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Punishment: Its Meaning in Relation to Separation of Power and Substantive Constitutional Restrictions and its Use in the Lovett, Trop, Perez, and Speiser Cases

NOTES

PUNISHMENT: ITS MEANING IN RELATION TO SEPARATION OF POWER AND SUBSTANTIVE CONSTITUTIONAL RESTRICTIONS AND ITS USE IN THE LOVETT, TROP, PEREZ, AND SPEISER CASES

Two recent decisions by the Supreme Court, *Perez v. Brownell*[1] and *Trop v. Dulles*,[2] have reopened the complex and often times highly emotional debate as to the correct boundary between legislative regulation and punishment. Both cases involved the constitutionality of certain provisions of the Immigration and Nationality Act[3] which codified and supplemented the laws concerning conduct whereby one was deemed to lose his citizenship. The consequences of such a loss is that one becomes not only an alien in this country but also a stateless individual, dependent for his privileges and benefits upon the whim and favor of each country in which he resides. These two cases are important both because they may indicate the constitutionality of the remaining portions of the Act[4] and because they add to a general analysis of the theories of punishment and regulation.

A third recent case is also instructive. *Speiser v. Randall*[5] illustrates the most recent chapter in the hard-fought legal debate over the validity and wisdom of test oaths as a method of "weeding out" communists in our society. Concerned in this case was a California statute which provided that to earn a tax exemption, one must tender a non-communist oath. The principal in this case, a veteran entitled to an exemption, refused to take the oath. Basing its decision on procedural grounds, the Supreme Court invalidated the oath. This case raises interesting questions as to punishment because of the particular analysis the Court used to determine that criminal instead of civil procedures should be required.

This note will deal with these cases only in an indirect manner. While the *Speiser* case will be analyzed as the capstone of the part on

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1. 356 U.S. 44 (1958).
2. 356 U.S. 86 (1958).
3. 54 Stat. 1137 (1940), 8 U.S.C. § 1481 (1952).
4. Especially § 9 which makes conviction of certain subversive activities result in the loss of citizenship. See Comment, *The Expatriation Act of 1954*, 64 YALE L.J. 1164 (1954).
5. 357 U.S. 513 (1958). Also similarly decided was First Unitarian Church of Los Angeles v. County of Los Angeles, 357 U.S. 545 (1958).

separation of powers,[6] an examination of the other two cases will be deferred to a final section (Part III).[7] It is felt that one can understand the implications of these two cases only after a discussion of punishment in its separation of powers sense and in its relation to other constitutional doctrines (Part I) and after an examination of substantive punishment and several theoretical attempts to rationalize it (Part II). Therefore, this note is composed of three somewhat separate units—the first centered on restrictions on legislative punishment of a narrow group, the second, differentiating punishment from regulation, and the third part, a criticism of the *Trop* and *Perez* cases.

"Punishment" as such is important in two contexts. One, in terms of separation of powers, states that the legislature shall not punish individuals. Although the legislature can set general standards, the judicial branch of the government shall apply the general norm to a fact situation that involves an individual. The constitutional restrictions on bills of attainder[8] specifically prevent the legislature from convicting an individual. The question is a "who does" one—what forum imposes punishment. The most famous recent case illustrating the separation of powers aspect of punishment is *United States v. Lovett,*[9] in which Congress by statute punished three named federal employees by disallowing them ever to be employed by the Government. The other context in which punishment is important can be labelled the substantive aspect of punishment. No matter what forum regulates or punishes, there are certain quantitative limits on this burden. This is a "how much" problem and involves such restrictions as those of the fifth and fourteenth amendments,[10] the ex post facto clause[11] and the eighth amendment.[12]

A basic and vital difference between the two uses of the word "punishment" is that in the latter merely deciding that a burden is punishment is not enough to bring a constitutional prohibition into play. To be invalid, it must be punishment of undue weight or be imposed without the requisite constitutional protections. But in the former context, as soon as one decides the legislature is punishing, no matter how light or inconsequential is the burden, the limitation of attainder applies to the law. As indicated, *Lovett* is illustrative of separation of powers punishment. The *Trop* case involves the use of substantive restrictions. In that case

6. See text accompanying note 15 *infra.*
7. See text accompanying note 239 *infra.*
8. U.S. CONST. art. I, § 9, cl. 3 and § 10, cl. 1.
9. 328 U.S. 303 (1946).
10. U.S. CONST. amends. V and XIV.
11. U.S. CONST. art. I, § 9, cl. 3 and § 10, cl. 1.
12. U.S. CONST. amend. VIII.

the loss of citizenship under a law regulating desertion and dishonorable discharge was deemed punishment. Chief Justice Warren, writing for four members of the Court, stated that the punishment was cruel and unusual. Mr. Justice Brennan, concurring, felt it was unreasonable.[13]

A further note should be made of terminology. In the separation of power part, discussion will center on "burden" and "benefits." To explain: in our society a fundamental concept is freedom of activity. To "burden" is to impose some limitation on one's conduct. That this burden is justified by sufficient benefits to society to warrant the restriction is the test for substantive due process. For example, to practice medicine one must expend time, money, and energy to meet standards set by the state. These burdens are justified by the necessity of having competent, skilled physicians. Again, certain criminals are disqualified from driving cars or from holding elective office. These burdens may or may not be punishment depending on why they were imposed. To illustrate the contrary situation, a statute might "benefit" a certain group by giving them a special tax exemption.

The laws examined in the separation of powers part apply to small groups. Since adjudication concerns the application of general norms to individual conduct, these narrowly drawn laws might be considered legislative adjudications (*i.e.,* attainder) to the degree that they burden people for past conduct or considered a violation of equal protection when they burden or benefit a narrow group. The problem in the separation of powers part focuses mainly on determining when a burden on a narrow group actually is legislative punishment.

"Sanctions" are considered generally in Part II. The relationship of a burden to a sanction may be illustrated by reference to Kelsen's analysis of a rule of law.[14] He states all law is of the formula: If x happens (the harm or the delict), y must happen (the sanction). To illustrate: 1) If A murders Y, A must die; 2) If A practices medicine without a license, he will be imprisoned; 3) If A adulterates food, he must be fined or imprisoned; 4) If A strikes B negligently, A must compensate B.

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13. This note comments on *Trop* and *Perez* only to the degree of questioning the criteria the Court used to find the "civil" law was punishment. Some of the tests used in this substantive examination were drawn from the analysis of punishment in a separation of powers context. The commentator, in the conclusion, questions the wisdom of mingling these two concepts and suggests an alternative which might have avoided this tangling of theory. But this suggested rationale makes sense only with a rather full examination of punishment both in substantive and separation of power contexts.

14. KELSEN, GENERAL THEORY OF LAW AND STATE 45-46 (1945).

The burden, as we use it, is the restriction on human freedom to avoid doing the harm or the delict. For example, the burden in 1) is to conduct oneself so as not intentionally to take B's life. In 2) it is to expend time and energy to get a degree and license to practice medicine. The sanction is a restriction in conduct (itself a burden) which results from a person's committing the harm. In this note, Part I has to do with the valid limits of legislative definition of those harms, especially when it defines the harm so that a fixed group has committed it. Part II examines the statute as written to see whether the sanction is criminal or civil.

PART I—PUNISHMENT IN A SEPARATION OF POWERS CONTEXT: THE LEGISLATURE CANNOT PUNISH

Separation of Powers

The concept of separation of powers seems to have developed in the seventeenth century. Its object was to insure that persons should be governed by general and prospective rules which the legislature formulated. It was for the courts, not the legislature, to apply the law to specific individuals. The political necessity for this division of power was obvious. If the legislature could specially burden a narrow group, the door was open for all sorts of political retaliation toward minorities in the form of special legislation.[15] To protect against this danger, constitutional restrictions attempt to guarantee the separation of governmental powers.[16]

Only early in our history was the separation of power doctrine itself used as a means of limiting the powers of the legislature to burden an individual. *Cooper v. Telfair,*[17] decided in 1800, illustrates an unsuccessful attempt of a burdened individual to challenge a narrow statute on separation of powers grounds. A Georgia statute expressly declared the plaintiff, among others, guilty of treason, confiscated his lands, and banished him. The state constitution contained no restrictions on attainder, but it did provide that all departments of government should be

15. See Wormuth, *Legislative Disqualification as a Bill of Attainder,* 4 VAND. L. REV. 603 (1950).

16. Although there are no express restrictions in the federal constitution, separation of power is implied from the effect of so decentralizing responsibility among the three departments of Government. 1 HORACK, SUTHERLAND'S STATUTORY CONSTRUCTION 16 (3rd ed. 1943). In contrast, many states have expressed this concept in their constitutions. *E.g.,* IND. CONST. art. 3, § 1. "No person charged with official duties under one of these departments shall exercise any of the functions of another except as this constitution provides."

17. 4 U.S. (4 Dall.) 14 (1800) (evidentally before the federal courts on diversity grounds).

separate and not exercise the power of one another. The Court rejected an attack on the statute on the basis of the constitutional restriction by stating that these general principles were declaratory and directory but were not binding rules.[18]

Although the doctrine of separation of powers is a goal (but not a technique)[19] in present-day society, there exist several apparent exceptions to this policy. Certain examples of narrow legislative benfits and burdens are definitely adjudicative. Legislative divorce,[20] a matter of judging and determining individual rights, has been justified on the basis of custom.[21] Private bills for tort or contract compensation which provide benefits to individuals are certainly adjudicative in that the legislature determines both the existence and extent of a liability. But if the liability is based on a moral obligation of the state, a law appropriating a certain sum of money to the individual is not considered adjudication and does not fall within a state constitutional restriction on special legislation.[22] An explanation for the acceptance of these special benefits might be founded in the general willingness of the state as a whole to be burdened because of the moral obligation that exists to the individual who might well be unable to sue the state directly.[23] This obligation would provide the necessary distinction from statutes subsequently considered under the equal protection clause which give a commercial advantage (a benefit) to a specific business.[24]

Likewise, certain narrow legislative burdens are allowed. First, the power of legislative contempt[25] does not seem to raise separation of powers problems but is justified as a necessary and legitimate concomi-

18. For cases other than Cooper v. Telfair, *supra* note 17, see 1 HORACK, *op. cit. supra* note 16, at 19 n.4.

19. An examination of annotations to art. 3, § 1 of the Indiana constitution and West's Dicennial Digest citations (Constitutional Law, Key no. 50) on legislative encroachment on the judiciary shows no cases dealing with statutes burdening a narrow group.

20. Maynard v. Hill, 125 U.S. 190 (1888).

21. "A long acquiescence in repeated acts of legislation in particular matters is evidence that those matters have been generally considered by the people as properly within the legislative sphere." *Id.* at 204.

22. See generally 172 A.L.R. 1389 (1948). In Indiana, although one opinion (1935 OPS. IND. ATT'Y GEN. 53) states that a private appropriation act is a violation of the prohibition against special legislation, no statute has been so invalidated.

23. See HORACK, CASES ON LEGISLATION 470 (2d ed. 1954).

24. See note 168 *infra.*

25. *Cf.* the Indiana constitution, art. 4, § 15. "Contempt—Either House, during its session, may punish, by imprisonment, any person not a member, who shall be guilty of disrespect to the House, by disorderly or contemptuous behavior, in its presence, but such imprisonment shall not, in any one time, exceed twenty-four hours."

tant to the power of investigation for the purpose of legislating.[26] Also impeachment[27] is a constitutionally-outlined procedure for the legislature to decide judicially the fitness for office of executive and judicial officials. This is, in effect, an attainder for public officials, constitutionally sanctioned as a part of a system of checks and balances.[28]

The exceptions to the separation of power doctrine can be rationalized in terms of custom, morality or necessity. Separation of power is a goal in our law, but is not currently used as a specific technique to challenge legislative adjudication; more narrow and specialized doctrines provide requisite protection. One such technique—the prohibition of bills of attainder, is considered in the next section. Other constitutional provisions to be considered which affirm the constitutional goal of separation of power are the prohibition on special legislation and the requirements for substantive due process and equal protection.

Bills of Attainder

Attainder is a legislative conviction of a crime. It is punishment of a fixed group levied directly by the legislative[29] branch of government without the benefit of judicial trial.

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26. See Schull, *Legislative Contempt—An Auxiliary Power of Congress,* 8 Temp. L.Q. 198 (1933). Because the punishment in legislative contempt is limited at its maximum to the length of the legislative session, the courts have been given jurisdiction to impose a more severe punishment. Nevertheless, Congress still retains power to punish for contempt. Jurney v. MacCracken, 294 U.S. 125 (1934). Although originally the contempt power was a defensive weapon to protect the legislature from threat, assault and bribery (Schull, *supra* at 205; see also Jurney v. MacCracken, *supra* at 148-49), today it is an offensive power, one to insure Congress' power to investigate. To facilitate investigation, there has been some sentiment for Congress to retain more contempt cases, for "the prestige of the legislative branch of the government would be enhanced if it occasionally handled the punishment in its own right." Senate Committee on the Judiciary, 80th Cong., 2d Sess., Proceedings Involving Contempt of Congress and its Committees 8 (Comm. Print 1947); see Schull, *supra.* Even though as recent a case as Jurney v. MacCracken, *supra,* sustains the legislative power to punish for contempt, it seems of doubtful wisdom to return to that forum to decide contempt questions and impose punishment. The considerations weighing against legislative punishment are these: Contempt is a punishment. Courts have had long experience in judging these cases and provide established procedures and adequate safeguards for the defendant. Conversely, Congress has no such traditions or procedures. These factors seem to outweigh the accrual of prestige to Congress by trying its own contempt cases.

27. U.S. Const. art. I, § 3.

28. French v. Senate of California, 146 Cal. 604, 80 Pac. 1031 (1905). In this case, the state senate expelled a member for bribery without a hearing or trial. The court held, in denying the member's injunction to compel his readmission, that under separation of powers, the admission of members is purely a legislative matter.

29. There has been some discussion whether the attainder prohibition can apply to executive action. See Mr. Justice Black's opinion in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 143-44 (1950); *cf.* text accompanying note 165 *infra,* where the statement of an executive officer may be evidence of an express legislative intent to punish.

Attainders, historically tied with political dispute,[30] were passed in England in the seventeenth century to dispose of political prisoners[31] and were not uncommon in America during and after the revolution.[32] The restriction on their use grew because of a recognition of their power as a means of political vengeance. The major judgment was this: Recognizing the danger of political retaliation prompted by a strong executive or a popular legislature, our Constitution alloted to the judiciary, less sensitive to transitory whims and passions and more disciplined with the traditions of impartiality and objectivity, the power to deal directly with narrow groups and individuals. The legislature cannot punish; that the judiciary must do.

But the problem of deciding what restrictions are punishment is a very difficult one.[33] A legislature can legitimately restrict choice (*i.e.*, impose a burden upon a person) if the act is in the category of regulation (*e.g.*, a person cannot practice medicine if he is not a graduate of a medical school). On the other hand such a burden constitutes an attainder if it punishes (*e.g.*, a person cannot be a doctor if he is a former sympathizer of the Confederacy). This distinction is more than a matter of words, for, if the burden is deemed to be punishment, an individual is entitled to full criminal procedural protection; but if it is only regulation, due process is satisfied by more relaxed standards. If the form of the statute is criminal, then the problem is less difficult. But a harder problem arises when the act itself is regulatory in form and is challenged on attainder or ex post facto grounds. Since these constitutional restrictions apply only to punishment, one must cut through the overt civil form of the statute to make the analysis.

The constitutional limitation on attainder has not been a powerful weapon in our history as a limitation on legislative power.[34] The companion powers of the due process and equal protection clauses have been much more tenacious in blocking excesses of legislative power. Never-

30. "Bills of this sort have been most usually passed in England in times of rebellion or gross subserviency to the Crown, or of violent political excitements; periods in which all nations are most liable (as well the free as the enslaved) to forget their duties and to trample upon the rights and liberties of others." STORY, COMMENTARIES ON THE CONSTITUTION § 1338 (1st ed. 1833).

31. See Cummins v. Missouri, 71 U.S. (4 Wall.) 277, 322-23 (1866).

32. See Thompson, *Anti-Loyalist Legislation During the American Revolution*, 3 ILL. L. REV. 81 (1908) and Pound, *Justice According to Law*, 14 COLUM. L. REV. 1 (1914). For early examples, see Respublica v. Gordon, 1 U.S. (1 Dall.) 252 (1788); Cooper v. Telfair, 4 U.S. (4 Dall.) 14 (1800).

33. See Annot., 90 L. Ed. 1267, 1271 (1945).

34. In a compilation of cases prior to 1945, only thirteen statutes were invalidated on attainder grounds. Since 1945, only two statutes have been invalidated as attainder. See summary of pre-*Lovett* cases, *id.* at 1292.

theless, twice in our history, the challenge of attainder was used to stymie major political retaliation.[35] The more recent case, *Lovett v. United States,* has stimulated great interest in the clause as a possible stabilizer in a period of political hysteria or fear.[36] Therefore, an examination of the present theory of attainder is timely and beneficial.

Since attainder only prevents legislative punishment and not merely regulation of a narrow group, the problem of determining when the legislature is punishing is critical. As an aid in determining the essential indicators of legislative punishment, an examination of two seventeenth century English attainders is helpful. The first attainted the Earl of Clarendon[37] and decreed he should suffer perpetual exile and be forever banished from the realm. It stated further that if he should flee and then return to the country after a certain date, he would be guilty of treason; but in the alternative if he should surrender himself for trial before that date, the statutory penalties would be of no effect.[38] The second illustrative attainder was that against the Earl of Kildare[39] which said that "all such persons which be or heretofore have been . . . confederated . . . in his false and traitorous acts and purposes shall in likewise stand, and be attainted, adjudged, and convicted of high treason."

These two examples seem to indicate the essentials of English attainder. First, within the statute, the attainted persons were named or a class was identified; second, it was clear that the legislature intended to punish the individuals since it declared them guilty of a crime; and finally, a burden—either capital or non-capital—was imposed as the pun-

35. *Cummins v. Missouri; Ex Parte* Garland, 71 U.S. (4 Wall.) 333 (1866); United States v. Lovett, 328 U.S. 303 (1946).

36. *Lovett* did seem to stimulate attainder challenges, but they met with very limited success. Of thirty-three cases where attainder was an issue, only two were held to be attainder, and these holdings are questionable. See notes 61 and 116 *infra.* Although most of the unsuccessful attainder cases involved anti-subversive legislation, many cases had to do with general regulatory statutes in the labor and police power fields. In a number of cases the attainder argument was merely "padding." One can safely conclude that *Lovett* did not provide a renaissance of attainder as a powerful tool limiting legislative power. *Cf.* the flurry of post-*Cummins* cases in which attainder "was used in a number of cases which arose thereafter, but with almost uniform lack of success." Norville, *Bill of Attainder—A Rediscovered Weapon Against Discriminatory Legislation,* 26 ORE. L. REV. 78, 97 (1946).

37. Reported in 6 HOWELL'S STATE TRIAL 391, and quoted in Cummins v. Missouri, 71 U.S. at 324.

38. This latter sentence provides some writers with proof that attainder may be "future." See note 56 *infra* for a discussion of this point.

39. 3 Statutes of the Realm, 694, 1535, 28 Hen. 8, c. 18. Also quoted in Cummins v. Missouri, 71 U.S. at 323.

ishment.[40] These three attributes—class, intent, and burden—are the touchstone of an analysis of present day attainder.

1. *Class: Who Can Be the Object of Attainder?* In the English attainder, the party burdened was named or identified. Today, there is little doubt that if a person is named in the statute and the requisite legislative intent to punish is shown, it is attainder.[41] A greater problem arises when one challenges a statute which burdens a class. As in the English attainder of the Earl of Kildare, a group of individuals need not be named, but can be identified as a class.[42]

A discussion of class necessitates additional terminology. At the time it was passed the attainder of the Earl of Kildare burdened a determinable group—"all such persons which be or heretofore have been" allied with him. By its terms, the statute was retrospective. This type of statute is labelled a "disability,"[43] and the class which is burdened is "fixed." People fall within the classification because of activity prior to the passage of the statute. Nothing they do now allows them to remove themselves from the group to which the statute applies. If a legislature intends to punish this fixed group, then it is attainder. At the opposite end of the spectrum is a statutory "qualification" which involves a "shifting" group. The statute is prospective, not retrospective. Since future conduct is the test of membership in the statutory class, the group is "shifting." At the time it is passed, the individuals who will suffer the burden of the statute cannot be known.[44]

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40. Although in English practice attainders referred to capital punishment, and bills of pains and penalties were non-capital, it is clear that our constitutional restriction on attainder includes both categories. *Ibid.* The definition of attainder used here is inclusive of both types of punishment.

41. In United States v. Lovett, 328 U.S. 303 (1946), Congress enacted a law which expressly prevented the expenditure of federal funds to compensate Lovett and two others for federal employment. This permanently withdrw any opportunity to work for the Government. On a showing of an intent to punish the law fell as an attainder. See text accompanying note 92 *infra.*

42. See note 39 *infra.*

43. *Cf.* Wormuth, *supra* note 15.

44. One distinction should be made. Upon its passage, a statute generally will apply to certain individuals, those who by chance have property interests tied up in the preservation of the status quo. But this does not make the class fixed, for each of these individuals may take himself out of the statutory classification. To illustrate, a statute may withdraw all licenses for naturopaths and require that they must pass a general medical examination. With the passage of the statute, all incumbent naturopaths find endangered certain property rights they may have worked long years to secure, *i.e.*, their status, clientele and equipment. But the process of withdrawing from the class (by passing medical boards) is examined in terms of reasonable regulation. *Cf.* Davis v. Beeler at note 160 *infra.* Similarly in Perez v. Board of Commissioners, 78 Cal. App. 2d 638, 178 P.2d 537 (1947), an ordinance provided that policemen henceforth cannot hold membership in an international union. At the time the ordinance became effective, certain policemen had property rights in union pension and security programs. But the class was not fixed, for each policeman had an opportunity to withdraw himself

Decisions relating to attainder seem to mirror this distinction—at least those decisions relating to political conduct.[45] In the familiar post-Civil War *Test Oath* cases— *Garland*[46] and *Cummins*[47]—statutes, civil in form, disabled a fixed group (those actively sympathetic and those "soft on" the Confederacy) by disallowing these persons to follow certain professions. The statutes held unconstitutional—involving the priesthood and the practice of law—were typical of the legislative attempts publicly to reprimand subversive individuals.

But, by contrast, recent statutes which are qualifications and involve shifting classes withstand the challenge of attainder. In *American Communications Ass'n v. Douds,*[48] the Taft-Hartley Act required leaders of all unions who wished to take advantage of the Act to swear a test oath that they were not members of or sympathetic to the Communist Party. Citing *Lovett, Garland* and *Cummins,* the union attacked this statute as attainder. The Court distinguished the earlier cases on the ground that they disabled, they punished for past action, while the Taft-Hartley Act was concerned with preventing future conduct. The statute was written in terms of a condition or a qualification. "Members of these groups identified in the charge are free to serve at any time they renounce (their) allegiances," but in *Cummins, Garland* and *Lovett,* "nothing that those persons could ever do would change that result."[49] Therefore, because the statute is prospective this burden is not attainder, but regulation, and must meet the requisite standards for substantive due process.[50] Likewise, in *Garner v. Board of Public Works,*[51] a Los Angeles ordinance required government employees to swear under oath that they did not and had not for five years advocated nor belonged to a group which advo-

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from the classification of the statute and thereby make himself eligible for employment as a policeman by disaffiliating from the union. Whether it is legitimate to force this choice on a policeman is the subject matter of a substantive due process analysis. But the crucial element that distinguishes these situations from a fixed class is that here one can withdraw himself from the statutory classification.

45. The analysis in this note is more sensitive to an examination of a retroactive statute which bases its disability on past political conduct than to one based on past non-political conduct. This emphasis flows more from the history of attainder itself as a weapon of punishing political enemies than from the concept that political rights are "preferred" rights under the Constitution. *Cf.* the famed "footnote four" of United States v. Caroline Products, 304 U.S. 144, 152 (1937).

46. 71 U.S. (4 Wall.) 333 (1866).

47. 71 U.S. (4 Wall.) 277 (1866).

48. 339 U.S. 382 (1950).

49. *Id.* at 414.

50. Albertson v. Millard, 106 F.Supp. 635 (E.D. Mich. 1952), *vacated,* 345 U.S. 242 (1952), correctly cites *Douds* as precedent that an act requiring registration of communist front organizations and an oath to protect and defend the Constitution was not an attainder because it was a conditional exclusion.

51. 341 U.S. 716 (1951).

cated the violent overthrow of the government by force. The Court held this ordinance was not ex post facto since a statute had been passed more than five years previously enabling the city to require such oaths.[52] Since the statute was interpreted as a qualification, there was no punishment; the legislature had merely set reasonable standards of qualification and eligibility. *Lovett* was distinguished since it was specific and retroactive; the Los Angeles ordinance was general and prospective.

These cases would seem sufficient to overrule any attempt to attach a bill of attainder label to a statute applying to a shifting group and should limit any case which states that an attainder may be written in terms of future conduct. Nevertheless, one commentator[53] states that attainder "may be prospective, and conditioned on future conduct" and cites language from *Cummins* and *Gaines v. Buford*[54] to support that proposition. If the "conditioned on future conduct" means the statute may be prospective and the class shifting, these two cases are directly contrary to *Douds* and *Garner*. But it seems the meaning is much more restricted. Attainder in the future is limited to situations where persons are named in a statute; the conduct for which they are being punished is actually past conduct. These named persons are given a future choice to remove themselves from the classification, and that choice is either illusory or one that has no relation to substantive policy. Any expansion of this statement comes from a misunderstanding or misconstruction of *Cummins*[55] and *Gaines*[56] and a refusal to recognize *Douds* and *Garner*.

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52. "The activity covered by the oath had been prescribed by the charter in the same terms, for the same purpose, and to the same effect over seven years before, and two years prior to the period covered in the oath. Not the law but the fact was posterior." *Id.* at 721. Mr. Justice Burton, dissenting, stated that as a practical matter the statute is ex post facto.

53. Annot., 90 L. Ed. 1267, 1273 (1945).

54. 31 Ky. 481 (1833).

55. *Cummins* provides no precedent that a qualification can be attainder, although it states that attainder "may inflict punishment absolutely or may inflict it conditionally." 71 U.S. at 324. But the conduct for which one was being punished was past conduct. Only the process of identifying the persons within the fixed class took place in the future. This is no more a future attainder than if a statute disabled a fixed class for past conduct but provided a judicial trial to identify the individuals within the class. When *Cummins* speaks of "absolute" punishment, it means an express statutory declaration that certain individuals were guilty. In a "conditional" imposition of guilt, the statute assumes guilt "unless the presumption be first removed by their expurgatory oath—in other words they assume the guilt and adjudge the punishment conditionally." *Id.* at 325. But in both situations, the conduct for which one is being punished in the disabling statute was past conduct, not the future conduct of taking or not taking the oath. This situation must be distinguished from *Douds*, in which the relevant conduct was present or future. Therefore, *Cummins* provides no basis for the theory of a future attainder.

56. A passage from *Gaines v. Buford*, 31 Ky. 481, 510 (1833), is also cited for the proposition that attainders may be "future." This case involved a statutory attempt of the Kentucky Legislature in 1824 to hasten the settlement and development of frontier

Post-*Lovett* cases seem consistent with the doctrine that attainder is limited to a fixed class. For example, one case[57] involved a statute levying a prohibitive fine of $10,000 a day for violation of the statutory strike and lockout procedure prescribed for public utilities employees. The statute was not attainder since it was not "directed specifically at the defendant union."[58] Likewise, the provision of the Taft-Hartley Act which removes supervisory employees from its protection was not attainder because it was "not directed against any named individuals or easily ascertainable members of a group. It expresses a policy, applicable to all within the general classification."[59]

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forest lands by providing automatic forfeiture of all land to the state if certain improvements were not made on the land before the 1st of August, 1825. In a much-quoted statement from this case one judge stated, "Bills of attainder have generally been applied to punish offenses already committed; but they have been and may be applied to the punishment of those thereafter to be committed . . . [A] bill of attainder is not necessarily ex post. A British act of Parliament might declare if certain individuals . . . failed to do something by a given day, they should be treated as convicted felons or traitors." For several reasons, this language is of questionable validity as establishing a precedent that attainder may be future. First, the decision states no holding on attainder. Only one of the two justices found the law was penal as violating the ex post facto restriction, in spirit, and the attainder clause, in fact; the other justice found the law was a violation of substantive due process. *Id.* at 487 and 490. Also, there were special circumstances in this case which might well have appealed to the court. Since during the period for proposed improvement the land was adversely possessed, the court stated that even with diligence it is questionable whether the owner could have brought an ejectment action and made the necessary improvements within the requisite period. *Id.* at 508. Further, the law was held penal because of the nature of the burden, *i.e.,* forfeiture of land. But the nature of the burden itself gives no final indication whether a law punishes. Therefore, the rationale of penalization in this law is questionable. On the contrary, this law today would be examined in terms of substantive due process. Finally, not only did the court fail to cite any American precedent for the proposition that attainder may be future, but also it misconstrued the attainder of the Earl of Clarendon (see text accompanying note 37 *supra*) which was future only to the degree that by statute certain persons, expressly adjudged guilty of a treason, were given the illusory choice of surrendering themselves to the authorities or fleeing and suffering treason. As in *Cummins,* the conduct for which one was being punished was past political conduct, not the prospective Hobson's choice that was given the individual. Either decision, to flee and lose his land and citizenship or to stay and suffer summary judgment for treason, was punishment. Further, not only was guilt expressly declared in the English attainder, but also the process of leaving the attainder class, *i.e.,* fleeing the country, had no relation to a legitimate substantive regulation. None of these conditions were present in the *Gaines* statute; therefore, the *Clarendon* attainder seems inapplicable as precendent to a *Gaines* or *Douds* prospective type statute. Therefore, *Gaines* is not a sound holding that attainder may be "future."

57. State v. Traffic Telephone Workers, 2 N.J. 335, 66 A.2d 616 (1949).

58. *Id.* at 352, 66 A.2d at 625.

59. NLRB v. Edward G. Budd Mfg. Co., 169 F.2d 571 (6th Cir. 1948). *Cf.* Dworken v. Callopy, 91 N.E.2d 564 (Ohio 1950), in which a prospective oath which was a condition precedent to participation in a state unemployment program was not attainder. Caveat this holding since Lawson v. Housing Authority, note 134 *infra;* In Goodin v. Clinchfield R. R., 125 F.Supp. 441 (E.D. Tenn. 1954), the Railway Labor Act, giving the railroad and the union power to make an agreement to force compulsory retirement of any employee upon his reaching seventy years was not an attainder. An act abolishing a certain position in state government in which the plaintiff had been permanently

Of the thirty-odd post-*Lovett* cases challenged as attainder, in only two were the charges upheld and the statute invalidated. The first involved a statutory burden on a fixed class by a change in criminal procedure and is discussed at length herein.[60] The other case[61] which upheld an attainder challenge is questionable because the statute concerned a shifting class. In the midst of a squabble among the city council, the mayor, and the city manager, the council passed an ordinance that any city official who disobeyed a city ordinance could, on a two-thirds vote of the city council, be removed from office and fined and imprisoned. The court held the ordinance "strongly resembles an attainder." Since the statute was prospective, the better ground for disposition seems the court's alternative holding that such action would constitute a deprivation of property without due process. The challenge in terms of attainder was premature; the only possible time for such an attack would be after the city council had removed and imprisoned a specific individual.

Although one accepts the fact that the class must be fixed, the problem of how narrowly defined the class must be to constitute an attainder is a perplexing one. Much more emphasis should be placed on the fact that the group is fixed than that it is small. The legislature can intend to punish a relatively large group, as it did in both the *Cummins* and the *Garland* cases. The important fact is that the group is fixed—that one became a member of the burdened group not of choice, but because of legislative fiat. A statute aimed at a narrow group should sensitize one to the possibility of attainder, but that fact alone should not control the analysis. At most one should allow the size of the fixed group to be one of the indicators of an intent to punish. That the burdened group is fixed is essential to attainder; that it is small is possibly indicative of attainder.

The fixed-shifting distinction seems critical in the analysis of modern attainder.[62] Legislative adjudication invalidated under the theory of attainder is limited to burdens on a fixed group.[63]

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certified was not attainder, since it abolished only a position and did not permanently bar the plaintiff from all government employment. Starkweather v. Blair, 245 Minn. 371, 71 N.W.2d 869 (1955).

60. See text accompanying note 116 *infra.*

61. Jones v. Slick, 56 So.2d 459 (Fla. 1952).

62. There remains the problem of a statute which is both retroactive for some and prospective for others—a so called "mixed group"—which is deferred to the text accompanying note 104 *infra.*

63. The problem of determining whether an organization can be the object of attainder is precipitated by the Communist Control Act of 1954 which withdraws from the Communist Party all its rights, privileges and immunities. Although attainders generally involved individuals or groups of individuals, in a well-reasoned analysis, one commentator states that organizations can likewise be subject to attainder. He feels the statute in question is attainder because the requisite intent to punish can be shown and

2. *Burden: Deprivations That Constitute Attainder.* *Garland* and *Cummins* seemed to open wide the types of burdens that could be used as punishment.[64] The corollary, then, is that an examination of the nature of the burden is not as important an indicator of attainder as are the other two elements—fixed class and an intent to punish.

The effect of *Lovett* is consistent, although the Court's discussion of the burden is less than satisfactory since it is based on the similarity of the statutory burden to other "penal" burdens. The major contribution of this case to the definition of an attainder burden was to break down the time-honored right-privilege distinction. Government employment, long thought to be a "privilege," was included within the scope of those civil rights of which a specific individual cannot be deprived legislatively.[65] As for the "similarity of burden" analysis, the Court, after examining *Cummins* and *Garland,* stated that "permanent proscription from any opportunity to serve the Government is punishment, and of a most severe type."[66] It continued that this is a type of a punishment used in outright penal statutes for "special types of odious and dangerous crimes" such as treason or acceptance of bribes by government officials. But certainly this alone is not sufficient to find the burden penal. Merely stating that a particular burden has been used in other criminal statutes does not mean it is, by nature, a "penal" burden. The thrust of *Cummins* is that a statute, whatever the burden, affecting a fixed class and intended to be a punishment, falls as attainder. A statute disabling Lovett from government employment is punishment only when accompanied by an intent to punish him. But a valid regulatory statute can set standards for public office which permanently exclude some fixed group.[67] A general statute that perpetually excluded imbeciles, idiots, and psychotics from any opportunity to serve with the government would not be examined as

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that there is no method whereby the organization can take itself out of the purview of the statute. See Comment, 64 YALE L.J. 712, 724 n.74, 725 n.81 (1955).

64. *Cummins* flatly states "The deprivation of any rights, civil or political, previously enjoyed, may be punishment." 71 U.S. at 320. The *Test Oath* cases reject the idea that an inclusive list of examples of punishment can be compiled. The latter approach is implicit in the dissent which states that "to punish one is to deprive him of life, liberty, or property, and to take from him anything less than that is no punishment at all." *Id.* at 320.

65. *Cf.* the earlier right-privilege view. Idaho disenfranchised bigamists by a statute that had both prospective and retrospective operation. In distinguishing *Cummins* and *Garland,* the court held the statutes there involved took away a "natural right attaching to every man, both in a state of nature and as a member of society and as sacred and inviolable as the right to till the soil, and in no sense similar to the right of suffrage, which we have seen is a privilege conferred or withheld by lawmaking power." Shepherd v. Grimmett, 3 Hash. (Idaho) 403, 31 Pac. 793 (1892).

66. 328 U.S. at 316.

67. For several examples, see Wormuth, note 15 *supra.*

a punishment merely because it involved permanent proscription from government service; the analysis would be in terms of substantive due process.

The only inference from a similarity between the burden in the statute challenged as attainder and the burden of a recognized criminal statute is an indication of an intent to punish. It does not, per se, indicate that the statute is penal.

Although erroneous, the concept that the nature of a burden indicates its penal effect has had some exposition in our legal history. A most outspoken example is *Gains v. Buford,* a case also responsible for the ill-conceived statement that attainders can be prospective.[68] As for the burden of forfeiture, imposed on land for a failure to make the required improvements, Judge Nicholas in that case said

> [I]t is not the weight of the penalty, nor the character of the offense, that makes it a bill of attainder. . . . [I]t *is the confiscation of the property of individuals* . . . . When a state rightfully acquires the property of a citizen by forfeiture, it is, as the punishment annexed, by law, to some illegal act, or the negligence of its owner. . . . *The right to forfeit is an incident merely to the power to punish guilt. Without the guilt, the forfeiture cannot be incurred.* (Emphasis added)[69]

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68. 31 Ky. 481 (1833). See note 56 *supra.*

69. 31 Ky. at 509. But forfeiture of property has been held to be a civil burden incident to the abatement of a public nuisance. In Moore v. Commonwealth, 293 Ky. 55, 168 S.W.2d 342 (1943), the forfeiture under a public nuisance statute of a house and lot whereon liquor was illegally sold was held to be a civil burden. And two other statutes were held civil in which bawdy houses were defined as a public nuisance and which provided for not only a permanent injunction against the proscribed activity and the forfeiture of any personalty used in the house for the immoral activity, but also a complete closing of the house for any purpose whatsoever for one year. In both situations, the defendants challenged the statutes as attainder and questioned the equity courts' jurisdiction, stating they should be afforded criminal procedural protections. In People v. Casa County, 35 Cal. App. 194, 169 Pac. 454 (1917), the court held the burden of forfeiture was civil because the statute provided for alternative criminal prosecution and because the statute worked no permanent forfeiture, but merely closed property to abate the nuisance. The former "alternative" argument is considered in note 201 *infra,* and the latter "narrow-gauge" approach is discussed in the text accompanying note 213 *infra.* State *ex rel.* Wilcox v. Gilbert, 126 Minn. 95, 147 N.W. 953 (1914), which in addition included a $300 penalty, emphasized the "regulatory" nature of a nuisance statute and the alternative argument that criminal sections were also created. Consistent with the theory of this note these statutes are not attainder since neither persons nor certain property is within a fixed class. But in addition, these cases indicate that forfeiture, as a burden, when disguised in a nuisance statute, is not regarded as punishment. Forfeiture of real property employed in violation of valid revenue laws has been held not attainder, but a civil regulation appropriate to accomplish the purpose of the act. United States v. Distillery, 25 Fed. Cas. 866 (No. 14965) (D. Del.) 1896. Similarly, a retroactive post-Civil War statute which exempted from liability those who had caused damage to private property while acting under military command was a non-penal exemption. That the forfeiture of the property owner's cause of action was not penal was "too

This case,[70] which allows the nature of the burden to control the definition of a penal burden, is contrary to the holding of the *Cummins* case. The sort of test it prescribes would not provide useful standards in the definition of attainder. First, assuming *Cummins* held that disabling an individual from following a profession is a punishment per se, how would one treat a statute which forbade convicted felons from practicing medicine?[71] The statute operated retroactively, and therefore applied partially to a fixed group. It would be folly to argue that by the nature of the burden, loss of such an opportunity is punishment in all situations. Likewise, a single burden, *e.g.*, requiring a person to leave the country, may be punishment to a citizen and regulation to an alien.[72] The essential point is that one must look to other factors than the burden itself; in these illustrations the purpose for the burden and the status of the person being burdened are relevant.

If the nature of the burden per se provides no answer to the issue of attainder, then the holdings of two post-*Lovett* cases seem erroneously founded. In one,[73] an act prohibiting public employees from striking was challenged as attainder. In lieu of the obvious disposition that the statute was not aimed at a fixed group, the court held that the act "provides for certain limitations and regulation but 'inflicts' no punishment. It does not provide for fines or imprisonment."[74] Similarly, in *Starkweather v.*

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clear to require discussion." In lieu of this bald dismissal, the Court well might have based this regulation upon the war power. Drehman v. Stifle, 75 U.S. (8 Wall.) 595 (1870). For contrast see McNealy v. Gregory, 13 Fla. 417 (1870), in which a statute retroactively declared void all judgments on notes which arose from the sale of slaves. The court held that if the post-Civil War Convention that passed the statute was legislating, it had impaired contracts; and if it was punishing the payee of the note for the moral wrong of using the slave as consideration in a contract, it was attainder. The court rejected the payor's argument that since his slave was freed, there was no impairment when the legislature cancelled his obligation to pay for the slave. This was in effect a retroactive judicial forfeiture of the payor's equitable remedy of recision.

70. *Cf. In re* Yung Sing Hee, 36 Fed. 437 (D. Ore. 1888) in which Yung, a citizen, was refused readmittance to the United States on the basis of the Chinese Exclusion Act. The court held that Yung did not fall within the statutory definition, but even if she did, the statute was invalid as attainder. The court argued that since banishment is a recognized method of punishment, a statute which banishes a citizen, *for any reason,* is a bill of attainder.

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

72. *Compare In re* Yung Sing Hee, 36 Fed. 437 (D. Ore. 1888), holding banishment is punishment for a citizen, *with* Quattrone v. Nicolls, 210 F.2d 513, 519 (1st Cir. 1954), which said that "deportation, however severe it may be on the alien, is not a punishment, . . . [but] merely a refusal by the Government to harbor persons whom it does not want." United States v. Hiekkinen, 221 F.2d 890 (7th Cir. 1955) similarly holds that deportation is not punishment.

73. Detroit v. Division 26 of Amalgamated Ass'n of Street Employees, 332 Mich. 228, 51 N.W.2d 228 (1952).

74. *Id.* at 247, 51 N.W.2d at 232.

Blair,[75] the plaintiff produced evidence of legislative hostility toward him in passing a statute which eliminated a position in which the plaintiff was permanently certified; the court distinguished *Lovett* and found no attainder since only a single opportunity for government employment was eliminated for Starkweather, not all opportunities. But the court again assumed that the quantum of the burden in *Lovett* was the fact that made it punishment. More correctly, it seems the burden plus the intent made it penal. Were one able in *Starkweather* to show legislative intent to burden the individual, that the burden itself was less severe and final than that of *Lovett* would be immaterial.

Two more collateral matters are worth examination. First, severity has been offered as a test of the penality of a burden. *Burbett v. McCarty*[76] held unconstitutional a prospective statute providing for expatriation for aiding the Confederacy and requiring as a pre-requisite to voting a test oath swearing allegiance to the Union. The court said that such a burden is a heavy penalty. "To decitizenize a freeman is a tremendous blow. It deprives him of his chosen country and home and sunders his most endearing relations, social and civil. Is not this severely punitory?"[77] The court argues that this punishment cannot be inflicted without judicial conviction "any more than a bill of attainder without judicial conviction can constitutionally punish a citizen." Guilt cannot be judged by election officials or by the "mock-trial" of taking a test oath. The element of severity, however, cannot indicate a burden is penal.[78]

Similarly, a discussion of the nature of the right of which the individual is deprived seems no more productive than an analysis of the nature of the burden. The most obvious weakness is an inability to catalogue the rights, civil and political, of which a person cannot be deprived without attainting him. In *Davis v. Berry*,[79] an Iowa statute authorized vasectomy for idiots, drunkards, drug fiends, epileptics, syphilletics, and moral and sexual perverts, and made vascetomy mandatory as to criminals twice convicted of a felony. The statute was applied to a person who had commited one felony prior to the statute. Correctly, the court rejected an ex post facto argument, but it accepted the challenge of cruel and unusual punishment, loss of procedural due process, and attainder. As for the latter argument, the court rationalized its finding of punishment in the following language:

75. 245 Minn. 371, 71 N.W.2d 869 (1955).
76. 73 Ky. 758 (1866).
77. *Id.* at 760.
78. See text accompanying note 192 *infra*.
79. 216 Fed. 413 (S.D. Iowa 1914).

> One of the rights of every man of sound mind is to enter into the marriage relation. Such is one of his civil rights, and deprivation or suspension of any civil right for past conduct is punishment for such conduct.[80]

This is attainder because it is a "legislative act which inflicts punishment without a jury trial."[81] By making the analysis in this manner the court never comes to grips with the vital issue of why a person is losing his power to procreate. Is it part of a punitive statute or is it based on the theory of engenic selection and passage of undesirable hereditary characteristics?[82] This same civil right to enter into marriage is secondary to eugenic considerations in *Buck v. Bell,*[83] which held the sterilization of idiots was not cruel and unusual punishment.

A further illustration of the inadequacy of an examination of the rights involved is *Shepherd v. Grimmett,*[84] which upheld an Idaho statute retroactively disfranchising Mormans for the practice of bigamy. The court distinguished *Garland* and *Cummins* which took away "a natural right attaching to every man, both in a state of nature and as a member of society."[85] It held that suffrage is only a privilege conferred or withheld by the lawmaking power.[86] Thus, one is either uncertain when a right gives way to a regulatory goal, or he is lost in the maze of distinguishing "natural" from "legal" rights and "privileges" from "rights." *Lovett,* which involves a traditional privilege, indicates the latter distinction is no longer relevant to attainder analysis.[87]

In conclusion, the burden itself is not as important as a fixed class or intent to punish. At best, one only can infer from a heavy penalty or a traditional punishment a legislative intent to punish. But this should

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80. *Id.* at 419.
81. *Ibid.*
82. Sterilization was a penal burden for the purpose of the eighth amendment analysis because historically it had been used as a punishment. Rejecting the argument that the statute was reasonable regulation, the court said that one could not eugenically edify the race by basing the marriage relationship on the "teaching of a farmer in selecting his male animals to be mated with certain female animals only." *Id.* at 417.
83. 274 U.S. 200 (1927).
84. 3 Hash. (Idaho) 403, 31 Pac. 793 (1892).
85. *Id.* at 412, 31 Pac. at 796.
86. *Cf.* Boyd v. Mills, 53 Kan. 594, 37 Pac. 16 (1894). A statute which retroactively disenfranchised anyone who had ever borne arms against the Government of the United States was only the withdrawal of a privilege, not an absolute right. In Wooley v. Watkins, 2 Idaho 590, 22 Pac. 102 (1889), a prospective statute disenfranchising polygamists was not punishment, but merely the state's establishment of voting standards. Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875) held that a statute restricting suffrage to males was not punishment for women since voting is not a privilege of citizenship.
87. *Cf.* the discussion of *Speiser v. Randall* in the text accompanying note 144 *infra.*

be but one relevant factor. A test for attainder should be devised less in terms of what the individual loses and more in terms of what the legislature intended.

3. *Intent to Punish.* The third attribute of attainder is a legislative intent to punish. If the legislature actually intends to regulate a fixed group, there can be no question of attainder, but the test of the statute should be in terms of due process. Therefore, to prove attainder the showing of an intent to punish is crucial. In the English attainders there was no question of the requisite intent, for the statute declared the person guilty of a crime.[88] But American law has gone beyond an express statutory declaration of guilt by developing two separate methods of showing intent to punish.[89] The first[90] is by demonstrating an "express intent" from punitive language of committee records and from floor debate.[91] The second is the concept of "hidden intent" which states that although the statute may be entirely civil in form, because of its effect, it punishes a fixed group.

As for the first branch, an express intent to punish must be found, as it was in the *Lovett* case, by looking to records or debate and finding Congressional intent to "purge."[92] Two critics have attacked this growth in our law of attainder—one on theoretical and the other on practical grounds. In both *Lovett* and *Garner,* Mr. Justice Frankfurter dissented to the expansion of the concept of express intent. In *Lovett* he stated that the statute "lacks the characteristics . . . that bear the hallmarks of a bill of attainder. . . . [A]ll bills of attainder specify the offense . . . [and] there was a declaration of guilt. . . . [T]he offense must be a preexisting crime, [but] here, no offense is specified and no declaration

88. 328 U.S. at 322-23. *Cf.* the text accompanying notes 38-40 *supra.*

89. That an English analysis of attainder would not go to these sources could be attributed to the general unwillingness of English courts in construing a law to go beyond the four corners of the statute. *Cf.* WILLIAMS, LEARNING THE LAW 94 (6th ed. 1957).

90. Starkweather v. Blair, 245 Minn. 371, 379, 71 N.W.2d 869, 875 (1955), states "apparently the *Lovett* case is the first in which the court has gone beyond the language of the act itself in seeking . . . [the legislature's] motive. It has often been held . . . not the proper subject of judicial inquiry."

91. It is possible that an attainder challenge may be levied against a congressional committee whose investigations have as one of their express purposes the exposure to the public of criminals and undesirables by lengthy interrogation before radio and television audiences. When the purpose of these investigations is not to provide information from which the committee can write legislation, the committee intentionally is punishing the individual it calls before it. The undesirable publicity is certainly a recognizable burden. Although the form does not fulfill traditional attainder standards, such an investigation has the substantive attributes of legislative punishment. This view was expressed in the defendant's brief in the case of United States v. Lamont, 18 F.R.D. 27 (S.D. N.Y. 1955), which is cited in full in WITTENBERG, THE LAMONT CASE 168-70 (1957).

92. Lovett v. United States, 328 U.S. at 311.

of guilt is made."[93] And of the statute in *Garner* which required government employees to take a test oath swearing non-subversive attitudes and behavior, he said, "I think the precise Madison would have been surprised to even hear it suggested that the requirement of the affidavit was an 'attainder' under article 1, § 10. An express declaration of guilt is a necessity."[94] One can only note, in rebuttal, that Mr. Justice Field was not at all surprised in *Cummins* when a "regulatory" statute was suggested to be an attainder. It seems the precise Frankfurter, on grounds of American judicial history, gives too little weight to the holdings of the *Test Oath* cases.[95]

The practical criticism of the *Lovett* concept came from a state judge who explained that a *Lovett* analysis would be of little value to a state. "How on the state level can one find and prove an intent to punish? Congress could go to committee hearings and debates. In Minnesota there are no records or committee hearings. Furthermore, one can't look to extraneous evidence not a part of the journal entry."[96] But while the *Lovett* theory may not be of much value on the state level, it may well continue to be important in federal cases. The Communist Control Act of 1954[97] might prove an instance, for in committee hearings on that bill, several legislators' statements indicated an intent to punish the Communist Party and its members.[98]

The second branch of intent to punish was developed in the *Test Oath* cases in terms of "hidden intent" and "relevancy," and is applicable although there is no declaration of guilt on the face of the statute or in committee records. If the effect of the statute is to punish, it is inferred the statute was passed with a hidden intent. The test states that when a disability is based on past conduct, and that conduct bears no relation to a present qualification, there is an attainder.[99] To explain: In *Cummins* and *Garland,* former Confederate sympathizers were, in effect,

93. *Id.* at 323.
94. 341 U.S. at 725.
95. In describing the difference between a statutory declaration of guilt and a regulatory statute where the intent was "hidden," the Court states that "the deprivation is effected with equal certainty in the one case as it would be in the other, but not with equal directness." 71 U.S. at 325. See also, in discussing the ex post facto aspects of the case, "the provision of the Federal Constitution, intended to secure the liberty of the citizen, cannot be evaded by the form in which the power of the state is exerted." *Id.* at 329.
96. Starkweather v. Blair, 245 Minn. 371, 71 N.W.2d 869 (1955).
97. 56 Stat. 786 (1942), 50 U.S.C. § 842 (1954).
98. See Comment, 64 YALE L.J. 712, 725 (1955).
99. It is obvious that this test is much like that of reasonable regulation in substantive due process. But in 1866, this doctrine was only in genesis. For a discussion of the relationship of the relevancy test to reasonable regulation, see the text accompanying note 170 *supra.*

excluded from their professions. The Court held that although the legislature can set standards of qualification, when these standards have no relation to competency, the burden is punishment and attainder. The Court found no relation between sympathizing or participating in the rebellion and performing professional tasks as a priest or a lawyer.[100]

But, conversely, in the case of *Hawker v. New York*,[101] which used the relevancy test as the indicator of hidden intent, a statute which declared it illegal for any person to practice medicine after conviction of a felony was held not to be ex post facto punishment. In this case Hawker had committed the felony before the passage of the statute, and since he was in a fixed group, challenged the statute on the basis of *Cummins* and *Garland*. The Court stated that the legislature can set standards of good character for doctors. In finding the requisite relevancy in this statute the Court said it is "not a fanciful or arbitrary rule, one having no relation to the subject matter, to say that who ever violated the criminal law had a lack of moral character."[102] The relevancy test developed in these cases remains an important part of the analysis of attainder.[103]

Summarizing, express intent (be it from the face of the statute or other records), hidden intent (using the relevancy test), the severity and the historical use of the burden, and possibly the very fact that the statute is applicable to a fixed group all indicate a legislative intent to punish.

One problem bridges requirements of both "class" and "intent." Some statutes may have both "fixed" and "shifting" application. *Hawker* involved such a statute. It said no one who committed a felony could practice medicine. This, of course, was prospective (a qualification), but it also included those who committed felonies in the past (a disability). In analyzing the validity of a statute involving a "mixed" class the group disabled should be examined separately from the shifting, prospective group, especially when past political conduct is involved. To analyze the statute as a whole on general due process grounds, with its slippery standards of reasonableness would result in playing down the retroactive application of the statute, a fact which should be of major

100. In *Cummins*, 71 U.S. at 319, the Court said "It is evident from the nature of the pursuits and professions of the parties . . . that many of the acts, from the taint of which they must purge themselves, have no possible relation to their fitness for these pursuits and professions. There can be no connection between the fact that Mr. Cummins entered or left the state of Missouri to avoid enrollment or draft in the military service of the United States, and his fitness to teach the doctrines or administer the sacraments of his church." Similarly in *Garland*, 71 U.S. at 380, the Court held that Congress cannot indirectly punish individuals under the form of creating qualifications and that the relevancy test applies to lawyers as well as priests.

101. 170 U.S. 189 (1898).

102. *Id.* at 196.

103. See cases accompanying notes 156-60 *infra*.

consideration. This suggestion of considering the fixed class separately has certain practical application. In *Weiman v. Updegraff*,[104] as a condition to teach in public schools, a mixed group was forced to take a test oath that they were not now (a qualification) nor had been for five years previously (a disability) a member of the Communist Party. Although the vital substantive issues were not reached since the Court disposed of the case on the lack of a requirement of scienter in the oath, it is obvious that, although for the shifting group *Douds* and *Garner* might sustain the oath, *Cummins* would cast doubts as to the validity of the disability.[105] This is true especially since in our legal history, there have been no valid legislative disabilities for past political conduct.[106]

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104. 344 U.S. 183 (1952).

105. Surprisingly enough, Mr. Justice Douglas, certainly a conscientious defender of individual liberties, does not agree on the issue of the validity of a disability based on past political conduct. In his explanation of the *Garner* holding he concedes the point, stating the statute involved was ex post facto and that the holding validated an oath relating to past acts. "*Garner* took past advocacy of a subversive creed as an absolute test of loyalty." DOUGLAS, THE RIGHT OF THE PEOPLE 132 (1958). *But cf.* his dissent, 341 U.S. at 735-36. Mr. Justice Clark, writing for the Court, did not consider the statute was ex post facto. Therefore, *Garner* should not be authority to validate a retroactive test oath.

106. While there have been no valid legislative disqualifications based on past political conduct, past political activity might be a legitimate basis for an administrative determination that a public employee is unfit for his position. *Garner* and *Beiland v. Board of Education*, 357 U.S. 399 (1958), require a public employee to disclose by affidavit or answer his present and past political conduct and may be discharged if he refuses. And the *Bar Examiner* cases—Konigsberg v. California State Bar, 353 U.S. 252 (1957) and Schware v. New Mexico Bar Examiners, 353 U.S. 232 (1957)—show that the Court will reevaluate the criteria that the state used to find incompetence. The difference is that the legislative statement is a broad, direct inference for all persons within the class that they are unfit if they have participated in the specified past political conduct. But in the administrative process, the burdened individual may appear to argue that not withstanding the past conduct, he is nevertheless competent in his position. He may introduce evidence and argue his case. Both the legislative and administrative disabilities focus on present competence, but the administrative hearing is more of a judicial procedure, examining the burdened individual with an opportunity for him to argue his case. Further, since the basis of the administrative disability is incompetence or insubordination, a conclusion arrived at by the exercise of administrative discretion, there is less relation between the past political conduct and the disability than in the automatic legislative disability where the relationship is in statutory terms. *Cf.* 22 C.F.R. § 51.135 (Supp. 1958) (passport regulations): "[N]o passport . . . shall be issued to: (a) Persons who are members of the Communist Party or who have *recently terminated such membership* under such circumstances as to warrant the conclusion—*not otherwise rebutted by the evidence*—that they continue to act in furtherance of the interests and under the discipline of the Communist Party." (Emphasis added.) As for the procedural rights incident to the hearing, see Bauer v. Acheson, 106 F. Supp. 445 (D.D.C. 1952); Boudin v. Dulles, 136 F. Supp. 218 (D.D.C. 1955). Special note should be taken of Mr. Justice Clark's language in *Garner*, 341 U.S. at 720, that "past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low position in private industry and are not less relevant in public employment." This language is not material to the question of a legislative disability for past political conduct. Nor is the issue before the Court of the legitimacy of an administrative decision to discharge on the basis of the disclosures in the affidavit. *Cf.*

In conclusion, class, burden and intent are the major foci of an examination of attainder.[107] Of the three, burden is the least important consideration. Attainder is a burden imposed by the legislature intending to punish a named individual or a fixed group.

ATTAINDER AND THE PROCEDURAL RIGHTS OF A FULL HEARING

There is certain confusion of the effect on attainder analysis of a statute which provides for a "trial." This confusion is heightened because of the black-letter definition of attainder, *i.e.*, the legislature punishing a narrow group of individuals without a judicial trial. A court can, and has, become confused because the definition is so stated that the presence of trial or a hearing may preclude the attainder issue. Indeed its presence may act as a cure-all for the court in dismissing an attainder challenge. This approach—rather than the more sound view of focusing on intent, burden, and fixed class—has serious consequences. If a prospective statute is involved, of course, due process requires a hearing. But if a fixed class is involved such a hearing must do more than judicially try whether or not the defendant falls within that class. It must further afford an opportunity to challenge the constitutionality of so legislating to a fixed class. If this right is denied, then the statute, applied to a fixed group, can be attainder, even though the method of finding

Beiland, supra. The question in *Garner* was limited to determining if a discharge was legitimate because the employee failed to file an affidavit relative to his past political activity. Wormuth, commenting on the relevance of past political conduct, seems not to have properly limited the meaning of the Court's words. Wormuth, note 15 *supra,* at 607 n.24.

107. Wormuth, note 15, *supra,* classifies the tests for attainder into four groups: a) irrelevance— as in *Cummins,* b) statement of guilt on the face of the statute—as Mr. Justice Frankfurter requires, c) measuring an individual against a general standard as in *Lovett* and d) a standard defined in terms of individuals as in *Garland.* In explaining c), Wormuth argues that the *Lovett* statute was based on specialized knowledge; *i.e.,* evidence of Lovett's guilt. He contrasts the valid *Hawker* statute which he feels was based on well-recognized facts of human experience. But to analyze legislation on this tenuous distinction between specialized and general knowledge seems impossible. The investigations of legislative committees are express efforts to obtain specialized knowledge. *Lovett* can best be explained as a modern expansion of Wormuth's category b). In defending d), Wormuth must distinguish *Hawker* from *Garland,* both of which he feels are based on "general human experience," and both of which he finds involve relevant disabilities. But he finds that while *Hawker* did not name individuals, *Garland* "must be treated as if it named all of them," and is thereby an attainder. This distinction is not valid. First, the requirement in *Garland* was not relevant (see 71 U.S. at 379, 380). And even if it were, still one cannot state that only the *Garland* statute identified individuals. *Hawker,* in its retroactive application, just as definitely burdened a fixed class, one able to be identified by a search of judicial records. The only distinction is that *Hawker* also included a shifting group. But that fact argues more in terms of intent. One might infer a greater congressional intent to punish from the very fact that the group is limited to a fixed class.

who is in the fixed group is by judicial trial instead of by a self-confessional "mock trial" called a test oath.[108]

Therefore, if the *Cummins* statute had provided for a judicial trial instead of an oath to determine who were Confederate sympathizers in the war, the law would be no less an attainder. Certainly the law also would be ex post facto, but it is still a legislative punishment of a fixed group. How one discovers who is in a fixed group that the legislature intends to punish is not crucial to the question of attainder.[109]

Several post-*Lovett* cases challenged as attainder have been disposed of on grounds of the availability of a trial. Although in two cases the attainder challenge merely "padded" the plaintiff's argument,[110] in three others there is the possibility that the court failed to examine sufficiently the scope of the hearing provided the burdened individual. In one,[111] the Selective Service Act, which affected the status of conscientious objectors who entered the service unwillingly, was held not to constitute a bill of attainder. "The act does not impose punishment without a judicial trial . . . (for) the writ of habeas corpus is available to protect rights of the individual after his induction into the service. The Constitution does not guarantee one the right to select his own tribunal or his own method of procedure."[112] The court focused on the availability of a judicial hear-

108. At least one writer, Comment, 63 YALE L.J. 844 (1954), misinterprets the requirement of a judicial trial in validating a statute. He argues that a trial before or after the legislative statement is sufficient to change the character of the statute from a judicial statement to a legislative one, basing his argument on a comparison of the *Test Oath* cases and the *Hawker* case. In the former, the disability, with no judicial trial, was invalid. The valid disability in *Hawker,* of course, was predicated upon a conviction. Therefore, he concludes if one has a judicial proceeding either before or after the trial, it is sufficient. This is an overgeneralization. The judicial hearing subsequent must be a full hearing with rights to attack the constitutionality of the statute. Furthermore, the mere presence of a prior conviction will not alone sustain a subsequent disability that has no connection at all with present fitness. Finally, a judicial conviction cannot be the exclusive basis of disability, for there are many legitimate ones that have nothing to do with the presence of a judicial trial, *e.g.,* epileptics prevented from driving, typhoid carriers disabled from teaching. *Cf. Ex Parte* Wall, 107 U.S. 265 (1882). The reasoned position seems that in most instances the presence of a prior conviction is relevant to present fitness. But one need not admit that the presence of a prior conviction automatically emasculates the attainder challenge. Some cases, erroneously have taken this position. For example, in Washington v. State, 75 Ala. 586 (1884), a statute which retroactively disfranchised those who had been convicted of certain crimes was no bill of attainder, since "it requires a conviction in the due course of judicial proceedings before disfranchisement is made to attach." *Ibid.*

109. Of course, in a prospective penal statute which involves a shifting group, it is critical whether this determination is made by the legislature or by the judiciary.

110. United States v. Silverman, 132 F.Supp. 820 (D. Conn. 1955) (The Communist Control Act did not curtail the full rights of trial guaranteed under the Smith Act); Peer v. Skeen, 108 F.Supp. 921 (N.D. W. Va. 1952) (habitual criminal statute provided for judicial trial on all issues).

111. Dodez v. United States, 154 F.2d 637 (6th Cir. 1946).

112. *Id.* at 638.

ing. But as stated above, this trial must test not only whether or not the defendant is an objector, but also, the more basic issue: whether by forcing the choice of military service or jail, the Government actually is punishing a conscientious objector no matter which alternative he chooses.[113]

Another case[114] involved an attempt to enjoin enforcement of a resolution forcing city policemen to disassociate themselves from a trade union. The plaintiff pleaded that the loss of existing rights—his pension and security funds and seniority rights in the union—was "in effect" a punishment without trial. Although under sound analysis this attainder challenge would be dismissed because a qualification is involved (the policeman has the choice of remaining either as a policeman or as a union man to protect his vested rights), the court held that since a trial is provided, there could be no attainder. Here, again, the presence of a trial confuses the attainder question. If the resolution was in fact a disability, the trial would have to provide an opportunity to question the validity of the statute itself.

Attainder and Retroactive Changes in Procedure

Retroactive procedural changes are difficult to rationalize with the theory of attainder, for traditional attainder (of both the *Lovett* and *Cummins* varieties) involves substantive burdens. The problem is complicated by the applicability of the ex post facto restriction to substantial retroactive procedural changes in criminal statutes.[115]

This interplay is demonstrated in one[116] of the two post-*Lovett* cases which invalidated a statute on attainder grounds. There, many persons were convicted of various crimes in proceedings instituted upon the filing of an information. Subsequently, as the instant case was waiting appeal, another case held that a conviction based upon an information was invalid, since Congress had not granted district courts jurisdiction over cases so filed. To prevent all the prisoners convicted upon an information from going free, Congress quickly amended the act to provide that a person so prosecuted cannot appeal. The effect of the statute was retroactively to make an information an adequate procedure. The court held this was both attainder and ex post facto. The explanation was that the

113. See also Christie v. Lueth, 265 Wis. 326, 61 N.W.2d 338 (1954), at note 120, *infra.*

114. Perez v. Board of Police Commissioners, 78 Cal. App.2d 638, 178 P.2d 537 (1947).

115. Although changes in substance in civil statutes may be ex post facto if the burden is found to be punishment. *Cummins.*

116. Putty v. United States, 220 F.2d 473 (9th Cir. 1955), *cert. denied,* 350 U.S. 821 (1955).

amendment was attainder since it "seeks to impose the penalty of imprisonment on a well defined group of persons . . . [and by denying a right to attack the district court's judgment] it would inflict imprisonment on them without a judicial trial."[117]

The grounds the court used to find attainder seem misguided. As stated in the prior section, one should not focus on the requirement "without a judicial trial" in attainder analysis but should look for an intent to punish a fixed class and an accompanying burden. The result of the court's analysis in this case is to require a check-list of all the necessary attributes of a trial and then to compare it with the procedural rights afforded the defendant. To focus on the procedural elements of a judicial trial is to consider matters more easily handled under ex post facto, if the deprivation is retrospective, or under procedural due process, if prospective. If one wants to rationalize this case in terms of attainder and its traditional elements, it seems this is the better approach: in the prospective criminal statute, the legislature has manifested a general intent to punish a shifting class. This, of course, is not sufficient for an attainder. But when the legislature retroactively deprives a fixed class of persons of a procedural right guaranteed by the statute, *i.e.*, the right of appeal, this indicates a specific legislative intent to punish a fixed group. This supplies the necessary elements of attainder—class, intent and burden.

This approach would explain the difference in a retroactive change in civil procedure, where there is no overriding legislative intent to punish. For example, consider two cases involving the Housing and Rent Act of 1947 and its amendment in 1949. The original bill allowed the aggrieved individual to sue for an injunction and damages. The 1949 amendment gave the Government the same cause of action and allowed its use retroactively. When challenged as an ex post facto punishment, the court said the statute "neither imposed a new obligation nor increased a former sanction. At most, it merely allocated the right of recovery in such a manner as to make its actual pursuit far more probable than it formerly was."[118] The other case rejected a due process challenge, emphasizing that the defendants' substantive liability was the same and that only the procedure had been changed.[119]

In the first case the court seems in error when it indicates there is no burden. The amendment seems to be a conscious attempt of the legislature to enforce the rent control statute by giving the Government a

117. *Id.* at 478.
118. United States v. Bize, 86 F. Supp. 939 (D. Neb. 1949).
119. United States v. Fullerton, 87 F. Supp. 359 (D. Mass. 1949).

new cause of action against a fixed class. To the defendant, this is indeed a substantial burden, for practically there is a much greater chance of his being liable in treble damages. To say this is no burden is to deal in technicalities, not substance. Nevertheless, the statute cannot be attainder for there is neither express intent to punish in the record nor hidden intent, since there was a relation between the retroactive burden and the vindication of the Government policy of rent control. If intent could be proved in such a case then attainder would be a more broad protection than ex post facto, since the latter doctrine is restricted to criminal procedure.

Such an intent to punish may have been present in the case of *Christie v. Lueth.*[120] In midst of a heated squabble among city officials, the city council passed a resolution ordering the Chief of Police to commence criminal charges against the plaintiff police officer. The court rejected the argument that this was attainder, characterizing the resolution as a mere attempt "to set the statutory program in action," a program which guaranteed a hearing and an appeal to the circuit court on the issue of his removal. Since the relevant statute required that the original charges of objectionable conduct be made by the Chief of Police or an elector, and here the council resolution required the Chief to file charges and set in operation a complete hearing process which included judicial review, the only right the policeman lost was his right not to have the legislature set a legitimate regulatory process in operation. Even though this is a minimal burden, if one could show an intent to punish, this resolution would be attainder. But the court out of hand rejected the attainder challenge. It examined an unduly narrow definition of attainder drawn from the *Cummins* case which emphasizes the procedural inequities of an attainder and compared it with the judicial rights the policeman was afforded. Not only does this definition not square with our modern concepts of legislative punishment but also it is not consistent with the facts of *Cummins* itself. This resolution affected one person by name and contained a burden, since the statute provided that the Chief of Police, not the legislature, initiate actions. This case also illustrates the problems of focusing upon the requirement of "a judicial trial." Since here there is a complete trial provided by the procedure, it is easy not to examine the procedure whereby one is brought to trial, which may itself be the attainder even though the proceeding is civil.

The *Garner*[121] case itself may be examined in this way. Although in that case generally it is assumed that the substantive burden was imposed

120. 265 Wis. 326, 61 N.W.2d 338 (1954).
121. 341 U.S. 716 (1951).

with the passage of the test oath ordinance in 1948, the Court itself interprets the ordinance as a mere change in procedure for determining which city employees lost their rights by the charter amendment of 1940.[122] Therefore, the relevant substantive deprivation was effected by the 1940 charter amendment. In such a case, the burdened individual could not challenge the amendment of a civil statute which merely made more effective the process of enforcing the statute unless there was some evidence of an intent to punish.

Attainder and Substantive Due Process as Protections of Political and Economic Rights; Relevancy and Reasonable Regulation

Since a present-day theory of attainder is limited in its application to statutes which disable, but substantive due process applies equally to qualification and disabilities, it is important to see the interrelation of the two doctrines. Therefore this discussion ties together the concept of hidden intent in attainder and reasonable regulation in due process.

1. *Political rights and test oaths.* Post-war uncertainties and insecurities brought a wave of legislation to control the "internal Communist threat." Many of these statutes exacted test oaths from individuals vitally situated in our society; the oaths forced a person to deny communist affiliation or sympathy and operated as a condition precedent to a person's holding office, teaching, etc. These oaths were attacked on many grounds, including attainder, freedom of speech, and substantive due process. In the development of the theory of attainder, *Douds*[123] and *Garner*[124] all but extinguished any possibility that a qualification could be attainder. Only if the statute is applicable to a fixed class, as it was in *Weiman,*[125] will the concept of attainder be valuable, except if the statute is an outright disability. Even in *Weiman,* the Court is not limited to a theory of attainder, for the statute under consideration may fall on substantive due process. Since in the future one may seldom reach the attainder issue, except possibly in considering statutes involving named individuals, an examination of the test evolved in *Douds* is instructive and a comparison with the "relevancy test" of *Cummins* will illustrate what little difference separates the two doctrines.

122. Query? The charter amendment itself seemed to contain some doubts whether the provision was self-executing and provided for subsequent municipal action to effectuate this disability. If this is the case, then not only was the burden imposed in practice in 1948, but also in fact.

123. See text accompanying note 48 *supra.*

124. See text accompanying note 51 *supra.*

125. See text accompanying note 104 *supra.*

The *Douds*[126] case involved section 9h of the Taft-Hartley Act which requires a non-communist oath from union leaders as a condition precedent to the receipt of its benefits. In this case, which developed the modern due process-speech analysis for test oath qualifications, the Court reasoned that since Congress had the power to regulate to prevent political strikes, and since, factually, there was demonstrated a grave danger to interstate commerce from political strikes and the possibility of communist infiltration into positions of union leadership, a test oath from union leaders who might order such strikes "bears reasonable relation to the evil which the statute was designed to reach."[127] Therefore, the showing of necessity precluded a due process challenge. As for the speech issue, the Court said the purpose of section 9h was not to curb speech, but to protect the public from the dangers of political strikes. The test is "to weigh the probable effects of the statute on [free speech] against the congressional determination of the evil."[128] The factors considered in this analysis included the fact that 9h was part of a large scheme of labor relations, that Congress had decided there was a substantial danger to commerce, and that the regulation restricted only a small group.[129] The *Douds* test determined the validity of the oath in terms of what dangers there are to the country without the oath and what interferences with free speech there are with it.

Two cases following *Douds* upheld oaths for public servants. *Gerende v. Bd. of Supervisors,*[130] held, per curiam, that it was legitimate to require a nonsubversive test oath from candidates for public office. This decision cited no cases. *Garner*[131] required an oath from all public employees. Citing *Gerende,* the Court held it was reasonable to set such qualifications in terms of an oath not to advocate violent overthrow, but the Court stated only its conclusion. The factors the Court considered in the process of balancing were not described. *Adler v. Bd. of Education*[132] concerned a statute which made a refusal to take an oath that one is not a member of a "subversive" organization a prima facie case for the dismissal of a teacher. The Court did not discuss attainder at all; on

126. 339 U.S. 382 (1950).
127. *Id.* at 391.
128. *Id.* at 400.
129. Query? The Court seems to consider that the burden applied only to those who must choose between the Party and Taft-Hartley privileges. But the effect is certainly much wider, since *all* union leaders are burdened by being forced to take the oath. This itself is a limitation on freedom of speech. Therefore the Court unduely narrows its analysis of the effect of § 9h on free speech.
130. 341 U.S. 56 (1951).
131. 341 U.S. 716 (1951).
132. 342 U.S. 485 (1952).

the speech issue, it followed *Garner,* stating there was no denial of speech but only a reasonable limitation on choice. The opinion rejected the substantive due process challenge that the case contained an invalid presumption.[133] The procedural guarantees were important factors in upholding the statute, *i.e.,* the organizations were guaranteed a hearing before being placed on the subversive list; proof of an individual's membership was only prima facie evidence of disqualification; and the teacher who refused to take the oath was afforded a full hearing before his dismissal.

All these cases concerned qualification statutes not imposing disabilities and in each case the oath was held valid. But in *Lawson v. Housing Authority,*[134] the *Doud* analysis was used for the first time to invalidate a prospective test oath. Pursuant to the Gwinn Amendment, a Wisconsin statute provided that no housing unit constructed with federal funds should be occupied by a person who is a member of a subversive organization. The tenant's loyalty was tested by a certificate of non-membership. The challenge to the statute was in terms of speech. In holding it was unreasonable to make a person choose between being a tenant and being a communist, the court pointed to the complete absence of a showing or finding of any subversive activities in housing as there were in the unions in *Douds.*[135] As in the *Adler* case, attainder was not mentioned; the sole basis of the challenge was on grounds of due process.

The latest chapter in the stormy, controversial history of test oaths was written on June 30, 1958, with the Supreme Court decision of *Speiser v. Randall.*[136] This case, and an accompanying one,[137] examined the administration of a California statute which denied any tax exemptions to persons who advocate the unlawful overthrow of the government. To effectuate this policy a statute required that an exemption claimant in his return must sign a statement declaring he does not engage in the proscribed activity. Speiser, a veteran, and the officials of the First Unitarian Church, refused to sign the oaths. These cases chal-

133. The Court also rejected the substantive due process challenge that the case contained an invalid presumption, *i.e.,* that the relationship between the fact found (that an organization advocates the violent overthrow of our Government) and the fact presumed (that a person belonging to such an organization is unqualified to teach) is unreasonable. It stated one cannot say the fact presumed is contrary to fact or that generality of experience points to a different conclusion.

134. 270 Wis. 269, 70 N.W.2d 605 (1955).

135. "It is beyond our power to comprehend how the evil which might result from leasing units . . . to tenants who are members of subversive organizations . . . is comparable [to *Douds*] . . . . The possible harm . . . outweighs the threatened evil." *Id.* at 287, 70 N.W.2d at 615.

136. 357 U.S. 513 (1958).

137. First Unitarian Church v. County of Los Angeles, 357 U.S. 545 (1958).

lenged the validity of the California statute requiring such an affirmation.

The Court, on procedural grounds, held that California's method of applying the statute denied due process, and thereby avoided any substantive determination of the issues of free speech, equal protection, or preemption. The relevant point to the present analysis is the Court's conclusion that the statute penalized speech and that in such circumstances to allow only civil procedures for the burdened individual was a deprivation of due process.[188] The Court was therefore forced to explain its more fundamental and subtle point, why the statute penalized.

Two typical indicators of a legislative punitive intent were not available in this case, *i.e.*, that the burden is called a penalty or that the burden is larger than the liability itself. Lacking these, the Court relied on two factors. First, the conduct to which the oath pertained was criminally prohibited. The Court stated that even though the state claims it is doing nothing more than computing the taxpayer's liability consistent with standard procedures, "in fact they have undertaken to determine whether certain speech falls within a class which constitutionally may be curtailed." But it is questionable whether this is a sufficient indicator that the burden, the loss of a tax exemption, is penal. Certainly, many statutes contain valid regulatory burdens which proscribe as the relevant conduct that which is criminally prohibited. For instance, just as the California statute forbids the granting of an exemption because of conduct which is criminal, the *Hawker* burden, the loss of a physician's license, was levied because of criminal conduct. Of course, cases of the latter variety can be distinguished because there criminal conduct was not only involved

138. In reaching its decision that there was a denial of procedural due process, the Court read the California decision to indicate that the oath was merely a preliminary step to aid the assessor in ascertaining the facts relevant to the claimant's loyalty. Even in the face of the oath, if the assessor was not satisfied, he could deny the exemption and require the claimant to prove the incorrectness of this determination in court. This, then, would place on the taxpayer the burden to prove he is qualified to receive the exemption; this is standard procedure in tax assessment cases. The fact that the burden of proof here was on the taxpayer indicated that the statute contemplated civil procedure. The Court then contrasted criminal procedure where the burden of proof is on the state. It cited certain tax statutes which penalize individuals, which to be valid, must meet the standards of criminal procedure. The Court stated that when the burden is more than compensatory, the burdened individual gets greater procedural protections. The Court then reasoned that even though the burden itself is merely compensatory, due process can still require stricter-than-civil procedure when the tax is "applied to penalize speech." Therefore, it was forced to explain why this burden "penalizes." (It is at this point that the Court's explanation results in a needless tangling of theory.) The analogy to compensation and more-than-compensation is difficult to apply here since the statute dealt with the converse of the usual situation—an exemption instead of a liability. But for the individual in both situations the result is the same; he has to pay more taxes. Therefore, this distinction should make no difference as long as one does not accept Mr. Justice Clark's idea in dissent that an exemption is merely a manifestation of the sovereign's largesse.

but also proved. Therefore, to avoid the stigma of punishment the Court seems to require conviction of the person under the accepted criminal statute.

This theory raises interesting problems. If, in one statute, conduct is proscribed as criminal and a sanction is attached, another statute, purportedly regulatory, would have to provide criminal standards of procedure before imposing a "civil" burden for such conduct. The implication is that once conduct is deemed criminal, every burden based on that conduct must be determined by criminal procedure. Certainly a great deal of the law does not bear out this analysis. The law has been willing to find both civil and criminal interests in one particular bit of conduct.[139] A tort and a crime may both flow from the same conduct; in such circumstances there is certainly no requirement that the tort damages be tried on criminal procedural standards. The tax statutes contain a civil addition to the income tax of five per cent for the wilful evasion of the tax and a fifty per cent addition for a fraudulent underpayment.[140] Further, it is a felony, punishable by imprisonment and a fine, wilfully to attempt to evade any tax imposed by the Code.[141] There is no suggestion that a person must first be convicted of the crime or be provided criminal procedure before the additions to the tax is assessed.[142] *Ex parte Wall*[143] provides a similar illustration. There, a lawyer was disbarred by a summary procedure for participating in a lynch mob. Certainly the conduct was criminal; but disbarment by this procedure was a justifiable exercise of the court's regulatory power to maintain high standards for the bar. Therefore, it is questionable whether this justification for finding the tax exemption a punishment can be sustained. All burdens that follow from conduct described as criminal in one statute need not necessarily be criminal conduct in all other statutes.

The second, more interesting argument that the burden is penal in *Speiser* states that because of the nature of the rights lost through the operation of the statute, one is entitled to criminal procedure. The Court states that where the transcending value of speech is involved, "due process certainly requires in the circumstances of this case, that the State

139. "Congress may impose both a criminal and a civil sanction in respect to the same act or omission, for the double jeopardy clause prohibits merely punishing twice." Helvering v. Mitchell, 303 U.S. 391, 399 (1938).

140. INT. REV. CODE OF 1954, §§ 6653a and 6653b.

141. INT. REV. CODE OF 1954, § 7201.

142. In fact, the procedure for determining an addition to a tax is civil. Helvering v. Mitchell, 303 U.S. 391 (1938).

143. 107 U.S. 265 (1882).

bear the burden of persuasion to show that the appellant engaged in criminal speech."[144]

An analysis of this latter theory reveals that it is of doubtful value. Mr. Justice Clark, in dissent, calls the Court to task for this theory, stating it is a "wholly novel doctrine, unsupported by any precedent"[145] and contrary to *Garner, Adler, Gerende,* and *Douds.* But assuming that the case is consistent with earlier oath decisions, this particular theory has little utility;[146] for were any loss of important rights to be classified as punishment, then one is faced with grave problems of analysis when he comes to conceded civil proceedings which involve even more sweeping losses of rights, *e.g.,* loss of citizenship, loss of the opportunity to procreate, and the total loss of liberty by institutionalization of incompetents. In each instance, a loss-of-a-significant-right analysis does not suffice, because in every case the individual is heavily burdened. Nevertheless, the burdens can be rationalized as regulatory.

To interject the concept of "transcending values" into the determination of what burdens are penalties seems needlessly to complicate the problem. The Court could have invalidated the statute on substantive grounds. In fact, the kernel of this substantive argument was contained in the Court's rejection of California's contention that *Garner, Gerende* and *Douds* control. For example, *Douds* was distinguished because a danger existed which was factually demonstrated in that case; here the Court found no such danger, but stated that the purpose was merely to restrain speech.[147] This latter, substantive argument is an appealing and superior grounds for decision, for it would not have further complicated an already complex analysis by plunging "transcendent values" into the theory of punishment.

Speiser v. Randall represents the most recent decision on oaths. If one may prognosticate, an oath required of employers under the Taft-Hartley Act may be the next challenge that arises. Although at present section 9h applies only to union leaders, there has been a great deal of pressure from the unions to broaden the oath requirement to apply equally to management and labor. The recent Kennedy-Ives bill,[148] which was defeated in the House after almost unanimous approval in the Senate,

144. 357 U.S. at 526.
145. *Id.* at 541.
146. See text accompanying note 236 *infra.*
147. In the *Douds, Garner,* etc., cases, "the evil at which Congress had attempted to strike was thought sufficiently grave to justify limited infringements of political rights." 357 U.S. at 527.
148. S. 3974, 85th Cong., 2d Sess. § 606c (1958).

included such a provision.[149] It is not unlikely that in the near future, another attempt will be made to pass an employer's test oath.

If this attempt is successful and the history of the statute is similar to the Kennedy-Ives bill, it is doubtful if the law would be constitutional, assuming that the court is consistent in applying the *Douds* case. The proponents of the bill base their argument on "fairness" and "equity" *i.e.*, if a union can be required to present a non-communist affidavit, so also can an employer. But this rationale, appealing as it may be, does not satisfy the requirements of the *Douds* case that Congress must base its regulation on facts showing a specific danger.[150] In the debate on the Kennedy-Ives bill there was not one word of justification by the author of the oath[151] in terms of a congressional finding of fact that there were a significant number of vitally-situated employers who were communists or that there was a substantial possibility of pro-communist political ac-

149. § 606 c of S. 3974, *id.*, read: "Section 9 of the National Labor Relations Act, as amended, is hereby amended by adding the following new subsection:

(g) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by an employer under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by an employer under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve month period by such employer, including the partners, if such employer is a partnership, and the officers, if such employer is a corporation or association, that he is not a member of the Communist Party, and that he does not believe in and is not a member of or does not support any organization that believes in or teaches the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of § 1001 of title 8 of the United States Code shall be applicable in respects to such affidavits."

150. See text accompanying notes 126-27 *supra*. The *Douds'* Court not only noted these findings but also referred to a specific instance of such a political strike. 339 U.S. at 389. It later stated that § 9h "regulates harmful conduct which Congress has determined is carried on by persons who may be identified by their political affiliations and beliefs." The test oath "is designed to protect the public not against what Communists and others identified therein advocate or believe, but against what Congress has concluded they have done and are likely to do again." *Id.* at 396. Further, "Congress has concluded that substantial harm in the form of direct, positive action may be expected from that combination" of being a union leader and a Communist. *Id.* at 404.

151. The original Kennedy-Ives Bill, as reported to the Senate for debate, had eliminated the union test oath, a policy consistent with an appeal by the President that it was no longer necessary. But, by amendment, Senator Mundt reincorporated the union oath provision and added a similar one for management, stating as he introduced the bill,

> There is no reason in the world to impose upon labor an anti-communist oath which is not equally applicable under the same circumstances to management. . . . So, since it is fair, honest, and right that it be made applicable to management, as well as to employers . . . [I recommended its passage]." 104 CONG. REC. 10249 (1958).

Later he made a crucial statement illustrating that although there was no factual basis showing a communist threat among employers, nevertheless the security of the country required "that such an oath be equally applicable to management and labor." *Id.* at 10250.

tivity by employers. Others who spoke for[152] and against[153] the oath stressed the aspects of fairness. Even if the requisite factual showing were made, *Douds* further holds that one must then weigh the significance of this showing of potential evil against the harm to freedom of speech which results from this restriction. Freedom of speech is impaired if there is no showing of a sufficient danger to the community to counterbalance the effect of such a restriction on political speech. "Justice" and "equity" do not suffice.

2. *Bills of Attainder and Economic Control.* Attainder has not been a powerful weapon limiting direct economic regulation of fixed classes.[154] Although one justice used attainder as the basis of invalidity in *Gaines v. Buford,* this case is of questionable validity.[155] In *Hawker,* regulations for the medical profession based not on political but on criminal conduct withstood an attainder challenge and were justified as reasonable regulation. Post-*Lovett* cases have not adopted the attainder analysis for regulatory statutes. Although some statutes have been decided on alternative grounds, *e.g.,* that the statute in question was a qualification or that there was no punishment, some decisions squarely state that the burden is merely reasonable regulation. Two obvious cases involve the payment of costs for repeatedly filing defective pleading[156] and a rebate for illegally taking pauper's aid.[157] A third case[158] holds that since a statute is a valid police regulation, it cannot be attainder. The statute which authorized the removal of telephone service and the cancellation of a hotel license without a hearing when allegedly used for illicit

152. Several other pro-oath senators similarly spoke for the bill in terms of justice and equity. *E.g.,* Senator Case: its present application to unions is "a bit one-sided." *Id.* at 10072. Senator Allott agreed with Case. *Ibid.* Senator Knowland: 9h as it stands is "unsound and unfair." *Id.* at 10250. Senator McClellan stated he "never thought it was fair to have the oath applicable to only one side." *Id.* at 10252.

153. It is significant that the opponents to the reintroduction and expansion of the oath into the Taft-Hartley procedure objected on grounds of utility, not constitutionality. See the testimony of Senators McNamara (*Ibid.*), Morse (*Id.* at 10253), and Kennedy (*Id.* at 10254).

154. See note 45 *supra.*

155. See note 106 *supra.*

156. The payment of treble costs by a party filing three defective pleadings was not attainder since it applied only to civil procedure and it inflicted no punishment of fine or imprisonment, but only a money judgment for unreasonably consuming the time and money of the court and litigants. Moffett v. Commerce Trust, 354 Mo. 1098, 193 S.W.2d 588 (1946).

157. A statute for double the amount of pauper's aid received if the "pauper" actually had more than a stated amount of wealth was held merely a burden to further public policy and secure obedience to the law. Department of Social Welfare v. Gardiner, 94 Cal. App. 431, 210 P.2d 855 (1949). The court also erroneously held as controlling the fact that defendant was not formally adjudged a criminal. *Contra, Cummins* and *Lovett.*

158. Southern Bell Telegraph and Tel. Co. v. Nineteen Hundred One Collins Corp., 83 So. 2d 865 (Fla. 1955).

gambling was justified as a valid protection of the Florida treasury which was supported in part by a tax levied on pari-mutual betting. This statute was a qualification and the attainder challenge could be met on that ground. But even if a fixed group and specific individuals are involved, the answer of reasonable regulation will meet the attainder attack.[159] In *Davis v. Beeler*,[160] the legislature repealed an act that set standards for naturopaths and required those who wanted to continue to practice to pass the more stringent test for osteopaths. The burden was the loss of professional status and clientele in which much time and money had been invested before the act was passed. This was held reasonable regulation because a more broad general classification was made.[161]

In all the cited instances, the attainder argument seemed mere "makeweight." But one is left with the problem of the availability of an attainder challenge to a law which, for example, would increase by fifty per cent the tax rate on all auto manufacturers who produced more than ten per cent of the national market the previous year. Could one say that the legislature is passing judgment on such firms and that it is punishing them since there is no relevancy between the past conduct and the present fitness to carry on business? One case has hinted that attainder might be applied where the statutes contemplate pure economic control. In *McFarland v. American Sugar Refining Co.*,[162] a severely sanctioned[163] monopoly statute in Louisiana applied in effect only to American Sugar.[164] The Attorney General of the state, in his answer, admitted that the statute was passed in view of American Sugar's conduct and made intimations as to the company's wickedness.[165] Mr. Justice Holmes, for the Court,

159. *Cf. Hawker.*

160. 185 Tenn. 638, 207 S.W.2d 343 (1947).

161. *Cf.* when the attack is on grounds of due process: "[R]etroactive legislation is often reasonable and valid. For instance, the Supreme Court has upheld a 1935 statute taxing income received in 1933, a statute providing for deportation of aliens on account of acts committed before enactment of the statute, a legislative extension of a statutory period of limitation which had already run, a statutory withdrawal of a vested right to a tax refund, a legislative ratification of tax collections admittedly illegal when made, and the re-negotiation of war contracts entered into before the enactment of the Re-negotiation Act." DAVIS, ADMINISTRATIVE LAW 211-12 (1951). See also Graham v. Goodcell, 282 U.S. 409 (1931), for a collection and full survey of authority. In each case above, a fixed group was involved, but there was no punishment.

162. 241 U.S. 79 (1916).

163. Upon conviction, the burden was a fine of $500 for each day of violation, revocation of its license to do business within the state, and the forced sale of all corporate property.

164. Paying less for sugar in Louisiana than in other states, or purchasing and keeping a refinery idle (evidentally referring specifically to certain past conduct of American Sugar) were prima facie evidence of an intent to monopolize.

165. Query whether the attorney general may provide evidence of legislative intent to punish?

stated that "by his answer, [the Attorney General] seems to import it is a bill of pains and penalties disguised in general words." But he disposed of the case on equal protection grounds, stating the the classification, even if it does not limit itself to American Sugar, is "arbitrary beyond possible justice."[166]

Although Justice Holmes suggested that attainder might apply to economic regulation of an individual or a narrow group, his disposition on equal protection grounds is no novelty. In another situation the Court made a similar judgment based on the fourteenth amendment. In *Cotting v. Kansas,*[167] the legislature imposed certain maximum prices for services for any stockyard which did more than a fixed amount of business the preceding year. This legislation obviously was economic "punishment," since by its terms it applied only to the plaintiff Kansas City Stockyards. Attainder was not even discussed in the opinion and the Court invalidated the statute on equal protection grounds.[168] Therefore, just as political restrictions on fixed groups may never reach the question of attainder but will be decided on due process, economic burdens on a narrow fixed group may well be disposed of on equal protection grounds.[169]

One interesting question remains from *McFarland* relevant both to the political and economic aspects of attainder. The statute in question there was not retroactive; the fact that the class was shifting seems to preclude an attainder challenge. But it was obvious that the effect of the statute was restricted to American Sugar, that one test of a violaion was based on the past conduct of that company, and that the Attorney General stated the statute was aimed at that company and its "wickedness." Does the express intent to punish an existing member of a class override the fact that the class is shifting, especially under circumstances where it is unexpected or difficult for additional persons to enter the class? This question seems not to have been answered and may remain unanswered because of the likelihood that, in such circumstance, equal protection will be the grounds for analysis.

166. 241 U.S. at 85.

167. Cotting v. Kansas City Stock Yards Co., 183 U.S. 79 (1901).

168. *Cf.* Morey v. Doud, 354 U.S. 457 (1957), in which a statute which expressly granted a benefit to a single corporation while regulating all others in its class was invalidated on equal protection grounds.

169. *Cf.* In New York *ex rel.* Bryant v. Zimmerman, 278 U.S. 65 (1927), a statute, under penalty of misdemeanor, required all fraternal organizations to file their constitutions, by-laws and lists of members and officers, but exempted from the requirement all organizations except the Ku Klux Klan. The effect then of the statute was to burden only the Klan. The Court found that there was no denial of equal protection for there was a real and substantial basis for distinction between the Klan and other fraternal organizations.

3. *Relevancy and Reasonable Regulation.* If the correct thesis is that one will not reach attainder issues in many cases because the disposition will be on an alternative ground of due process, it is significant to understand the relation and similarity between the "relevancy test of hidden intent" in attainder, the "balancing" speech-due process test of *Douds,* and the general "reasonable regulation" test for due process.[170]

In *Garland* and *Cummins,* the formula determined whether the past conduct which disabled a person related to present fitness. This is a rough-hewn due process test. The difference between the relevancy test in attainder and the reasonableness test of due process lies only in the degree of refinement of the formula for substantive due process, which because of its more constant use involves more fine distinctions, *e.g.,* between vested property interests and mere commercial advantages and between transferring rights from one person to another or to the public. By comparison the relevancy test for attainder remains more unsophisticated because of the paucity of cases that have forced judges seriously to consider the matter of relevancy.[171]

Since the relevancy test is used only in hidden intent situations where fixed classes are involved and the due process test is also available and more thoroughly developed in these cases, it might be no great loss to encourage challenges to these statutes through the fifth and fourteenth amendments, as in *Cotting v. Kansas* and the *McFarland* case. The use of substantive due process plus the utilization of equal protection would leave as the effective scope of attainder those statutes where there was an express intent to punish, either on the face of the statute or in some committee hearing.

This approach would be a partial vindication of Mr. Justice Frankfurter's concurring opinion in the *Lovett* case.[172] In that opinion, he limits attainder to situations where guilt is declared on the face of the statute. Although this specific holding is open to question,[173] the context in which he makes this statement is more sound. He states, "There are other provisions in the Constitution, specific and comprehensive, effectively designed to assure the liberties of our citizens."[174] He is will-

170. It is fascinating to speculate that *Cummins* probably was decided on attainder grounds because at that time substantive due process had not been developed, while *Lovett* was held as an attainder because the Court did not want to use it.

171. These questions are material to the relevancy test: (1) Is it past or present conduct of the individual which is the basis of the statute? (2) If it is a disability, is it based on political or non-political conduct? (3) How narrow is the burdened group?

172. 328 U.S. 318 (1945).

173. See text accompanying notes 93-95 *supra.*

174. 328 U.S. at 326.

ing to restrict the operation of attainder because of the available alternatives of substantive and procedural due process, and equal protection.

Although his statement has been attacked by the commentators[175] as an attempt capriciously to mothball the constitutional protections which were developed in the *Cummins* case, his point is well taken. One must remember that in 1866 the Constitution contained few weapons the Court could use to strike down excessive legislation except the ancient, express prohibitions of ex post facto, attainder, and the contract clause. The due process clause had little substantive meaning,[176] and the Court was forced to use attainder to attack the oaths. But today, the doctrines of substantive due process and equal protection are well developed and provide the individual with a protection from the exercise of arbitrary legislative authority. Therefore, subrogating attainder challenges to substantive due process may be the most simple, direct approach to the problem.

To rely on substantive due process in these situations may force some readjustment of present judicial philosophy. In a period of widespread judicial abnegation in the face of a legislative determination of fact, there might be some reticence to trust this concept to vindicate private rights. But theoretically, courts would feel the same pressure to defer to legislative judgment in determining relevancy in an attainder challenge as they would in an examination of the reasonableness of the statute under due process. Psychologically, however, there are still advantages to attainder challenges. Practically, a court may be less restricted by the concept of abnegation when examining an attainder challenge, merely because it is a new and different theory. Further, the in-

175. It seems the opposition is misdirected. One writer says that if Mr. Justice Frankfurter is right, then prior to the passage of the 14th amendment a person could be put to death by a vote. Wormuth, *Legislative Disqualification as a Bill of Attainder,* 4 VAND. L. REV. 603 (1950). But Mr. Justice Frankfurter's argument states that at present there are sufficient alternatives. Another writer states that a person unable to take the oath truthfully is punished without all the due process guarantees; he feels this should dispose of Justice Frankfurter's argument. Note, 63 YALE L.J. 844 (1953). But if one must use alternatives, substantive or procedural due process affords the opportunity to challenge the validity of the statute.

176. Note that the statute in the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), which granted a monopoly to one business, was attacked on privilege and immunity grounds; the Court paid little attention to substantive due process or equal protection. As for substantive due process, the Court said: "Under no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed by the state of Lousiiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of this provision." *Id.* at 81. As for equal protection: "We doubt very much whether any action of a state not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision." *Ibid.* Also see generally Carpenter, *Substantive Due Process at Issue: A Resume,* 5 U.C.L.A. L. REV. 47, 61 (1958).

validation of a statute on attainder grounds might be more durable than one on general due process grounds since a later court may be more hesitant to upset the holding. Finally, the use of attainder provides the Supreme Court with a method of invalidating a congressional statute while preserving its posture of abnegation. It seems significant that in two important recent cases the Court has used "offbeat" constitutional doctrines, in examining and invalidating a statute, even though the cases were argued on more conventional grounds.[177] By disposing of *Lovett* as an attainder and *Trop* as cruel and unusual punishment,[178] the Court did not have to reopen the question of substantive review. Therefore, if one agrees with Justice Frankfurter that attainder is no longer necessary to the protection of individual rights, there should be some adjustment in the theory of judicial review, allowing for a more thorough re-examination of legislative judgments which burden private persons.

4. *Motive in Attainder.* An interesting quirk in attainder is that it is an exception to the general rule that the court will not look to the motives of the legislature but only to its power.[179] Attainder, with its emphasis on legislative intent to punish, necessarily includes the question why the legislature was burdening a person. When the court goes beyond the statute itself to find evidence of an intent to punish, it certainly seems to expand typical judicial inquiry.[180] Of course one might answer, it is legitimate for the court to investigate the issue of power; and since by the Constitution the legislature has no power to attaint, an examination of motive is essential to determine if the power existed to pass the law. But as long as attainder remains a vital prohibtion, there will be a theoretical dispute whether the analysis goes beyond the legitimate bounds of judicial inquiry.

To give content to the constitutional prohibtion, a court must look to legislative motive when there is an express intent to punish a fixed class. But in any event, one partially can avoid this thorny theoretical inconsistency by examining all cases of hidden intent on grounds of due

177. Brief for appellant, pp. 138-39, Lovett v. United States, 328 U.S. 303 (1945) (arguing separation of powers and substantive and procedural due process).

178. For a full discussion of *Trop,* see the text accompanying note 242 *infra.*

179. *Cf.* the language from Morey v. Doud, 354 U.S. 457 (1957), where an Illinois statute prescribed a comprehensive scheme of regulation for currency exchange, but expressly exempted the American Express Company. As to the motives for granting this narrow benefit, Mr. Justice Black said: "Whatever one thinks of the merits of this legislation, its exemption of a company of known solvency from a solvency test applied to others of unknown financial responsibility can hardly be called arbitrary." *Id.* at 471. Mr. Justice Frankfurter agreed: "Sociologically, one may think what one may of the state's recognition of the special financial position obviously enjoyed by the American Express Company. Whatever one may think is none of this court's business." *Id.* at 475.

180. Starkweather v. Blair, 245 Minn. 371, 71 N.W.2d 869 (1955).

process as was suggested in the preceding section. The latter test directly examines power; one need not worry about the implications of the judiciary examining legislative motives which necessarily accompany the relevancy test.

Attainder and Ex Post Facto

A final distinction between attainder and ex post facto is helpful. Whatever the argument as to the historical meaning of ex post facto,[181] practice today limits its scope to criminal laws. As long as the law is penal on its face, the problems of judging its validity are direct, *i.e.*, if it changes procedure retroactively, the person must suffer a "substantial" deprivation of individual rights. If a criminal statute eliminates retroactively one of the substantive elements needed for the commission of the crime, all that is necessary to invalidate the statute is to show that the conduct took place before the change in the statute. But the most difficult problem of ex post facto arises when the statute is civil in form and purports merely to set standards and regulate, as was the case in *Cummins* and *Garland*.[182] In this situation to hold the burden retroactive punishment, the court must cut through the civil form of the statute. The problem is much like that of finding hidden intent in attainder, and the test of punishment of a fixed group is similar. The Court in *Cummins* emphasized the fact that the relevant statutory conduct was past conduct[183] and the oath prescribed an "impossible condition"[184] on the practice of medicine by Confederate sympathizers as a means of showing that a regulatory statute could be ex post facto. But *Hawker* focused the issue sharply when it said that not all past conduct which is the basis for standards is ex post facto; the test of punishment is the one used in *Cummins* for finding attainder, that the past conduct is relevant to present fitness.[185]

Attainder and ex post facto are often considered as synonomous or at least overlapping. *Lovett* literally was held to be within both restric-

181. See, *e.g.*, Mr. Justice Johnson's views that ex post facto applied both to criminal and civil laws. Green v. Biddle, 21 U.S. (8 Wheat.) 1, 94 (1823).

182. One author seems not to recognize *Cummins* and *Garland* when he states that "the Constitutional prohibition of ex post facto laws has always been limited to criminal law and has never been applied to civil legislation or regulation." Davis, Administrative Law 211 (1951).

183. *Cummins* and *Garland* made this change in the theory of ex post facto. Traditionally, the conduct for which one was punished occurred before the statute was passed. But in the *Test Oath* cases, there was conduct subsequent to the statute, *i.e.*, the practice of one's profession in violation of the statute. But the Court deemed that the conduct for which one was burdened by the loss of professional rights was past Confederate sympathizing.

184. 71 U.S. at 329.

185. 170 U.S. 189 (1898).

tions but was discussed only on attainder grounds. *Hawker* fell on dual grounds, but only expost facto was discussed. While in civil statutes the test for punishment is similar for both ex post facto and attainder, there are differences in the theories of the two constitutional protections. Separation of powers today is described merely as a goal; and attainder, parts of procedural due process, and the restrictions on special legislation are interpreted as manifestations of that goal. The issue is finding who can burden a narrow group and how it can be done. This is a problem of forum—finding the correct group to place the burden on an individual. But the problem in ex post facto is different. Even if the right group is doing the burdening (the forum problem), there remains the problem of setting quantative limits on acceptable legislative regulation of a group's action. This problem manifests itself in substantive due process, ex post facto and contract clause questions. It involves questions of quantum. Finding another department of government which will place the burden, as one does in attainder, is no solution in ex post facto or substantive due process problems, because whichever department of government attempts to impose a retroactive criminal penalty, the ex post facto clause prevents it.

PART II. PUNISHMENT IN A SUBSTANTIVE CONTEXT

The preceding part was concerned with the problem of direct legislative punishment of a fixed group of people, thereby preempting the judiciary of its legitimate function and depriving individuals of their rights to trial. Here the question is whether the legislature, in an admittedly prospective statute, has written a criminal or regulatory law. If the former, the burden is punishment; and if the latter, it is merely regulation. Classifying the law in one category or the other has profound implication for the persons burdened. For, if the statute is deemed penal, more stringent procedural safeguards are provided for the accused, safeguards which do not exist in the more relaxed civil procedure.

The relevance of this section to the *Trop* and *Perez* cases is obvious. In those cases the statute, the operation of which deprived the defendants of their citizenship, was prospective and had none of the attributes of attainder. Although the *Trop* statute was civil in form and had the hallmarks of regulation, the burden, expatriation, was successfully challenged as cruel and unusual punishment. The analytical problem is to see how the Court determined the burden was penal. To aid this analysis, this Part examines and crticizes various theories that judges and jurisprudes have offered as guides to explain that problem.

Before examining these theories, it might be useful to explain in more detail exactly how this problem arises, *i.e.*, why courts must attempt to differentiate between the concepts of "punishment" and "regulation." A defendant may claim a criminal procedural right in the course of a "civil" hearing. This challenge forces the court to decide whether the law is actually civil or criminal. Illustrative of the many doctrines under which a defendant can raise this challenge are these: the restriction on an ex post facto application of the statute, the right to a full jury trial (to be present, to face the accusor, to exclude testimony by deposition, etc.), the question of double jeopardy, the protection of the fifth and eighth amendments, the statute of limitations, which marks a relatively short period to collect a fine but an unlimited time for the government to collect a civil debt, the accumulation of interest on an obligation, the right to a full and fair hearing as guaranteed by procedural due process, and finally the doctrine from the conflict of laws that one state does not enforce the penal laws of another.

Thus to the judge in the midst of a trial, the problem arises in a very simple and straight forward manner—does the accused get criminal protection? Unfortunately the answer is much more complex. A final analytical solution is almost impossible to construct. Although some suggestions are offered at the conclusion of this section, the main goal is merely to point up the theoretical difference between punishment in a separation of power and a substantive context and the present jumble of theory within the area of substantive punishment itself.

Two further comments seem in order. First, the concept that the classifications of "civil" and "criminal" can be an inclusive, accurate, and mutually exclusive description of all positive law might well have fitted the economic and legal life of the early eighteenth century. To enforce certain policy goals, *e.g.*, sanctity of property and the reliability of a contractual agreement, compensatory tort and contract causes of action were allowed the individual.[186] In the area of public law where the state possessed the cause of action and brought the complaint, a law breaker was punished by death, imprisonment, torture, or a fine accruing to the public treasury. The goal of private law was compensation and that of public law, punishment. Within each area there grew a certain code of procedure, associated with the particular policy goal and compatible with constitutional restrictions and protections.

186. Two exceptions persist today. Both punitive damages in tort law and penal actions (*i.e.*, informer suits) have for their goal not compensation, but punishment and deterrance from a future socially harmful course of conduct.

But with the advent of big government in the last seventy-five years, the goals of punishment and compensation do not accurately define the policy ends of law. Literally hundreds of regulatory statutes do not fit into the classic moulds. Although these statutes are enforced with civil procedure, there is often a "penalty" that resembles a traditional penal fine, a money payment, which is too large realistically to be considered merely compensatory. Our concepts of modern government and the regulations accompanying it have outgrown the crude, simple classification of "criminal" and "civil" law. Second, the problem is further complicated because sanctions and the forum in which they will be enforced seem to be the least considered section of a statute. Often the sanction is merely tacked on as by rote and the legislature never comes to grips with the problem of determining the effect of a certain statute on the dual classification of "civil" and "criminal" law.

Once one assumes the dual classification of our law, the test whereby one can classify a particular law becomes crucial. The varied explanations that courts have used when forced to decide whether a civil statute was criminal or regulatory may best be examined by grouping them into four general classifications which emphasize their major characteristics: 1) the nature of the sanction (emphasizing the severity or the customary use of the burden as punishment; 2) the formal characteristics of the statute itself (focusing on procedure, the language and structure of the statute, and the person who has the rights to sue); 3) the purpose of the statute (focusing mainly on the compensatory-punitive distinction); and 4) the nature of the right (classifying some burdens as more important losses to individuals).

1. *Nature of the sanction.* One can find very little help by analyzing the nature of the sanction itself.[187] First, the types of sanction are almost limitless, and any classification in those terms would be only superficial.[188] Although death, fine, and imprisonment are traditional

187. "The conventional assumption that 'criminal' and 'civil' sanctions differ in nature as well as in purpose does not square with the facts. Value deprivations of great severity are common to both. In some situations, the applicable 'civil' sanctions (denatruilazation, deportation or indefinite confinement of individuals, decrees of divesture, divorcement or dissolution addressed to individual or commercial organizations) are far more depriving than any applicable 'criminal' sanction. Classification of the sanction as 'civil,' moreover automatically deprives the person against whom it is invoked of the special constitutional and procedural safeguards accorded one against whom a 'criminal' sanction is invoked." Dession's suggested analysis: "A more functional classification of sanctions involving deprivations might distinguish between those utilizing deprivation as an instrument and those to which deprivation was incidental." Dession, *Sanctions, Law and Public Order,* 1 VAN. L. REV. 8, 14 (1947).

188. "In the traditional law alone, penalties have varied so considerably as to defy summary treatment. They are a tribute to man's ingenuity and sadistic impulses." HALL, PRINCIPLES OF CRIMINAL LAW 318 (1947).

criminal punishments, and compensatory damages are customarily civil, the picture is clouded by penal actions, punitive damages, penalties in a tax suit, the loss of a license to practice a profession, and sterilization.[189]

Two possibilities do exist that have been offered as tests. First, a burden is punishment if it customarily has been a punishment. For example in *Li Sing v. United States,*[190] a statute provided for punishment (imprisonment at hard labor) for failure to make timely application for travel papers after a deportation order had been issued by an administrative body. The case held that since punishment was involved, procedural due process required a full hearing before imprisoning the alien, not merely a perfunctory hearing to decide whether he had been ordered out of the country and whether the required time had passed to make application for travel papers. The hearing must determine, ab initio, whether or not the alien is deportable at all.

This case holds that once a certain deprivation is tagged as punishment, there must be a full judicial hearing before the burden is inflicted upon the individual. If the burden is not punishment, then procedures less strict are sufficient. As in the *Li Sing* case, Congress can pass a law, even one that is retroactive, that orders deportation of aliens on certain grounds, *e.g.,* prior or present adherence to communist dogma. But the courts hold that deportation, by custom and by its very nature, is not a criminal sanction but is merely the refusal of a country to accept the presence of an "alien non grata." Since the purpose of this burden is merely regulatory, there is no need to guarantee all the constitutional rights afforded one facing punishment. It is a different situation however where the deprivation is imprisonment at hard labor for failure to follow a deportation order. By the nature of the sanction it is punishment, and one must be granted a full hearing.[191] But custom is not helpful in analyzing burdens which are used both in punishment and regulation, *e.g.,* money payments to the government. Further, it is of no help as the law develops new and additional burdens. The utility of custom is also lessened when one considers *Cummins* which says that in an attainder analysis, any deprivation of rights can be punishment in the right circumstances.

The second test states that a burden is punishment because of its

189. *Cf.* the use in civil law countries of "measures of security" which are noncriminal burdens imposed on individuals justified as social regulation. *E.g.,* the POLISH PENAL CODE OF 1932 (Lemken & McDermott transl. 1939).

190. 180 U.S. 486 (1901).

191. See text accompanying note 70 *supra. Cf.* the *Yung Sing Hee* case, note 70 *supra,* in which a statute was labelled attainder because banishment was of the nature of punishment.

severity. Analysis of this test, however, is equally frustrating. As far as the individual is concerned, there is little distinction between civil and criminal penalties (with the excepton of capital punishment which would be comparable only to euthanasia and genocide inflicted within a regulatory statute). But imprisonment is matched by commitment in a mental institution; a fine, by a civil penalty; expatriation, by deportation; and disqualification from office, by establishment of certain standards for office.[192] In fact, a most severe burden, sterilization, is sometimes inflicted without the protection afforded an individual who is contesting a reckless driving charge. To clinch the issue, consider that sterilization has been prescribed for habitual criminals both as a punishment[193] and as a regulatory burden.[194] The regulatory statute prescribing sterilization of, among others, habitual criminals was justified on the grounds that modern genetic theory shows that certain characteristics are congenital and hereditary. Thus if this regulatory statute is held valid, as far as the burden itself, there is no difference in the severity of the sanction of the habitual criminal and sterilization statutes.

2. *Nature of the statute—descriptive.* There are several analyses that examine the statute itself for some clue whether it is regulatory or criminal. The purpose is to determine legislative intent. There are several possible benchmarks of that intent: the procedure the legislature outlined; the actual language used in the statute; the fact that burdens are listed in the alternative, one civil, another criminal; and the nature of the plaintiff in the suit.[195]

As for statutory procedures as an indicator of legislative intent, Glanville Williams states the "legal consequences" of the act are the only test. He dismisses any considerations of the nature of the sanctioned conduct, since one act may have both civil and criminal consequences.

192. The general social stigma toward one who formally has been punished might be a crucial element and the social reaction to a sanction labelled "criminal" might constitute "psychic" punishment for the individual. This informal reaction by the public (which is not present if the defendant in a law suit has merely a civil judgment entered against him) can be used to distinguish civil and penal burdens which objectively may seem the same weight. Of course, this analysis assumes that the legislature has already stated a certain burden is penal and society has become conditioned to that fact. Therefore, as a test in the circumstances assumed in this section, this approach is of no help.

193. State v. Feilen, 70 Wash. 65, 126 Pac. 75 (1912) (statutory punishment for ravishment of female child included life imprisonment and sterilization).

194. Davis v. Berry, 216 Fed. 413 (S.D. Iowa 1914) (discretionary sterilization for idiots, feeble-minded, drunkards, etc.; mandatory sterilization for twice-convicted felons). The retroactive application of this regulatory deprivation had to be justified on the same basis as the disability in *Hawker,* namely, that there was a sufficient relationship between the past criminal conduct and present fitness. The present fitness was to practice medicine in *Hawker* and procreate in *Davis v. Berry, supra.*

195. These tests are used in the absence of a clear statement of legislative intent. Of course, when available, the latter source is the more accurate.

Confidently he gives his guide: "Every lawyer knows, for instance, that fine and imprisonment follow a crime."[196] Possibly this rule is sufficient in England where the courts look only to the four corners of the statute. But his approach is of no help at all when one is faced with a statute similar to that in the *Cummins* case which is challenged as inflicting punishment.

Several domestic cases have tried to rationalize decisions on the basis of the procedure outlined in the statute or on the basis of the language of the statute itself. It seems a safe generalization that a statue expressly providing for criminal procedures will indicate that it is a penal statute.[197] But an examination of a statute which provides for civil procedure leads to varying conclusions.[198] The courts are equally uncertain when they use language culled from the statute as a benchmark. Some cases hold it controlling,[199] while others cut through the civil language to hold that the statute is essentially criminal.[200] Just as clouded is the test which

196. WILLIAMS, LEARNING THE LAW 2 (2d ed. 1946).

197. For at least one circumstance when this generalization is not true, see Cummings v. Church, 50 R.I. 71, 145 Atl. 102 (1929). The statute involved the administration of a bastard-support statute. Retroactively the statute broadened the class which could sue the father for support. Even though the procedure was in part criminal (there was a complaint filed and a warrant issued), the court held that the statute was in substance civil.

198. In a proceeding challenged as putting the defendant in double jeopardy, the burden of forfeiture (of a warehouse and distillery which were operated in violation of prohibition laws) was held to be civil because the procedure against the property was in rem. Waterloo Distillery Corp. v. United States, 282 U.S. 577 (1930). The Court characterized a criminal proceeding as one in which an individual personally is held liable. (The use of a fine as a criminal penalty challenges this point.) In contrast, in a case almost fifty years prior, when the defendant asserted his fourth and fifth amendment rights against a statute which provided only civil procedure in a proceeding for the forfeiture of property brought into this country in violation of customs regulation, the statute was held to be criminal in substance. The Court stated directly the purpose was to punish and there was no validity to the concept that forfeiture was in rem, and that it was therefore civil. Boyd v. United States, 116 U.S. 616 (1885). This case seems to draw the proper distinction between the reason for placing a burden on an individual (which may be penal or regulatory) and the statutory method of enforcing the burden.

199. Where the issue was whether the court could direct a verdict in a case, the statute under which the action was brought was held to be civil (although it contained a fixed penalty for violation of immigrant labor standards) because the legislature had used "civil" language, *i.e.*, "sue for and recover." Hepner v. United States, 213 U.S. 103 (1909). Likewise, in a case where the issue was whether a civil or criminal burden of proof rested on the state, the language "sued for and recovered" and "as debts of like amounts are now recovered" indicated regulation, notwithstanding the fact that there was also criminal language ("forfeit and pay" and "misdemeanor"). United States v. Regan, 232 U.S. 37 (1914). And in Helvering v. Mitchell, 303 U.S. 391 (1938), the fact that the payment was to be collected "by distraint" indicated a civil intent.

200. "Doubtless even a clear legislative classification of a statute as 'non penal' would not alter the fundamental nature of a plainly penal statute." United States v. Constantine, 296 U.S. 287, 294 (1935); United States v. La Franca, 282 U.S. 568, 572 (1931). Lipke v. Lederer, 259 U.S. 557 (1922) challenged the method of enforcement of a fixed penalty by tax notice. The Court held that a tax notice procedure was not sufficient procedural protection since this burden was "not a tax, but a penalty by its very nature."

states that if the statute contains two types of burdens, one is civil.[201] Early cases stated two other unsatisfactory tests. If the suit resulted in a money payment from the burdened individual[202] or if it consisted of a money payment for a sum certain,[203] the action of debt (a civil suit) was proper no matter how the obligation arose. All these tests provide only superficial tools with which the court can analyze the nature of the statute.

A pair of similar tests have been suggested by writers but have not been mentioned by the courts. The first is the distinction as to who institutes the suit—an individual or the state. Kelsen offers this theory in his explanation of the division of rights between criminal and private (or civil) law.[204] Some rights are given to individuals to enforce (the subject matter of tort and contract law) even though the whole community has an interest in having the legal order stabilized (especially in a system of private capitalism which relies on a system of voluntary contractual agreements for the distribution of goods). On the other hand, a criminal action is instituted by the state, not by the person injured. Unfortunately this analysis is overly superficial. First, many civil proceedings are instituted by the government, *e.g.*, the loss of a license or restitution of money fraudulently withheld in a tax suit. Further, by Kelsen's static analysis, one can only consider the assignment of various rights to sue as a *fait accompli*. He thereby avoids the most important

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Since to show the statute's applicability one must show conduct which is "evidence of a crime," the statute "clearly involves the idea of punishment for the violation of the law." *Id.* at 562. (*Cf.* Speiser v. Randall, 357 U.S. 513 (1958) in notes 138-43 *supra*). In United States v. Hess, 317 U.S. 537 (1943), the Court again "cut through" criminal language. In an action by an informer to collect treble damages from one charged with defrauding the Government, the statute withstood an attack that it was criminal and the defendant was under double jeopardy, notwithstanding the fact that the statute spoke in criminal language, "forfeit and pay." From these cases one can conclude there is little theoretical consistency in the courts' discussion of procedure and language as indicative of a criminal or regulatory statute.

201. In Boyd v. United States, 116 U.S. 616 (1886), where forfeiture of property illegally brought into this country was deemed criminal, the Court expressly pointed to the fact that the fine, the imprisonment and the forfeiture textually were in one section. Also a 50% addition to an income tax was civil because the increased liability appeared in a section labelled "additions to tax" separate from the criminal section called "penalties." Helvering v. Mitchell, 303 U.S. 391 (1938). But Lipke v. Lederer, note 200 *supra*, shows that even in this simple, mechanical test there is no consistency. There the burden was contained in a section labelled "tax." Although the statute had a separate section for penal sanctions, the burden was penal.

202. United States v. Zucker, 161 U.S. 475 (1896) is squarely in error when it states, in answer to the challenge that the defendant has the right to be confronted with his accusor under the sixth amendment, that if the burden for concealing merchandise illegally imported was only money, it was a civil action.

203. Stockwell v. United States, 80 U.S. (13 Wall.) 531 (1871) involved a suit for a fixed penalty for concealing merchandise illegally imported. Although followed in United States v. Regan, 232 U.S. 37 (1914), this analysis seems no longer to be determinitive.

204. KELSEN, GENERAL THEORY OF LAW AND STATE 50 (1945).

question—by what rules does the legislature pass out these rights and by what standards does one gauge when it has incorrectly assigned rights?

A similar suggestion is to determine who is enriched in a suit.[205] It is said a civil sanction directly enriches some individual, while a criminal sanction never enriches anyone. But some civil sanctions neither involve a money gain nor enrich another individual, *e.g.*, the loss of a license or unfavorable publicity about a manufacturer released by an administrative agency. Further, a penal action (an informer suit) certainly manifests one of the ends of punishment, deterrence, but it is conducted by civil procedure; it enriches an individual.[206] None of these tests provide sufficient certainty to allow their unlimited use to differentiate between civil and criminal statutes.

3. *Purpose of the statute: analytical.* There is a set of tests used by courts which looks not to the sanction or the text of the statute but to the purpose of the statute. The classic test is the compensation—punishment analysis.[207] Criminal law punishes, while civil law compensates. The thesis is that the latter involves a money loss to the individual harmed; therefore, the defendant must make the plaintiff whole. This remedy provides redress for the injured plaintiff. The concept of tort and contract law exemplifies this approach. Criminal law, on the other hand, is punitive or preventative. It forces the defendant to undergo an evil, not for the sake of redress, but for the sake of example.

Although this generalization is appealing,[208] one finds many civil actions that punish. First, of the actions instituted by private individuals, penal actions punish,[209] but the burdened individual gets no criminal protection. Further, many civil governmental suits do much more than merely compensate. Of course, the government, as a property owner or a party to a contract, can sue for compensatory damages in tort or contract as a private individual. But the courts seem to go to any length to tag a statutory money payment as compensatory and as merely a civil enforcement of an essentially private right. Thus, in a civil action for a

205. TURNER, KENNY'S OUTLINES OF CRIMINAL LAW 538 (16th ed. 1952).

206. Kenny suggests that the power of pardon was the crucial element. Private (civil) law was defined as that area where a private person had the discretion (*i.e.*, the power) not to enforce his rights. *Contra,* Turner's comments *id.* at 547. Kenny's essay, on *The Nature of a Crime,* reproduced in the appendix, *id.* at 530, is a comprehensive analysis of the problem of punishment and regulation.

207. 1 AUSTIN, LECTURES ON JURISPRUDENCE § 721 (1874).

208. But even this statement is too broad for two jurisprudes. Kenny and Salmond state that quasi-contract cases are the only true civil actions. The former explains that a tort recovery is a documentum, a warning, to persons in general not to cause such injuries. TURNER, *op. cit. supra* note 205, at 537. Salmond agrees, stating that from the defendant's point of view, a tort recovery is a penalty for him. SALMOND, JURISPRUDENCE 232 (7th ed. 1924).

209. Hess v. United States, 317 U.S. 537 (1943).

fraudulent return of an income tax statement, the Government recovered not only the full amount of the tax that should have been paid, but also an additional fifty per cent premium on that amount.[210] This additional burden was a "safeguard for the protection of revenue and a reimbursement of the Government."[211] The Court has stated the test of criminality in terms of an unreasonable excess of recovered damages compared with the immediate damages the Government suffered.[212]

In critically examining this test, it is obvious that a distinct line between compensation and punishment is blurred when the courts adopt an "excessiveness" test which states that compensation ends when the recovered damages are too excessive in comparison to actual damages. But the cases leave one in doubt as to the effectiveness of this test when a fifty per cent additional payment is rationalized as mere restitution. It seems to stretch credulity to state that the purpose is to compensate the injured party. A more obvious purpose is to shape social conduct to prevent individuals from defrauding the government. Obviously, this sounds of deterrence—a generally accepted end of criminal law.

Another test of the purpose of the statute can be examined in terms of "broad-gauge" or "narrow-gauge" analysis. Some burdens can be rationalized as regulation if they avoid a specific harm. An injunction or proved civil damages illustrate the "narrow-gauge" regulatory approach. The sanction is tailor-made to fit the particular fact situation before the court. When the legislature sets standards for a profession and violation of those standards results in the loss of an opportunity to pursue that particular activity, the law is regulatory. The burden avoids the specific harm. Thus in the *Perez* case,[213] where expatriation was a consequence of voting in a foreign election, the burden was held to be regulatory because any possible embarrassment to our foreign policy re-

210. Helvering v. Mitchell, 303 U.S. 391 (1938).

211. *Id.* at 401. In Hess v. United States, 317 U.S. 537 (1943), a statute provided for double damages plus a certain scaled penalty, depending upon the amount of the fraud. The defendant was earlier convicted on a criminal charge and in a prosecution for damages, claimed he was in double jeopardy. The Court held that this statute was merely remedial and the recovery was merely compensatory.

212. *Ibid.* The Court stated, kindly enough, in *Hess* that there might have been some punishment under the statute, but not enough to make it criminal. In Rex Trailer v. United States, 350 U.S. 148 (1956), another double jeopardy problem, the defendant defrauded the Government on a contract. The statute provided for a criminal penalty plus a choice of civil remedies: (1) $2000 plus double damages, (2) twice the consideration in the contract as double damages or (3) restoration of the property to the Government plus restoration of the defendant's consideration by the Government. In a suit by the Government utilizing the first alternative, the Court held that any money payment under this statute was merely liquidated damages accruing to the Government, a party which had a right to sue for damages for fraud. And as in *Hess, supra,* the amount was not so excessive as to transform the burden into a criminal penalty.

213. Perez v. Brownell, 356 U.S. 44 (1958).

sulting from a person manifesting dual allegiance could be avoided merely by taking away his United States' citizenship. In the medical profession, a doctor who is not competent loses his license. He can still do other things for a living, but the potential harm of improperly and incompetently treating patients is avoided by a withdrawal of his license to practice. Similarly, by sending a mentally incompetent person to an institution, society is avoiding a specific harm, *i.e.,* segregating an individual who is unable to care for himself in modern society. And sterilization of mentally defective persons, if engenic theory is in vogue, is justified as a technique of avoiding the potential harm of genetically transferring all one's unsocial characteristics to his heirs. In all these situations, as the theory goes, the sanction fits the harm to be avoided.

But in "broad-gauge" sanctions, those of the criminal law, the concept of punishment is opposite. Much more is involved than merely avoiding repetition of the particular type of harm. If a person burns down a house, imprisonment is a much greater deprivation than merely not allowing the arsonist to carry matches. Punishment does not fit the crime. It is an inflexible burden which is imposed on one for acting in a legally forbidden manner.

However the use of this classification as an aid in divining the nature of the statute is of limited use. There is no doubt that some regulatory burdens have broader effects than merely avoiding a certain harm and actually have penal consequences, *e.g.,* the threat of the loss of a license will force individuals to conform to the standards necessary to retain the license; in turn, punishment in its effect often avoids a certain harm, *e.g.,* the physical confinement of an arsonist avoids his setting fire to buildings, but only as long as he is confined. When these secondary effects of the statutes become too marked, this test becomes useless. Further, personalization of punishment tends to obliterate the broad- and narrow-gauge distinction. Such modern, enlightened practices as indeterminate sentences, extensive parole procedures, and judicial discretion as to the type of institutions where an offender may be confined make punishment more like regulation. More and more the goal is to make the punishment fit the crime—to shape the burden to fit the offender. To the degree this is accomplished, the utility of this test is lessened.

A knotty problem is posed in statutes drafted as tax measures challenged as being punitive. Certainly it is legitimate to require individuals to pay taxes to defer the costs of government, but when a special tax imposed on specified conduct has as its purpose the enforcement of a certain legislative policy (as prohibition), the tax is like a penalty or a

fine. Nevertheless, the general rule seems to be that the judiciary will accept as conclusive the congressional determination that the burden is a revenue-raising device.[214] In *The Oleomargarine Case,*[215] the Court refused to examine the motive of Congress in applying an exorbitant tax, the effect of which might well drive oleo producers out of business. It was not penal since the levy did not follow conviction of a crime.[216] This approach is similar to the test that focuses on the form of the statute. If the form is civil, that ends the inquiry. Similarly, if Congress says the money burden is a tax, the court will not question that statement.

Until the *Speiser* decision the cases that did not adhere to this approach must be considered the exceptions. In *Lipke v. Lederer,*[217] the "tax" for non-compliance with prohibition statutes "clearly involved the idea of punishment for violation of the law," and a summary procedure for the collection of the tax was a violation of due process. Likewise, in *United States v. Constantine,*[218] a $1000 excise tax for violation of a state liquor law was deemed actually a penalty. The issue was whether the statute was one to aid in the enforcement of the eighteenth amendment (repealed by that time by the twenty-first amendment) or whether the tax was to raise revenue. In holding the purpose of the tax was "to impose a penalty as a deterrant and a punishment for unlawful conduct,"[219] the Court pointed to two factors. First, in comparison with other excise taxes, this tax was fifty times as high. "[T]he exaction is highly exorbitant. This fact points in the direction of a penalty rather than a tax."[220] The text of excessiveness is similar to that described in the punishment-compensation section. Second, the commission of a crime is a condition to the imposition of the tax. This approach is much like that of the *Speiser* case where unlawful communist speech was a condition to the loss of a veteran's exemption.

But even where no federal criminal violation was involved, the *Child Labor Tax Case*[221] held as a penalty a tax which provided for a heavy

214. See United States v. Kahlinger, 345 U.S. 22 (1952) (a tax on gamblers); Sanchez v. United States, 340 U.S. 42 (1950); Negro v. United States, 278 U.S. 332 (1928); and Doremus v. United States, 249 U.S. 86 (1918) (all concerning a tax on dealers in narcotics); Sonzinsky v. United States, 300 U.S. 506 (1937) (a tax on transportation of sawed-off shotguns).

215. McCray v. United States (The Oleomargerine Case), 195 U.S. 27 (1904).

216. This rationale that the absence of conviction precludes punishment is considered in note 108, *supra. Cf.* in result, Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533 (1869) (post-Civil War statute which imposed tax of 10% on any state bank notes circulated, sustained as a tax).

217. 259 U.S. at 562.

218. 296 U.S. 287 (1935).

219. *Id.* at 295.

220. *Ibid.*

221. 259 U.S. 20 (1922).

exaction (a ten per cent tax on profits) for deviation from a detailed and specific course of conduct, employing a child less than fourteen years of age.[222] But as was shown by *Speiser,* there is no longer any magic in the fact that the statute is written as a tax, especially when the tax or exemption is based on criminal conduct and the conduct involves a "transcendent" value such as speech. In such circumstances, the statute is deemed to penalize, and certain criminal procedures are guaranteed the burdened individual. This recent decision may portend a more piercing review of legislative tax statutes, even when less "transcendent" values are involved.

The test to distinguish civil from criminal statutes sometimes is whether a burden carries out the purpose of the statute. But the effect of a burden which "aids in carrying out the purpose of the statute" is ambiguous. Sometimes this makes the burden criminal; sometimes, civil. Not only is this test inconclusive, but also it is strange that this criterion would be used at all; for the purpose of all burdens, civil and penal, is to achieve the policy ends of the statute. It might be significant that in the cases in which this test was used, the issues were all nonconstitutional.

In some circumstances, carrying out the purpose of the statute may make the burden a penalty. *Rodgers v. United States*[223] illustrates this situation. Under a statute assessing penalties for non-compliance with acreage limitations, the question arose whether interest should accrue on this penalty. By statute interest did accrue if the payment was for civil damages, but not if it were a fine. The court held the purpose of the payment was not to raise revenue as a general tax, but to force farmers to comply with agricultural policy, *i.e.,* to shape farmers' conduct. This made it a penalty, and interest did not accrue.[224]

In *Pan-American Petroleum and Transport Co. v. United States,*[225] the Government sought to cancel oil leases obtained through fraud. The defendants contended that, consistent with general equity procedure, the United States was required to make restitution of the defendant's down payments before the leases could be cancelled. But the Court held it was not necessary to return the purchase money, since the agreements tended to defeat a national policy of preserving coal and oil reserves. Therefore, the defendant lost not only the contract but also his down payments.

222. *Id.* at 36.
223. 332 U.S. 371 (1947).
224. Note that here the farmer did not take the next logical step and ask for criminal procedural protections in determining whether he had failed to comply with the standards of conduct set for farmers. Had he done so, then the constitutional issue would have been squarely presented.
225. 273 U.S. 456 (1927). *Cf.* United States v. Trinidad Coal Co., 137 U.S. 160 (1890).

"Implicit in both cases is the rationale that the proceedings were not just to recover title but to vindicate, by punitive action, a broad national policy."[226] The Court admitted the proceedings were to punish, but allowed this purpose to be carried out in an equity proceeding.[227]

In contrast is *Ehrlich v. United States*[228] where the Government had to make restitution of the defendant's payments before cancelling the contract since no purpose was served by the Government's retaining the defendant's consideration. If by retaining the consideration, the purpose of the statute was not further carried out, the result would be punishment. The court said that the Government, in selling land to veterans, was no more than an ordinary real estate agent and that restoration of the status quo would not thwart or frustrate obedience to the statute, but that criminal penalties for fraud were a sufficient deterrant. Therefore, while in *Rodgers* the penalty was criminal since it was to carry out the purpose of the statute and not merely to raise revenue, in *Ehrlich* a loss of the down payment to the vendee was punishment, since the loss did not carry out the purpose of the statute. But in *Pan-American,*[229] when the same burden did carry out the purpose of the statute and was classified as a punishment, such a burden could be imposed in an equity court.

An examination of contempt further illustrates the inconsistent use of the concept of "carrying out the purpose of the statute." The power of the court to punish for contempt traditionally has had for its purpose effectuating judicial orders or affording Congress the opportunity to investigate and question individuals in the process of legislating. Therefore, contempt as a civil burden was used to force compliance with the purpose of the order. For example, detention is conditioned on a person's refusal to follow a court order. If he complies, the threat disappears. But in the recent case of *Green v. United States,*[230] contempt procedure (civil, since there was no jury trial) was used to punish. Green and Winston jumped bail but gave themselves up voluntarily. Under contempt charges, they were sentenced to three years in jail, a sentence which can only be punishment, deterring others from jumping bail in the future. This strays far from the concept of contempt as a civil device to force prospective compliance to a specific legislative or judicial decree.

226. Ehrlich v. United States, 252 F.2d 772, 777 (5th Cir. 1958).
227. This might give an answer to the question of what would happen in Rodgers v. United States, 332 U.S. 371 (1947), had the defendant asked for criminal procedure.
228. 252 F.2d 772 (5th Cir. 1958).
229. See note 225, *supra.*
230. Green v. United States, 356 U.S. 165 (1958).

Further, a civil burden which reasonably carries out the policy of the statute for society in general can be imposed on an individual as a regulatory burden even though he can show that there is neither a harm to be avoided nor a necessity for applying the statute to him to vindicate the purpose of the statute. In the administration of a statute an individual cannot demand a hearing as of right to determine whether he falls within the evil the statute was intended to correct. Often a person will claim he is an "innocent" caught within the working of a statute. He feels the policy has no application to him. Thus, in *Hawker,* if the purpose of the statute was to maintain high medical standards of character and competence, and the legislature decided that conviction of a felony was an indication of lack of character, a doctor cannot demand a hearing to show his good character notwithstanding the legislative presumption of bad character.[231] An "innocent" individual must suffer the same burden as the "evil" individuals once the statute has been substantively approved as proper legislation.[232] The only possibility of relief is that there are enough "innocents" within the scope of the statute to merit a challenge on equal protection or substantive due process grounds. This restriction on an "innocent's" activity can be justified only as the price an individual must pay for living in an organized society which must necessarily legislate with broad standards.

One concludes that under civil procedure, the government can institute a suit and burden an individual solely on the ground that such a burden is necessary to carry out legitimate governmental ends, *i.e.,* to shape individual behavior. There is no standard by which one can tell when the statute must provide criminal protection since none of the cases were decided on constitutional grounds. However, when a challenge forces the issue, it is doubtful whether the test of carrying out the purpose of the statute will be of much aid in that determination.

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231. *Cf. Hawker,* 170 U.S. at 197.

232. A holding company cannot plead that its own conduct in accumulating a widespread financial empire did not result in the evils the statute was attempting to avoid and therefore an application to it would be violative of due process. North American Co. v. SEC, 327 U.S. 686, 710 (1946). *Cf.* Johnson v. Board of Dental Examiners, 134 F.2d 9, 12 (D.C. Cir. 1943). "There is nothing in the Act to indicate that the Board must consider each licensee separately in respect of the location of his office building, his office floor, local traffic conditions, etc. . . . As we see it—if a general dimensional regulation of this character is reasonable, if it substantially effectuates the purpose of an act designed to promote the public health and safety, it cannot be considered to contravene the guarantees of the Fifth Amendment. Like the rain, which falleth on the just and on the unjust, the regulations of the Board affect alike all dentists in the District of Columbia. In legislation of this character, and regulations thereunder, it may well be that conscientious and responsible members of the profession are affected by regulations designed to constrain their less scrupulous brethren in the exploitation of the public."

Another classification[233] is based on the type of harm effected by the sanction. In this explanation, sanctions are classified as punitive (implying harms involving moral culpability), corrective ("harms that do not involve moral culpability, but which are sufficiently dangerous to warrant application of social measures" and which imply a capacity to learn on the part of the burdened individual), protective (a similar harm, but with little prospect of rehabilitation, making the main purpose segregation), and compensatory (the traditional sanctions of contract and tort law which provide reparation). Although this classification is as perceptive as any put forth, it is lacking in two regards. First, the concept of corrective sanction should be expanded to include governmental burdens which rehabilitate and train, such as the threat of loss of a license to practice a profession for incompetency and the unfavorable publicity that accompanies the finding of an administrative body. Further, the classification seems more useful in describing the purpose of the legislature in passing the statute than in indicating the nature of the harm itself, if one assumes that each type of harm in the classification is intended to be mutually exclusive. If the characteristic of a punitive sanction is that the harm contains moral turpitude, an examination of some harms for which reparation is exacted indicates they also contain immoral conduct which is the subject of punitive sanctions. As an example, an intentional breech of contract involves immoral conduct and results in social and individual harm. Yet it is considered civilly compensable. Finally, this classification develops no standards to aid the court in the very practical situation we have assumed, *i.e.*, a defendant requesting criminal procedural safeguards.

After making this four-fold classification of sanctions, Dr. Jerome Hall lists some characteristics that make criminal sanctions distinctive. While punishment is a deliberate infliction of suffering on the offender himself because of past moral wrong, reparation implies no suffering, no moral culpability, and no final personal liability on the individual because of the possibility of economically shifting the defendant's damages. But does not a $100,000 tort liability imply suffering to a defendant just as does six months in jail? Although there is no strain of moral culpability running through a suit for negligence, certainly in intentional torts and an intentional breach of contract one finds ethical behavior very much involved.

4. *Nature of the right protected by the statute.* Two analyses focus on the nature of the rights protected in the statute. One approach is that

233. HALL, PRINCIPLES OF CRIMINAL LAW 317-22 (1947).

criminal law involves public rights while civil law deals with private rights.[234] But its utility as an analytical aid is questionable. All antisocial conduct involves both individual and societal harms. As an illustration, just as rape both harms the individual physically and emotionally and harms society by disrupting the orderly, peaceful, stable functioning of social institutions, so also does an intentional breach of contract cause both individual financial harm and social problems, especially in a system of private capitalism where economic production and distribution is carried out in reliance on a set of private agreements. Both facets of conduct are intentional; both are immoral. One seems unable to label statutes on this basis. The public-private distinction seems only an ex post description of causes of action after they are in the hands either of individuals or the government.[235]

The *Speiser* case indicates the Court will give currency to the concept of a spectrum of rights, the deprivation of a more important right to be afforded the protections of criminal procedures. That this approach has fundamental weaknesses was sufficiently discussed in the section on test oaths.[236]

5. *Conclusion.* The purpose of this part was merely to differentiate punishment in its separation of powers and substantive contexts and catalogue and examine various theories of substantive punishment to illustrate the complexities, intracacies, and contradictions involved when courts attempt to set standards or evolve a formula to differentiate between punishment and regulation. Although the purpose was not to provide any new test for analyzing punishment, some suggestions might be in order.

First, one cannot expect too much from a theory.[237] Each of the

234. "The distinction of public wrongs from private, of crimes and misdemeanors from civil injuries, seems principally to consist in this: that private wrongs, or civil injuries, are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals: public wrongs of crimes and misdemeanors, are a breach and violation of the public rights and duties, due to the whole community, considered as a community, in its social aggregate capacity." 4 BLACKSTONE, COMMENTARIES 5 (1807).

235. "The distinction between public crimes and private injuries seems entirely to be created by positive laws, and is referable only to civil institutions." *Ibid.*

236. See text accompanying notes 144-47 *supra.*

237. Possibly the conclusion is that there are no workable standards at all. *Cf.*, "The astute reader may object that these definitions are 'circular'—in other words, that we cannot tell whether an act is a crime unless we know whether it can legally be followed by criminal proceedings, and we cannot tell whether it can legally be followed by criminal proceedings unless we know whether it is a crime; so also with civil wrongs. The difficulty here is more apparent than real. It is true that our definition does not tell us whether a particular act is a crime or a civil wrong; but no definition can. If a definition could be framed to do this, there would be no further law of criminal and civil wrong for the student to learn! All the definition can do is to explain how lawyers use the terms 'criminal' and 'civil wrong.'" WILLIAMS, LEARNING THE LAW 6 (6th

many attempts to provide a test for punishment has utility and solves the problem in certain instances, but it seems unavailing to generalize from them to form a workable formula for future cases. The major weakness of all the approaches listed is in their explanation of governmental sanctions. Well understood is the typical punishment in the public law field with criminal procedure. And certain historically-conditioned examples of private punishment continue to exist. We rationalize certain governmentally-instituted suits within the area of private law as compensatory, the government suing (in a public tort capacity) as a property owner, or as a party to a contract. But in a theory one must accommodate for the many administrative sanctions that are enforced in the area of private law. To strain to label them compensatory is to distort their purpose which is to deter persons from violating the law, as is exemplified in the money penalties in income tax and contract fraud cases. Certainly many other sanctions have as their purpose forcing adherence to a statutory definition of approved conduct. Only when sanctions such as these are accepted for what they are will the way be clear for an attempt to make a comprehensive statement of the nature of criminal and civil burdens.

PART III. THE PEREZ AND THE TROP CASES

With the foregoing background, one is ready to re-examine these two recent cases and evaluate their holdings. The *Perez* case[238] held that the Government can use expatriation as a regulatory burden to carry out a valid police power goal. However, Mr. Justice Whittaker,[239] one of the six Justices who agree with this proposition, dissented on the particular application in this statute.[240] Three members (Warren, Douglas, and Black) dissented on other grounds, stating that one can lose his citizenship only by voluntary abandonment, that the extent of legislative power is to determine that certain conduct indicates such voluntary renunciation, and that the Court can review the wisdom of the legislative judgment.

The conduct here that caused automatic denationalization was voting in a foreign election. Frankfurter (with Brennan, Burton, Harlan, and Clark) stated that such a burden was a legitimate exercise of congres-

ed. 1957). One can only rebut to the positivist position that judges must wish the problem was as simple as Williams states it is.

238. 356 U.S. 44 (1958).

239. Because there are seven opinions in the two cases, it is necessary to refer again and again to the authors individually. The commentator intends no disrespect when in the attempt to avoid a stilted style, he subsequently omits the title of "Justice" in reference to the various authors.

240. 54 Stat. 1137 (1940), 8 U.S.C. § 1481 (1952): "A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by: . . .

(e) Voting in a political election in a foreign state or participating in an election or plebescite to determine the sovereignty over foreign territory."

sional power to regulate foreign affairs. He reasoned that since Congress has the implied power to regulate foreign affairs, it has the power to deal with and prevent incidents that might be "embarrassing" to the conduct of these foreign relations. It is possible that Congress felt that voting in a foreign election was embarrassing. Further, expatriation as a regulatory burden can be justified because it eliminates the source of embarrassment, *i.e.*, that a person is participating in the formal political affairs of two countries. This latter approach is consistent with the "narrow-gauge" test for regulation. Further, the Frankfurter opinion states the Court need only find that a "rational nexus" exists between the power over foreign affairs and the working of the statute. In an anticipated rebuttal to Warren, Frankfurter observed that Congress felt that voting in a foreign election indicated less than full alliance to the United States and thereby forms a legitimate ground for inferring voluntary renunciation. This opinion typifies the judicial deference to legislative decision that is labeled judicial abnegation.

Whittaker agreed with Frankfurter that the Government possesses the power to denationalize a citizen, but, in an example of piercing review of legislative wisdom, stated that in this particular case voting was neither embarrassing nor indicative of a voluntary abandonment of citizenship.

Warren (with Douglas and Black) proposed the theory that citizenship is a right which is given to native-born citizens by the fourteenth amendment and can be lost only if a person voluntarily renounces it. It is the most basic of our liberties; in fact, it is the right to have rights. Agreeing with Whittaker, Warren said it is unreasonable to infer that by voting in a foreign election a person intended voluntarily to surrender his citizenship. Douglas and Black wrote an opinion emphasizing the Warren view as to possible excesses in the future if expatriation is allowed as a burden. But *Perez* stands for the fact, as Warren concedes, that "citizenship may be divested in the exercise of some governmental power."[241]

In the *Trop* case,[242] the basic issue of using expatriation as a burden is settled. The liberal wing of the Court accepted this holding, but battled further on the concept that some uses of denationalization actually are punishment. But if this is so, one must know how to determine when it is used as punishment, and once that is established, what constitutional doctrines limit the use of the burden.

The provision of the Nationality Act under examination in *Trop* stated that a court-martial conviction for desertion in wartime plus a dis-

241. Trop v. Dulles, 356 U.S. 86, 93 (1958).
242. *Id.* at 86.

honorable discharge with no subsequent restoration to active duty resulted in denationalization.[243] The statute was held unconstitutional, but without a majority adhering to any single theory. Warren (joined by Black, Douglas, and Whittaker) said that expatriation in these circumstances is cruel and unusual punishment. Brennan (who agreed with the majority in *Perez*) found that expatriation under these facts was unreasonable regulation; the legislature could not reasonably use expatriation as a punishment. Frankfurter (with Burton, Harlan and Clark) never reached these questions because he held the burden was similar to that in the *Perez* case. He justified expatriation as a burden on non-penal grounds—that the legislature had jurisdiction under the war power to pass laws to maintain the discipline of our soldiers abroad.

The effect of these two cases, with their interrelated and tangled theories leaves one in a quandary as to the present state of the law. It seems that expatriation may be:

1. A result of voluntary conduct. (All Justices agree as to this.) The legislature may define from what conduct one may infer abandonment of citizenship. Four members of the Court will review this inference closely (Warren, Black, Douglas and Whittaker).

2. Used as a means of carrying out the governmental police powers. As indicated above, the Government can sanction its statutes by burdens that are penal or regulatory. The issue becomes deciding which the legislature intended:

   a. If it is imposed as a burden incident to regulation.
      (1) The Frankfurter wing (five Justices) will conduct only a timid review of the "rational nexus" between the police power and the conduct defined, and the burden imposed for non-compliance with the standards enumerated.
      (2) Whittaker will make a more vigorous review. Warren, Douglas, and Black would probably join in an effort to limit, as much as possible, the use of loss of citizenship as a "necessary and proper" burden.
   b. But if expatriation is imposed as a punishment.
      (1) Warren, Douglas, Black and Whittaker feel that when it is used as a type of punishment, expatriation is cruel and un-

243. 54 Stat. 4 (1940), 8 U.S.C. § 1481 (a) (8) (1952):
"A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by: . . .
(g) Deserting the military or naval forces of the United States in time of war, provided he is convicted thereof by court martial and as the result of such conviction is dismissed or dishonorably discharged from the service of such military forces: Provided [that] . . . restoration to active duty . . . shall be deemed to have the immediate effect of restoring such nationality or citizenship and all civil and political rights. . . ."

usual per se and falls under the eighth amendment.

(2) Brennan would examine the relationship of the punishment to the crime in terms of the ends of criminal law (deterrence and rehabilitation) to decide whether it was rationally imposed.

(3) The Frankfurter wing will be hesitant to say that this burden is punishment in any circumstances, with the result that they will not reach this question at all.

Therefore there is great necessity to examine the standards used to determine whether expatriation is used as a punishment or as a valid regulatory burden. This Part will not evaluate the military power versus civil authority issue that is in the background of the *Trop* case, an issue which troubled Black and Douglas. It will not re-examine the arguments for and against using expatriation as a regulatory burden, but will accept the *Perez* holding as part of present doctrine.[244] The wisdom of Warren's choice of the eighth amendment as the basis of his holding in the *Trop* case is bound to be controversial (and may precipitate a flurry of eighth amendment cases as *Lovett* did in the attainder field). This note will not add any comment to the wisdom of its use but will suggest an alternative disposition for the case. Nor will it become embroiled in the debate over the wisdom of abnegation, for that would merely duplicate arguments more persuasively presented elsewhere. It will confine itself to a critical evaluation of the criteria the Court used to determine that the *Trop* burden was a penal burden.

1. *The form of the statute.* Frankfurter[245] argued that the law was technically not punishment and that he could find a non-penal end to be served by the burden of expatriation, *i.e.*, maintaining the morale of our troops during wartime. This opinion is reminiscent of Frankfurter in *Lovett* where he refused to find punishment when the question was one of attainder. In rebuttal Warren seems on solid ground when he states that "form cannot provide the answer."[246] If *Garland* and *Cummins* are still the law, they contradict the dissenters. *Lovett* certainly is recent authority to the contrary. Therefore form is not the final arbiter.

2. *Severity.* All three relevant opinions in *Trop* state that the se-

244. As for the unavailability of expatriation as a sanction, *cf.* the discussion of the "severe remedy of outlawry" which was never known to the federal law and is unavailable to federal courts. Green v. United States, 356 U.S. 165 (1958).

245. 356 U.S. at 122, 125.

246. *Id.* at 95. "But the government contends that this statute does not impose a penalty. . . . We are told this is so because a committee of Cabinet members, in recommending this legislation to the Congress, said it 'technically is not a penal law.' How simple would be the tasks of constitutional adjudication and of law generally if specific problems could be solved by inspection of the labels pasted on them!" *Id.* at 94.

verity of the punishment is not controlling. But Warren,[247] in determining the legislative purpose, said it is "relevant" to a determination that the legislature is punishing. Brennan[248] felt that it is not enough itself to invalidate the statutes, but that severity forces the Court to "look closely" to see if it is justified in reason. Frankfurter[249] felt that even though there are "severe" and "even tragic" consequences, this is no indication that the burden is punishment. His argument that denationalization is like deportation and denaturalization which are not punishment is rebutted by Warren's insistence that the latter two restrictions on aliens are not applicable to citizens.

All these Justices seem correct that severity is not itself controlling. *Cummins* and *Garland* stated that any burden, however slight, can be punishment, if so intended by the legislature. Warren stated the best proposition, that severity may be relevant in as much as it indicates an intent to punish.

3. *Consequence of a violation or a conviction.* Both Warren and Brennan further found indications of "punishment" since the burden follows a crime. Warren,[250] while cryptically discussing why the burden here is not regulation under the war power, stated that Congress can make rules under this power, but a statute that provides consequences for its violation is penal. One queries this. Examples such as license revocation and disqualification for voting or for public office are consequences, but they are not penal. *Hawker* itself is a refutation of this idea. There, the statute provided a "consequence of a violation" which was not penal. Brennan[251] also indicated adherence to the "consequence" view. He found punishment indicated by the fact that the statute expressly provides that citizenship will be lost "if and when he is convicted by a court martial." Again *Hawker* disposes of this thesis. In that case a person, on conviction, automatically loses the opportunity of ever becoming a doctor, but the burden nevertheless is regulatory.

The inapplicability of the consequence view cuts two ways. First, a burden may be punishment even though it does not follow a conviction.[252] Therefore, cases which conclude that there is no punishment because there was no formal conviction are erroneous. Second, even though there has been a conviction, that does not necessarily mean that subse-

247. *Id.* at 96, n.18.
248. *Id.* at 111.
249. *Id.* at 124.
250. *Id.* at 97.
251. *Id.* at 109.
252. *Cummins.*

quent burdens based on that conduct are penal.[253]

4. *The purpose of the statute is to punish.* Brennan[254] based his argument on two grounds. First, the legislative history indicated an intent of Congress to use the burden as punishment. Also, he argued it must be punishment, since it is not regulation. He distinguished *Perez* where the regulatory burden avoided the evil and concluded that the burden must be punishment for only in that way does it help wage war.

Warren's analysis[255] is more complex. First, he found no help in the congressional history of the act, dismissing it as "equivocal." But he did state that when a court must determine if a statute is penal in an attainder or ex post facto challenge, it must find the purpose of the statute. Citing *Lovett, Garland* and *Cummins,* he stated that if the purpose is to reprimand the wrong-doer or deter others, it is penal; but it is non-penal if the statute is deemed to accomplish some other legitimate governmental purpose.

In determining what is the purpose, Warren argued[256] that expatriation must be penal since there is no other legitimate end it could serve. He made the irrelevant statement that it cannot fall within the scope of the power over foreign relation as did *Perez.* But this provision was an exercise of the war power and its "narrow-gauge" regulatory effects should have been analyzed in relation to the purpose of maintaining military discipline. As discussed above Warren felt expatriation could not be justified as a regulation under the war power; for although under that power Congress can set standards, the consequence of violating these regulatory provisions is a penal law. Therefore, he concluded since this burden is punishment, it provides a basis for further examination under the eighth amendment to see if it is cruel and unusual.

Warren's analysis is less than satisfying in setting standards for future decisions. His opinion seems to be an *ad hoc* reaction that the purpose of this statute is punishment. Although he cites *Lovett, Garland* and *Cummins* as examples where the Court must find the intent of the legislature, he fails to use the tests developed in those cases. In fact the *Test Oath* cases and the relevancy test used there to determine the legislative purpose involved retrospective statutes with a fixed group burdened. The statute in the *Trop* case was a qualification, and there is no hint of an attainder. After this decision one is in a quandary as to how to determine the purpose of a similar statute. Warren states only his conclu-

253. *Hawker.*
254. 356 U.S. at 107-10.
255. *Id.* at 95, 96.
256. *Id.* at 97.

sion that the statute involved punishes. He does not indicate whether one should use the relevancy test of *Cummins* and *Garland* or some other criteria to find the "evident purpose" of Congress in passing a law. The former approach involves some theoretical difficulty, for the relevancy test used in these circumstances does not necessarily involve punishment. The statutes in *Trop* were prospective and involved a shifting class. In a prospective statute, if the relevancy test shows there was no relation between the conduct resulting in dishonorable discharge and fitness to be a soldier, he has merely shown that the regulation is unreasonable, not that Congress intended the burden to be punishment. The relevancy test in *Cummins* and *Garland* indicated a congressional intent to punish because there was a fixed group involved. Certainly one cannot argue on the basis of those cases that an unreasonable prospective statute is punshment.

In review, Warren's arguments that expatriation as used here is a punishment are not convincing. The congressional history of the act is "equivocal." That expatriation is severe is indeed some indication of a penal intent, but it is not controlling. The criteria of "consequences" is hazy and not helpful. Finally the bald statement that "there is no other purpose" of expatriation but to punish gives one no aid in determining why this statute is penal or in setting standards for future decisions.

If this is the case, would not the Court have been on more firm ground to agree with Frankfurter that the burden was non-penal regulation, but to examine the statute on grounds of substantive due process? It is assumed that only its concept of abnegation prevents the Court from reevaluating the advisability of a particular regulatory burden. But if the Court was willing to demonstrate so much vigorous review in determining that the burden here was punishment when the statute was written in terms of regulation, could not the same energies be applied to a review of a non-penal burden?

It seems to the commentator that this sort of judicial review could have avoided any discussion of penal burdens and merely reviewed a regulatory burden. Form, as explained above, is never the final test of the nature of a statute. But when one need not second-guess the form (as here, where the Court could review the burden as regulation), it seems better to reveiw on this ground. Note that where the Court has "cut through form," as in the *Test Oath* cases, it was necessary to do so, because a regulatory statute was challenged as attainder or ex post facto. Here, it is not necessary. To review the burden as regulation would have avoided the introduction of several questionable doctrines and uncertain tests into the already complex field of regulation and punishment.

Had Warren agreed with Frankfurter that expatriation here is a burden incident to regulation, but that it is an excessive burden and unreasonable under the fifth amendment, there would have been no need for the transfer of separation of power concepts into this new area. Whichever theory the Court would use to invalidate the statute, by analysis either in terms of "punishment" or "regulation," involves a great deal of judicial second-guessing, but this latter method seems to provide a much less intricate analysis. If cast as a regulatory burden, the statute would be interpreted: Under the war power Congress has jurisdiction to deal with conduct that affects military discipline. Congress in this statute said dishonorable discharge on conviction of desertion was relevant to maintaining discipline and prescribed the regulatory burden of expatriation for such conduct and conviction. This formula could be attacked on two grounds. First, following Whittaker's approach in *Perez,* one could challenge the assumption that all dishonorable discharges actually affected troops' discipline. Further, one could say that the regulatory burden was "excessive" and "unreasonable." This would involve many of the same considerations that Warren and Brennan brought out in their opinion in regard to punishment—the severity of the burden and the fact that expatriation does not avoid the harm intended.

The decisions where the Court has reviewed either the conduct proscribed or the burden imposed seem to be split. But two cases indicate that the Court will review the former, and a third, the latter. These cases involve qualifications for professions, and have a background of anti-communist legislation, but their holdings are applicable to this case. In *Weiman v. Updegraff,*[257] the holding in effect was that innocent membership in the Communist Party was not relevant to standards of teaching, *i.e.,* it did not indicate that one should not teach. *Schlockauer v. Bd. of Higher Education,*[258] which invalidated a New York statute providing for automatic dismissal of any city employee who took the fifth amendment, indicated that exercising one's rights under that amendment was not relevant to the qualifications of teachers. *Trop* could follow this lead. Dishonorable discharge for desertion, since it can be based on so many grounds (many of which are "innocent" desertions), does not reasonably affect discipline to the degree to justify expatriation as an exercise of the war power.

As for the burden itself being unreasonable or excessive, one can look to *Sacher v. United States.*[259] The Supreme Court stated that dis-

257. 344 U.S. 183 (1952).
258. 350 U.S. 551 (1956).
259. 354 U.S. 930 (1956).

barment was too "excessive" a judgment in a suit instituted on the basis of Sacher's contempt conviction as counsel in the *Dennis* case.

These cases, although not completely symmetrical, would have provided the Court with precedent had the majority rechanneled its energies to find a regulatory burden unreasonable or excessive, instead of a punishment cruel and unjust. This would have been a happy alternative to the Court's disposition, for the present holding will only confuse and further tangle the distinction between punishment and regulation.