp. 89 (4th Dep't 1929). See also Truax v. Corrigan, 257 U.S. 312 (1921).

their legal papers.[13] In its opinion the Court assumed that the prisoners' study of law was an essential part of the right of access.[14] The defendants based their objections primarily on the ground that to allow petitioners' contentions would result in storage difficulties, censorship problems, as well as a general deterioration of prison discipline. In light of the sacrosanct status of constitutional rights, this argument has little merit. In noting the inconvenience caused by a flood of habeas corpus petitions a well known jurist once commented: "We must not play fast and loose with basic constitutional rights in the interest of administrative efficiency."[15]

Even if it can be established, however, that there has been a deprivation of a substantial right, the legality of that deprivation cannot be impeached unless it is found that the basic requirements of due process of law have not been met. Admittedly, the constitutional caveat is expressed negatively: "no State . . . shall . . . deprive any person of life, liberty, or property, without due process of law . . . ,"[16] but the necessary implication of this language is that one *can* be so deprived, provided there *is* due process of law. Naturally, the difficulty arises in defining and locating the requisite due process. Traditionally, the basic due process test has been that a law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.[17]

In the area of deprivation of prisoners' rights, there are several theories by which one may seek to bottom the legal justification for an infringement. It has been suggested that the very fact of imprisonment, or the prison sentence itself, provides the necessary basis of due process.[18] It would seem, however, that the prison sentence, which undoubtedly serves to lawfully deprive the individual of his freedom to move about at will, or his power to communicate freely with those outside prison walls, would not justify a deprivation in no real way logically connected to the reason for imprisonment. Therefore a restraint on a prisoner's right to communicate with his attorney, or a restraint on a prisoner's right to worship, could not be founded in the law which originally authorized the individual's imprisonment, because the means employed would bear no "real and substantial relation" to the end sought to be attained. Certainly the restraints imposed upon a criminal are not imposed solely for the sake of punishing him. Were this the case, it would be easier to justify unwonted restraints upon his personal rights. Such theory, in addition to being legally indefensible,[19] is suspect on moral grounds.[20]

It may be argued, however, that the au-

[13] See Bailleaux v. Holmes, 177 F. Supp. 361, 362 (D. Ore. 1959).

[14] *Id.* at 363. In light of the fact that this "right" is at least twice removed from the constitutional guarantee, it would seem that a strong argument might be made to the contrary. This would be particularly true where adequate "post-conviction" statutes have been enacted.

[15] See United States *ex rel.* Marcial v. Fay, 247 F.2d 662, 669 (2d Cir. 1957), (Medina, J.) *cert. denied,* 355 U.S. 915 (1958).

[16] U.S. CONST. amend. XIV.

[17] See Defiance Milk Prods. Co. v. Du Mond, 309 N.Y. 537, 132 N.E.2d 829 (1956); Noyes v. Erie & Wyoming Farmers Co-op. Corp. 281 N.Y. 187, 22 N.E. 2d 334 (1939).

[18] See discussion of McBride v. McCorkle, 44 N.J. Super. 468, 130 A.2d 881 (1957) in 4 CATHOLIC LAWYER 89 (Winter 1958).

[19] See HALL & GLUECK, CRIMINAL LAW AND ITS ENFORCEMENT 9-10 (1951).

[20] See AQUINAS, SUMMA THEOLOGICA, II-II, q. 68, art. 1; II-II, q. 43, art. 7, ad. 2. See also ROONEY, LAWLESSNESS, LAW, AND SANCTION 39-44 (1937).

thority for the deprivation of prisoners' rights can be found in the form of statutes conferring authority on prison officials to control and discipline inmates.[21] Concededly, prison officials can make regulations which may result in the deprivation of a prisoner's rights, but which are nevertheless valid because they bear a reasonable relation to the maintenance of prison security. Again, however, the real and substantial relation is the *sine qua non*. So, for example, it would be difficult to conceive of the relation between a regulation restraining a prisoner's right to worship and the maintenance of a successful security system. Likewise, in the instant case, the prisoner's study of law cannot be stifled on the ground that such study interferes with prison discipline, because, as the Court pointed out, "administrative control . . . must yield to the basic right to have access to the courts."[22] The Court's meaning, although not expressed, is none the less clear; administrative control must yield because administrative control can exist separate from and unimpaired by the influence of this particular activity. Undoubtedly, if this fact could not be shown, a regulation prohibiting the study of law would be valid.

[21] See, *e.g.*, N.Y. CORREC. LAW §112: "The commissioner of correction shall have the . . . control of the state prisons and the prisoners therein. . . . He shall make such rules and regulations . . . for the government and discipline of each prisoner, as he may deem proper. . . ." *Ibid.* See also 18 U.S.C. §4042 (1958).

[22] Bailleaux v. Holmes, 177 F. Supp. 361, 365 (D. Ore. 1959).

Full Disclosure by Attorneys

"I do solemnly swear (or affirm) that I will support the constitution of the United States, and the constitution of the State of New York, and that I will faithfully discharge the duties of the office of Attorney at Law, according to the best of my ability."[1] Admission to the Bar of the State of New York is thus effected. Utterance of these words heaps upon the qualified candidate all the privileges, and all the corresponding burdens, incident to membership in an ancient and most honored profession.

With his admission to the bar, the attorney is privileged to be installed as an "officer of the court, and, like the court itself, an instrument of justice."[2] To this privilege is attached the duty to assist the court in its deliberation, to stand in fiduciary relation to it,[3] and to refrain always from any practice that might disrupt, impede or thwart the judicial process.[4]

The New York Court of Appeals has re-

[1] N. Y. CONST. art. XIII, §1.

[2] People *ex rel.* Karlin v. Culkin, 248 N. Y. 465, 470-71, 162 N.E. 487, 489 (1928) (Cardozo, C. J.).

[3] People v. Beattie, 137 Ill. 553, 27 N.E. 1096 (1891). "The lawyer's duty is of a double character. He . . . owes the duty of good faith and honorable dealing to the judicial tribunals before whom he practices his profession. He is an officer of the court, – a minister in the temple of justice. His high vocation is to correctly inform the court upon the law and the facts of the case, and to aid it in doing justice and arriving at correct conclusions." *Id.* at 574, 27 N.E. 1103. See Canon 22, AMERICAN BAR ASSOCIATION CANONS OF PROFESSIONAL ETHICS: "The conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness." *Ibid.*

[4] In New York, the Appellate Division is authorized to "remove from office any attorney . . . who is guilty of . . . any conduct prejudicial to the administration of justice." N. Y. JUDICIARY LAW §90(2).

cently indicated, in *Matter of Cohen,*[5] that this duty of cooperation, attaching to lawyers as officers of the court, is not lightly to be assumed, nor may it readily be avoided.

In *Matter of Cohen,* the defendant, an attorney under non-criminal investigation pertaining to the conduct of his law practice,[6] asserted his right against self incrimination[7] and declined to answer most of the sixty questions asked of him pursuant to the inquiry. Replying to a warning by counsel for the inquiry that such refusal to answer might inspire an adverse recommendation from the Appellate Division (an allusion to disbarment proceedings), defense counsel declared that no punishment ought accrue to attorneys for "doing what they had an absolute legal right to do."[8] This remark isolates the precise issue resolved in *Cohen, viz.,* whether the disbarment of an attorney who declined to testify in a non-criminal proceeding is in fact a violation of his right under the due process clause.[9]

The question is a narrow one and the minority (only Judge Fuld dissented) and majority opinions serve as ample summary of the key arguments in the area.

Chief Judge Desmond, in the majority opinion, bases his decision solely upon the duty of cooperation which befalls all attorneys by virtue of their special relation to the court.[10] Adherence to this duty is among the conditions by which membership in the bar is conferred upon the attorney. "Membership . . . is a privilege burdened with conditions. . . . Compliance [therewith] . . . is essential at the moment of admission; but is equally essential afterwards. . . . Whenever the condition is broken the privilege is lost."[11]

The court agrees that attorneys, as citizens, are entitled to withhold incriminating answers.[12] It does not accept, however, the view that disbarment for having done so is punishment for *exerting* the right, and thus a violation of constitutional guarantees. The court takes the position rather, that disbarment is merely due acknowledgment that an attorney has failed to maintain his *professional* character and obligations. How that failure or breach came about is quite immaterial; paramount is the fact that a breach of the duty of cooperation has occurred.[13] Disbarment, therefore, is not the consequence of asserting a constitutional right, but on the contrary, it is a consequence of refusing to observe the duty of full disclosure.

---

[5] 7 N. Y. 2d 488, 166 N.E. 2d 672, 199 N.Y.S. 2d 658 (1960).

[6] Specifically, the investigation "was concerned with charges of alleged illegal, corrupt and unethical practices and of alleged conduct prejudicial to the administration of justice, by attorneys and others acting with them, in the County of Kings. . . ." Matter of Cohen, 7 N. Y. 2d 488, 492, 166 N.E. 2d 672, 673, 199 N.Y.S. 2d. 658, 660 (1960).

[7] U. S. CONST. amend. V; N. Y. CONST. art. I, §6.

[8] Matter of Cohen, 7 N. Y. 2d 488, 494, 166 N.E. 2d 672, 675, 199 N.Y.S. 2d 658, 662 (1960).

[9] See note 7 *supra.*

[10] Matter of Cohen, 7 N. Y. 2d 488, 166 N.E. 2d 672, 199 N.Y.S. 2d 658 (1960). "The key word is duty. . . . Breach of the special duty brings a special penalty." *Id.* at 496, 166 N.E. 2d at 676, 199 N.Y.S. 2d at 663.

[11] Matter of Rouss, 221 N. Y. 81, 84, 116 N.E. 782, 783 (1917). See also Selling v. Radford, 243 U. S. 46 (1917).

[12] Matter of Cohen, 7 N. Y. 2d 488, 495, 166 N.E. 2d 672, 675, 199 N.Y.S. 2d 658, 662 (1960).

[13] Matter of Cohen, 7 N. Y. 2d 488,166 N.E. 2d 672, 199 N.Y.S. 2d 658 (1960). "Our present appellant by declining to answer may have escaped criminal prosecution and punishment, but he could never, while a member of the Bar, escape the other consequences of his flagrant breach of his absolute duty to the court whose officer he was. That breach was in itself . . . a valid reason for depriving appellant of his office as attorney." *Id.* at 497, 166 N.E. 2d at 677, 199 N.Y.S. 2d at 664.

The distinction may appear to be a tenuous one, but, as the majority opinion indicates, it is not without full support in precedent. Reference is made to a group of decisions rendered by the New York Court of Appeals and the United States Supreme Court.[14] These cases serve to demonstrate that lawyers are not alone in their obligation to answer, even though that duty is wholly inconsistent with their right against self incrimination.[15]

The most recent of these cases (and typical among them) is *Nelson v. Los Angeles County.*[16] There, the Supreme Court sustained the dismissal of two county employees who had refused to answer questions posed by a congressional sub-committee. By statute in California, public employees are obliged to answer any questions pertaining to membership in subversive organizations.[17] Said the Court: "the fact that he chose to place his refusal [to answer questions] on a Fifth Amendment claim puts the matter in no different posture, for . . . California did not employ that claim as the basis for drawing an inference of guilt."[18] The dismissal of the employees for insubordination in the face of statutory mandate to answer was thus not in violation of any constitutional right because the assertion of that right was not the basis of the dismissal.

The *Nelson* case, therefore, finds proper analogy to the constitutional issue presented in *Matter of Cohen.* Both defendants were disciplined, not for declining to answer, but because in so doing they simultaneously violated a positive duty to make full disclosure. Defendant Nelson, as a public employee, was by statute commanded to answer. Defendant Cohen, as an attorney, was commanded by the written ethics of his profession,[19] which are entitled to the force and effect of legislative enactments.[20]

Noteworthy is the fact that the decision in *Cohen* relies heavily on federal decisions interpreting the United States Constitution. But whatever may be the case under the federal constitution, past interpretations placed on the Constitution of New York State tend most strongly to favor the position that a refusal to answer, if it be placed on constitutional grounds, is not cause for disbarment.

The question of an attorney's right to assert his constitutional immunity from self incrimination was first raised in New York in *Matter of Kaffenburgh.*[21] That decision rejected the contention that disbarment is the appropriate discipline for an attorney who "refused to answer each and all of the questions as to his personal transactions, on the ground that his answers might tend to incriminate him. . . ." The rejection was based on the ground that "the provision of our Code applies to penalties or forfeitures as well as

[14] *Id.* at 496, 166 N.E. 2d at 676-77, 199 N.Y.S. 2d at 663-64 (1960).

[15] In similar positions, for example, are police officers, Christal v. Police Comm'r, 33 Cal. App. 2d 564, 92 P. 2d 416 (1939), subway conductors, Lerner v. Casey, 2 N. Y. 2d 355, 141 N.E. 2d 533, 161 N.Y.S. 2d 7 (1957), *aff'd,* 357 U. S. 468 (1958), and public school teachers, Beilan v. Board of Educ., 357 U. S. 399 (1958). Both *Lerner* and *Beilan* were cited as controlling in Nelson v. Los Angeles County, 362 U. S. 1 (1960).

[16] 362 U. S. 1 (1960).

[17] CAL. GOV'T CODE §1028.1.

[18] Nelson v. Los Angeles County, *supra* note 15, at 7.

[19] Canon 22, AMERICAN BAR ASSOCIATION CANONS OF PROFESSIONAL ETHICS. See note 3 *supra.*

[20] Matter of Annunziato, 201 Misc. 971, 973, 108 N.Y.S. 2d 101,103 (Surr. Ct. 1951).

[21] 188 N. Y. 49, 80 N.E. 570 (1907).

crimes or misdemeanors.[22] The defendant, therefore, . . . had the right to refrain from answering any question which might form the basis of or lead to the prosecution of himself for a forfeiture of his office of attorney. . . ."[23] The majority in *Cohen* distinguished *Kaffenburgh* on the ground that it involved testimony at a criminal trial, whereas in *Cohen* the proceedings were purely investigative. However, since the constitutional provisions protecting against self incrimination are designed in large measure to prevent subsequent prosecution of the witness on the basis of the testimony given, the question must be asked whether the distinction between an "investigation" and a criminal proceeding is pertinent to the interpretation and application of the right against self incrimination. Surely, a witness may be prosecuted as effectively upon testimony given during an "investigation" as upon that given in a criminal trial. And, as Judge Fuld points out in his dissent in *Cohen*: "The questions put to Kaffenburgh dealt solely with his conduct in the practice of the law and, certainly, he was as much an officer of the court conducting the trial as the appellant here was of the court conducting the judicial inquiry."[24]

Thirty years after *Kaffenburgh* came *Matter of Solovei*[25] which dismissed disbarment proceedings brought against an attorney who refused to waive his constitutional immunity. There the court stated: "*Matter of Kaffenburgh* decided that an attorney who in good faith refused to answer questions on the ground that they would tend to incriminate him was not amenable to disciplinary proceedings."[26] *Matter of Solovei* was distinguished by the majority in *Cohen* on the ground that it involved testimony given before a Grand Jury and not before a court inquiry as in the present case. Again, the question arises whether that distinction merits the controlling force given it, and again, it must be doubted that it does. If a case is to be effectively distinguished, ought not the varying circumstances call to action a superseding principle? All things may be distinguished, but only those distinctions affecting principle can further the argument offered.

The appellant in the present case relied most heavily on *Matter of Grae*[27] and *Matter of Ellis*.[28] Both these decisions construed Article I, section 6 of the New York Constitution as applied to attorneys. In each case, the attorney was spared disbarment.

In *Matter of Grae,* the defendant, although expressing his willingness to answer questions before a judicial inquiry investigating so called "ambulance chasing" practices on Staten Island, refused to sign a waiver of immunity and thereby

[22] N. Y. CODE OF CIVIL PROCEDURE §837. This code is no longer in effect, having been superceded by the Civil Practice Act. However, the new act contains a provision similar to that contained in the earlier code. "This provision [concerning the right to avoid self incrimination] does not require a witness to give an answer which will tend to accuse himself of a crime or to expose him to a penalty or forfeiture. . . ." N. Y. CIV. PRAC. ACT §355.

[23] Matter of Kaffenburgh, 188 N. Y. 49, 53, 80 N.E. 570, 570 (1907).

[24] Matter of Cohen, 7 N. Y. 2d 488, 500, 166 N.E. 2d 672, 679, 199 N.Y.S. 2d 658, 667 (1960).

[25] 276 N. Y. 647, 12 N.E. 2d 802 (1938), *affirming mem.* 250 App. Div. 117, 293 N.Y.S. 640 (2d Dep't 1937) (per curiam).

[26] Matter of Solovei, 250 App. Div. 117, 121, 293 N.Y.S. 640, 645 (2d Dep't 1937) (per curiam), *aff'd mem.*, 276 N. Y. 647, 12 N.E. 2d 802 (1938).

[27] 282 N. Y. 428, 26 N.E. 2d 963 (1940).

[28] 282 N. Y. 435, 26 N.E. 2d 967 (1940).

relinquish his privilege against self incrimination. The Court of Appeals held that the defendant was within his legal right in declining to surrender a protection guaranteed to him by the constitution.[29] The present case compared to *Matter of Grae* produces this anomaly: every citizen, including an attorney, is entitled to the privilege against self incrimination, and no disciplinary action may be taken against an attorney who refuses to relinquish the protection it affords; nevertheless, an attorney, having retained the privilege, may not employ it. To do so is to violate a positive duty of full disclosure to the court.

Matter of Ellis presented circumstances very similar to those appearing in *Matter of Grae*. However, in addition to declining to execute a waiver of immunity, the defendant Ellis *also* refused to answer any questions on the ground that such answers would tend to incriminate him. Ellis later expressed his willingness to testify, but the court was of the opinion that his testimony ought not to be taken until he consented to waive his immunity. Disbarment proceedings were instituted upon these facts. The Court of Appeals cited *Matter of Grae* as controlling and dismissed the charge; this, notwithstanding Ellis' refusal to answer questions.

Both *Ellis* and *Grae* held the duty to disclose to be subservient to the right against self incrimination. "The constitutional privilege is a fundamental right and a measure of duty; its exercise cannot be a breach of duty to the court."[30] The majority in the instant case laid *Ellis* and *Grae* aside, stating: "The holding in each case was that a lawyer like every other citizen is constitutionally privileged not to answer damaging questions. The difference between those cases and the present one may seem slight but it is enough to permit a fresh examination (or re-examination) of the question now directly presented."[31] It must be agreed that the "difference" is indeed slight, particularly with regard to *Matter of Ellis* where the defendant's refusal to answer questions went wholly unpunished and, in fact, unquestioned.

Despite its lack of support in New York precedent, and although that precedent actually militates strongly to the contrary, the decision in *Matter of Cohen* appears to be both prudent and timely. As indicated previously, the concept of a positive duty of disclosure accruing as a condition of membership in the bar is not a new one. That the duties of office may be divorced from, and operate without the application of, opposing constitutional protections is not without justification in logic and precedent. (However, such precedent in New York does not deal specifically with attorneys.)[32]

A most significant result of the decision in *Matter of Cohen,* no doubt, will be substantially increased effectiveness in combatting the evils wrought by the demoralizing practice of "ambulance chasing."[33] The

[29] Matter of Grae, 282 N. Y. 428, 434, 26 N.E. 2d 963, 967 (1940).
[30] *Id.* at 435, 26 N.E. 2d at 967.
[31] Matter of Cohen, 7 N. Y. 2d 488, 497, 166 N.E. 2d 672, 677, 199 N.Y.S. 2d 658, 664 (1960).
[32] This is true although the majority in the instant case placed considerable reliance on a New York decision, People *ex rel.* Karlin v. Culkin, 248 N. Y. 465, 162 N.E. 487 (1928), which held that an attorney's refusal to answer questions and his refusal even to be sworn in, constituted grounds for disbarment. However, defendant Culkin asserted no constitutional ground for his refusals, and therefore no constitutional question arose. Since the major issue in *Matter of Cohen* was one of constitutional interpretation, the *Karlin* case has no real place in its determination.
[33] For comprehensive discussions on the practice of "ambulance chasing," its elements and effects,

problem of intensive preparation and investigation, and the task of convincing lay juries that solicitation of business is condemnable in the practice of law, will no longer be troublesome obstacles in the prosecution of errant attorneys. Condemning evidence may now be gleaned from direct examination of the attorney charged; or, in the event such attorney refuses to testify, discipline may be exercised via disbarment proceedings grounded upon the violation of a duty to make full disclosure.

Two oft quoted declarations serve as succinct statements of the philosophy of the present law in New York on the issue here discussed: "Co-operation between court and officer in furtherance of justice is a phrase without reality if the officer may then be silent in the face of a command to speak."[34] "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman"[35] (nor, by analogy, an attorney).

---

see Matter of Bar Ass'n of City of New York, 222 App. Div. 580, 227 N.Y.S. 1 (1st Dep't 1928), and *Legal Ethics – Ambulance Chasing*, 30 N.Y.U.L. REV. 182 (1955).

[34] People *ex rel.* Karlin v. Culkin, 248 N. Y. 465, 471, 162 N.E. 487, 489 (1928) (Cardozo, C. J.).
[35] McAuliffe v. City of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892) (Holmes, J.).