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Harry G. Fins

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IN LIGHT OF RECENT FEDERAL CONSTITUTIONAL DEVELOPMENTS, WHEN IS AN ILLINOIS PROCEEDING "CIVIL" AND WHEN "CRIMINAL"?

By HARRY G. FINS*

FEDERAL BILL OF RIGHTS IN CRIMINAL CASES

The fourth, fifth, sixth and eighth amendments to the Constitution of the United States guarantee procedural due process in criminal cases. The Supreme Court of the United States has established, through a long series of decisions rendered in recent years, that the protection of these amendments is not limited to proceedings in the federal courts only — as was previously held[1] — but applies also to the prosecution of criminal cases in state courts.[2] Therefore, the determination of whether a particular

*Ph.B., J.D. Member of the Bars of Illinois and the Supreme Court of the United States. Author of numerous books and treatises on Illinois and Federal Practice and Procedure and a contributor of articles to various law reviews and legal publications. Lecturer in the Post-Graduate Division of The John Marshall Law School (1939-49) and at Lawyers Post-Graduate Clinics (1949-54). Member of the Illinois Joint Committee on Implementation of the Judicial Amendment (1961-65). One of the draftsmen of the Illinois Administrative Review Act of 1945 and of the 1963 amendments thereto, and one of the draftsmen of the 1963, 1965 and 1967 amendments to the Illinois Civil Practice Act.

[1] Until recently, the court had consistently held that the first ten amendments did not restrict the powers of the states, but were intended to apply only to the federal government. *See, e.g.*, Walker v. Sauvinet, 92 U.S. 90 (1875); United States v. Cruikshank, 92 U.S. 542 (1875); Presser v. Illinois, 116 U.S. 252 (1886); Spies v. Illinois, 123 U.S. 131 (1887); Maxwell v. Dow, 176 U.S. 581 (1900); Collins v. Johnston, 237 U.S. 502 (1915).

[2] Fourth amendment — Search and seizure: Mapp v. Ohio, 367 U.S. 643 (1961); Marcus v. Search Warrant, 367 U.S. 717 (1961); Berger v. New York, 388 U.S. 41 (1967); Terry v. Ohio, 392 U.S. 1 (1968); Sibron v. New York, 392 U.S. 40 (1968); Davis v. Mississippi, 37 U.S.L.W. 4359 (U.S. April 22, 1969).

Fifth amendment — Self-incrimination: Malloy v. Hogan, 378 U.S. 1 (1964); Escobedo v. Illinois, 378 U.S. 478 (1964); Miranda v. Arizona, 384 U.S. 436 (1966); Gardner v. Broderick, 392 U.S. 273 (1968); Uniformed Sanitation Men Ass'n v. Comm'r of New York, 392 U.S. 280 (1968); Orozco v. Texas, 37 U.S.L.W. 4260 (U.S. March 25, 1969).

Sixth amendment — Assistance of counsel: Gideon v. Wainwright, 372 U.S. 335 (1963); Douglas v. California, 372 U.S. 353 (1963); Escobedo v. Illinois, 378 U.S. 478 (1964); Miranda v. Arizona, 384 U.S. 436 (1966); Swenson v. Bosler, 386 U.S. 258 (1967); Anders v. California, 386 U.S. 738 (1967); Entsminger v. Iowa, 386 U.S. 748 (1967); Gilbert v. California, 388 U.S. 263 (1967); Burgett v. Texas, 389 U.S. 109 (1967); Mempa v. Rhay,

proceeding is "criminal" or "civil" is extremely important. If it is the former, the state courts, as well as federal courts, must accord the constitutional protections; whereas, if it is the latter, the constitutional safeguards have no application to state court proceedings.

Recently, the Supreme Court has rendered a number of important decisions which dictate that the difference between "civil" and "criminal" cannot rest on arbitrary labeling by courts and legislatures, but must be drawn through careful examination of legal consequences in order to distinguish reality from fiction. Indeed, the Court has made it clear that "a State cannot foreclose the exercise of constitutional rights by mere labels."[3]

PROCEEDINGS FORMERLY "CIVIL" ARE NOW "CRIMINAL"

Juvenile Delinquency

Since the enactment of the first juvenile court statute[4] the states had treated proceedings against juveniles as civil proceed-

389 U.S. 128 (1967); Arsenault v. Massachusetts, 393 U.S. 5 (1968). Speedy trial: Klopfer v. North Carolina, 386 U.S. 213 (1967); Smith v. Hooey, 393 U.S. 374 (1969). Washington v. Texas, 388 U.S. 14 (1967) (compulsory process for obtaining witnesses). Confrontation with witness: Pointer v. Texas, 389 U.S. 400 (1965); Douglas v. Alabama, 380 U.S. 415 (1965); Smith v. Illinois, 390 U.S. 129 (1968); Barber v. Page, 390 U.S. 719 (1968); Roberts v. Russell, 392 U.S. 293 (1968); Berger v. California, 393 U.S. 314 (1969); Shaw v. Illinois, 394 U.S. 219 (1969). Trial by jury in criminal cases not falling within the category of "petty" offenses: Duncan v. Louisiana, 391 U.S. 145 (1968); Bloom v. Illinois, 391 U.S. 194 (1968); Dyke v. Taylor Implement Co., 391 U.S. 216 (1968). Trial by an "impartial jury": Parker v. Gladden, 385 U.S. 363 (1966); Witherspoon v. Illinois, 391 U.S. 510 (1968).

Eighth amendment — Cruel and unusual punishment: Robinson v. California, 370 U.S. 660 (1962).

The United States Supreme Court has not yet ruled specifically as to whether the following provisions of the Federal Bill of Rights are applicable to state criminal proceedings:

Fifth amendment — "presentment or indictment of a Grand Jury" and "twice put in jeopardy of life and limb": The "double jeopardy" issue is now pending in the United States Supreme Court, Benton v. Maryland, 392 U.S. 925 (1968).

Sixth amendment — "informed of the nature and cause of the accusation."

Eighth amendment — "Excessive bail shall not be required nor excessive fines imposed."

While application of the excessive bail prohibition of the eighth amendment has not been ruled on by the Supreme Court, the United States Court of Appeals for the Eighth Circuit has observed:

> We recognized in Pilkington v. Circuit Court of Howell County, Missouri, 8 Cir., 324 F.2d 45, that the excessive bail prohibition of the Eighth Amendment was applicable to the states through the Fourteenth Amendment.

Mastrain v. Hedman, 326 F.2d 708, 711 (8th Cir.), *cert. denied*, 376 U.S. 965 (1964).

[3] N.A.A.C.P. v. Button, 371 U.S. 415, 429 (1963).

[4] The first such statute was enacted in Illinois in 1899. Every state subsequently enacted a similar system. *In re* Urbasek, 38 Ill.2d 535, 538, 232 N.E.2d 716, 718 (1967).

ings.[5] Rules of criminal procedure were not to be applied, but rather the juvenile was to be treated and rehabilitated through procedures which were clinical rather than punitive.[6] While such systems professed to protect the juvenile from the harsh aspects of a criminal prosecution, they also omitted from juvenile proceedings many of the procedural safeguards afforded an adult defendant in a criminal trial.[7]

This philosophy was followed by most of the state courts until in *Kent* v. *United States*,[8] the Court questioned whether the admittedly laudible purposes of the juvenile courts were in reality being carried out:

> There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds; that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.[9]

While *Kent* only dealt with the District of Columbia, the fiction once having been disclosed, this limitation was soon removed by *In re Gault*,[10] in which the Court held that "proceedings to determine 'delinquency,' which may lead to commitment to a state institution, must be regarded as 'criminal' for purposes of the . . . " federal constitutional guarantees.[11] The Court accented the fact that "commitment is a deprivation of liberty. It is incarceration against one's will. . . ."[12]

Thus, as the Tenth Circuit Court of Appeals in *Heryford* v. *Parker*[13] observed soon after *Gault:*

> It matters not whether the proceedings be labeled 'civil' or 'crimi-

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[5] Treatment of juveniles under the various acts was predicated on the theory that the child was "essentially good" and should thus be the "object of [the states'] care and solicitude." *In re* Gault, 387 U.S. 1, 15 (1967).

[6] *Id.* at 16.

[7] *In re* Urbasek, 38 Ill.2d 535, 538, 232 N.E.2d 716, 718 (1967).

> The juvenile courts were originally conceived as a progressive social experiment for treating juvenile offenders in specially designed forums. As such the idea departed significantly from the traditions of criminal law. The objective was an institutionalized curative device whereby juveniles deviating from the norms of accepted social behavior could be brought under the paternal protection and instruction of the state. The state would then provide the proper influences and, if necessary, a more appropriate environment for the juvenile during his formative years. . . . The proceedings were to be protective rather than punitive. A corollary of this conclusion was that protection from the state was unnecessary, for the state was pursuing the juvenile respondent's ultimate benefit.

Welch, *Delinquency Proceedings — Fundamental Fairness for the Accused in a Quasi-Criminal Forum*, 50 MINN. L. REV. 653, 653-54 (1966).

[8] 383 U.S. 541 (1966).

[9] *Id.* at 555-56.

[10] 387 U.S. 1 (1967).

[11] *Id.* at 49.

> In Gault, this Court held squarely, for the first time, that various of the federal constitutional guarantees accompanying ordinary criminal proceedings were applicable to state juvenile court proceedings where possible commitment to a state institution was involved.

In re Whittington, 391 U.S. 341, 344 (1968).

[12] 387 U.S. at 50.

[13] 396 F.2d 393 (10th Cir. 1968).

> nal' or whether the subject matter be mental instability or juvenile delinquency. It is the likelihood of involuntary incarceration — whether for punishment as an adult for a crime, rehabilitation as a juvenile for delinquency, or treatment and training as a feeble minded or mental incompetent — which commands observance of the constitutional safeguards of due process.[14]

In *In re Urbasek*,[15] the Illinois Supreme Court followed *Gault* and held that a delinquency proceeding in the juvenile division of an Illinois Circuit Court was a criminal proceeding, that the preponderance of evidence rule of a civil case did not apply and that the juvenile had to be proven guilty beyond a reasonable doubt as in other criminal cases.

Likewise, in *In re Boykin*[16] and *In re Marsh*[17] the court held that indigent juveniles found to be delinquent were entitled to free transcripts for appeal.[18] The court in *Marsh* further held the fourth amendment protection against illegal search and seizure applicable to proceedings under the Illinois Juvenile Court Act.[19]

Sex Offenses

In *Specht* v. *Patterson*,[20] the Supreme Court considered Colorado's proceedings under the Colorado Sex Offenders Act,[21] which like the Illinois Sexually Dangerous Persons Act[22] had been characterized as civil, and reversed the Colorado Supreme Court,

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[14] *Id.* at 396.

In *Heryford*, a boy was committed to the Wyoming State Training School for the feebleminded and epileptic. The boy's mother brought a writ of habeas corpus contending that the boy was denied his right to counsel and confrontation. The writ was granted and the State of Wyoming appealed. The United States court of appeals in affirming, held:

> Where, as in both proceedings for juveniles and mentally deficient persons, the state undertakes to act in parens patriae, it has the inescapable duty to vouchsafe due process, and this necessarily includes the duty to see that a subject of an involuntary commitment proceedings is afforded the opportunity to the guiding hand of legal counsel at every step of the proceedings, unless effectively waived by one authorized to act in his behalf. Certainly, this duty is not discharged when, as here, the prosecuting attorney undertakes to 'prosecute the application [for commitment] on behalf of the state,' and the proposed patient is not otherwise represented by counsel.

Id.

[15] 38 Ill.2d 535, 232 N.E.2d 716 (1967).

[16] 39 Ill.2d 617, 237 N.E.2d 460 (1968).

[17] 40 Ill.2d 53, 237 N.E.2d 529 (1968).

[18] On the same day, the Illinois Supreme Court adopted rule 661 providing for appointment of appellate counsel and free transcript for indigent juvenile delinquents on whose behalf appeals are prosecuted. ILL. ANN. STAT. ch. 110A, §661 (Smith-Hurd 1968).

[19] 40 Ill.2d at 53, 55, 237 N.E.2d at 529, 531 (dictum).

[20] 386 U.S. 605 (1967).

[21] COLO. REV. STAT. ANN. §§39-19-1 — 39-19-10 (1967).

[22] ILL. REV. STAT. ch. 38, §105-3.01 (1967).

This section provides:

> The proceedings under this Act are civil in nature. The provisions of the Civil Practice Act including the provisions for appeal, and all existing and future amendments of that Act and the rules now or hereafter adopted pursuant to that Act shall apply to all proceedings hereunder except as otherwise provided in this Act.

holding that a proceeding against a person with sexually aggressive tendencies is a criminal case protected by the Federal Constitution.[23] The Court reasoned that the deprivation of liberty by confinement "is criminal punishment even though it is to keep individuals from inflicting future harm."[24]

Although the Illinois Sexually Dangerous Persons Act[25] calls the proceedings civil, the Illinois Supreme Court in *People* v. *Capoldi*[26] stated:

> We have held in proceedings and under the Sexually Dangerous Persons Act that *a defendant must be accorded the same procedural safeguards available to an accused in a criminal trial* even though the proceedings are civil in nature.[27]

More significantly, the Illinois Appellate Court in *People* v. *Potter*[28] cited and followed *Specht*, observing:

> This is a status determination. Call them civil commitments if you will, nevertheless, their end result is incarceration for an indeterminate time and until there is a probationary discharge or a final discharge based on recovery from the mental disorder. . . . Justice . . . dictates that such confinement shall be only in proper cases and only in a proper manner.[29]

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[23] 386 U.S. at 608-09.

Specht had been convicted under COLO. REV. STAT. ANN. §40-2-32 (1963) for indecent liberties under which the maximum sentence was ten years. He was sentenced, however, in accordance with a procedure under the Colorado Sex Offenders Act, COLO. REV. STAT. ANN. §§39-19-1 — 39-19-10 (1963), which provided for an indefinite term from one day to life without notice or full hearing.

Thus, the precise question presented, as stated by the Court, was whether the holding of Williams v. New York, 337 U.S. 241 (1949), that in determining the sentence of a convicted person the due process clause did not require a hearing nor the right of participation of the convicted in any such hearing that was held, was controlling.

The *Specht* court refused to extend *Williams* to the "radically different situation" before it and held these proceedings were subject to the requirements of both the due process and equal protection clauses of the fourteenth amendment. 386 U.S. at 608. The Court reasoned that the commission of the enumerated crime was not the basis of sentencing, but was, under the Sex Offenders Act, the basis for commencing a new proceeding, a new finding of fact, not a part of the charged offense, namely, "whether a person constitutes a threat of bodily harm to the public, or is an habitual offender and mentally ill." *Id.* Thus, such a proceeding "whether denominated civil or criminal" had to meet constitutional safeguards since the punishment under the new finding was "criminal punishment," deprivation of liberty by confinement, "even though it is to keep individuals from inflicting future harm." *Id.* at 608-09.

[24] 386 U.S. at 608-09.

[25] ILL. REV. STAT. ch. 38, §105-3.01 (1967).

[26] 37 Ill.2d 11, 225 N.E.2d 634 (1967).

[27] *Id.* at 15, 225 N.E.2d at 637 (emphasis added).

[28] 85 Ill. App. 2d 151, 228 N.E.2d 238 (1967).

[29] *Id.* at 154, 228 N.E.2d at 240.

The court concluded that "[t]he end result under our Sexually Dangerous Persons Act is incarceration for an indeterminate period of time and is against one's will," and that, therefore, the *Miranda* safeguards had to be followed in such proceedings with respect to in-custody interrogation. *Id.* at 156, 228 N.E.2d at 241.

A sequel to People v. Potter is People v. Kennedy, 101 Ill. App. 2d 91, 242 N.E.2d 278 (1968). The court said: "The deficiencies that we found to exist in Potter exist here, and if the rules for criminal appeals apply, we

Revocation of Probation

Prior to 1967, a proceeding for the revocation of probation had been held to be "civil."[30] In *Mempa* v. *Rhay*,[31] the United States Supreme Court held that in a proceeding to revoke probation, the defendant had a right to assistance of counsel under the sixth amendment. Thus, the Supreme Court determined that revocation of probation is a "criminal," not a "civil" proceeding.[32]

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have jurisdiction and under Potter must reverse the remand." 101 Ill. App. 2d at 94; 242 N.E.2d at 280. However, the *Kennedy* case encountered the following procedural problem on appeal. On March 3, 1967, the trial court found the defendant to be a sexually dangerous person and entered an order committing him to the custody of the Director of the Department of Public Safety. No notice of appeal was filed within the regular 30-day appeal period. On August 17, 1967, more than 5½ months after the entry of the order, the defendant wrote a letter seeking leave to appeal. The appellate court treated the letter as a petition for leave to appeal and, under Illinois Supreme Court Rule 606(c), ILL. REV. STAT. ch. 110A, §606(c) (1967), allowed the defendant to file his notice of appeal.

There is a procedural difference in Illinois as to late appeals in civil and criminal cases. In civil cases, application to the reviewing court must be made within 30 days after the expiration of the time for the filing of a notice of appeal, ILL. REV. STAT. ch. 110A, §303(e) (1967), whereas in criminal cases, the application to the reviewing court may be made within six months after the expiration of the time for the filing of the notice of appeal, ILL REV. STAT. ch. 110A, §606(c) (1967).

The *Kennedy* court concluded as follows:

> Rule 303(e), effective January 1, 1967, does apply and since the petition for leave to appeal here was filed more than sixty days after the March 3 order, we are without jurisdiction to grant leave to appeal and our order granting leave to appeal was in error. The State's motion to dismiss the appeal must be allowed.
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> . . . .
>
> . . . In our judgment, however, the issues here involved are of sufficient public interest and of sufficient importance that we should on our own motion grant a certificate of importance, and it is so ordered.

101 Ill. App. 2d at 94-95, 242 N.E.2d at 280-81.

It is of interest to observe that the procedure for obtaining a certificate of importance is provided for in Illinois Supreme Court Rule 316, ILL. REV. STAT. ch. 110A, §316 (1967), which rule requires an "application" and does not provide for the granting of such certificate on the court's own motion. Research does not disclose any other Illinois case where a certificate of importance was granted on the appellate court's own motion without an application.

The case of People v. Kennedy is now pending in the Supreme Court of Illinois under Docket No. 41848. The Supreme Court is thus faced with the direct and blunt question — is a proceeding under the Illinois Sexually Dangerous Persons Act "civil" or "criminal"?

[30] *See generally* H. FINS, ILLINOIS COURT PRACTICE UNDER THE NEW JUDICIAL ARTICLE 163-64 (1967) [hereinafter cited FINS].

[31] 389 U.S. 128 (1967).

[32] It is interesting to note that although the "civil" — "criminal" question was not expressly raised, the Court, impliedly, again held that regardless of whether it be denominated civil or criminal, the protection of the sixth amendment was applicable.

After conviction, the petitioners had been placed on probation and the imposition of sentence had been deferred pursuant to WASH. REV. CODE §§9.95.200, 9.95.210 (Supp. 1968). At subsequent hearings for revocation of probation, the alleged denials of counsel occurred.

The state contended that the petitioners had been sentenced at the time of probation and that the imposition of the sentence following revocation of probation was merely a formality — thus, the suggestion that the proceeding was not criminal in nature. The Court, however, pointed out:

> [A]s happened in these two cases, the eventual imposition of sentence

In *People* v. *Coffman*,[33] decided on June 1, 1967, the Appellate Court of Illinois reversed the judgment of the trial court on the basis of lack of due process because the defendant was not represented by counsel in a proceeding for the revocation of probation.

In this sphere, the Supreme Court of the United States (which reviewed a case from the State of Washington) and the Appellate Court of Illinois reached their respective conclusions independent of each other, but the result is the same.

Forfeiture Proceeding

In *Plymouth Sedan* v. *Pennsylvania*,[34] the Supreme Court reversed a Pennsylvania decision involving a forfeiture proceeding deemed civil in nature by the Pennsylvania court[35] and held that the federal constitutional guarantee against unreasonable searches and seizures applied to state forfeiture proceedings.[36] The Court held that "proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offences committed by him, though they may be civil in form, are in their nature criminal."[37] The Court reasoned:

> Its object, like a criminal proceeding, is to penalize for the commission of an offense against the law. . . . In this forfeiture proceeding he was subject to the loss of his automobile, which at the time involved had an estimated value of approximately $1000, a higher amount than the maximum fine in the criminal proceeding. It would be anomalous indeed, under these circumstances, to hold that in the criminal proceeding the illegally seized evidence is excludable, while in the forfeiture proceeding, requiring the determination that the criminal law has been violated, the same evidence would be admissible. That the forfeiture is clearly a penalty for the criminal offense and can result in even greater punishment than the criminal prosecution has in fact been recognized by the Pennsylvania courts.[38]

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on the prior plea of guilty is based on the alleged commission of offenses for which the accused is never tried.
389 U.S. at 136-37.

Thus, the Court apparently was suggesting the same new finding of fact theory as was stated in *Specht*, which finding of fact could lead to confinement.

All we decide here is that a lawyer must be afforded at this proceeding whether it be labeled a revocation of probation or a deferred sentencing. *Id.* at 137.

On October 14, 1968, the Supreme Court held Mempa v. Rhay to be retroactive, McConnell v. Rhay, 393 U.S. 2 (1968).

[33] 83 Ill. App. 2d 272, 227 N.E.2d 108 (1967).

[34] 380 U.S. 693 (1965).

[35] *Id.* at 695.

Likewise, prior to 1965, a proceeding for the forfeiture, destruction, disposition or recovery of property seized or confiscated as contraband was considered by the Illinois courts as "civil." *See generally* FINS at 160-61.

[36] 380 U.S. at 696.

[37] *Id.* at 697.

[38] *Id.* at 700-01.

Municipal Ordinance Violation

The Supreme Court has held that, as a matter of federal constitutional law, a prosecution under a municipal ordinance is a "criminal" case.[39]

In *Camara* v. *Municipal Court*,[40] the Court held that enforcement of a municipal ordinance which may result in the imposition of a fine or imprisonment is a criminal case protected by the Federal Constitution as such.[41] The Supreme Court of the United States overruled its earlier decisions[42] and the California Court of Appeals which had held that a city ordinance "is part of a regulatory scheme which is essentially civil rather than criminal."[43] The Court stated that "[i]n this case, the appellant [defendant below] has been charged with a crime,"[44] and referred to the proceeding as one "enforced by criminal processes," by a "criminal complaint," constituting "a criminal offense" and was "a crime, punishable by fine or even by jail sentence."[45]

In *See* v. *City of Seattle*,[46] decided by the Supreme Court on the same day as *Camara*, the defendant was fined $100.00 for

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[39] Camara v. Municipal Court, 387 U.S. 523 (1967); See v. City of Seattle, 387 U.S. 541 (1967). Both the above cases were decided on June 5, 1967.

[40] 387 U.S. 523 (1967).

[41] In *Camara*, appellant was charged with refusing to permit a lawful inspection of his leased premises under section 507 of the San Francisco Municipal Code which provides in relevant part:

> Any person . . . who violates . . . or who resists or opposes the execution of any of the provisions of this Code . . . shall be guilty of a misdemeanor . . . [punishable] by a fine not exceeding five hundred dollars . . . or by imprisonment, not exceeding six (6) months or by both . . . .

387 U.S. at 527, n. 2.

Inspectors from the San Francisco Department of Health had attempted several times to inspect the premises without a warrant, and each time the appellant refused to allow such inspection. The inspections were authorized under section 503 of the San Francisco Municipal Code which authorized certain employees, upon presentment of proper credentials, to enter any building, at reasonable times, "to perform any duty imposed upon them by the Municipal Code." *Id.* at 526.

[42] Frank v. Maryland, 359 U.S. 360 (1959); Ohio *ex rel* Eaton v. Price, 364 U.S. 263 (1960). Both cases upheld convictions for refusal to permit inspections without warrants.

However, as the *Camara* court prefatorily noted:

> Since those closely divided decisions, more intensive efforts at all levels of government to contain and eliminate urban blight have led to increasing use of such inspection techniques, while numerous decisions of this Court have more fully defined the Fourth Amendment's effect on state and municipal action. E.g., Mapp v. Ohio, 367 U.S. 643; Ker v. California, 374 U.S. 23. In view of the growing nationwide importance of the problem, we noted probable jurisdiction in this case and in See v. City of Seattle, post, to re-examine whether administrative inspection programs, as presently authorized and conducted, violate Fourth Amendment rights as those rights are enforced against the states through the Fourteenth Amendment. 385 U.S. 808.

387 U.S. at 525.

[43] 387 U.S. at 528.

[44] *Id.* at 540.

[45] *Id.* at 531.

[46] 387 U.S. 541 (1967).

the violation of a city ordinance and the fine was suspended. The Court reversed the conviction, and, following the above-discussed *Camara* case, held that it was a criminal case protected by the Federal Constitution as such.[47]

In *Village of Park Forest* v. *Bragg*,[48] amici curiae urged the Supreme Court of Illinois to follow the above-discussed *Camara* and *See* cases, but the Illinois Supreme Court neither followed nor cited these decisions of the United States Supreme Court and persisted in relying upon earlier Illinois decisions of the pre-*Camara* and *See* period, holding that a prosecution for the violation of a municipal ordinance was a "civil" case.[49]

However, in *City of Chicago* v. *Thomas*,[50] decided on November 7, 1968, which involved "the assessment of fines for violation of municipal ordinances,"[51] the argument was advanced that the proceeding was "civil." The court referred to *Village of Park Forest* v. *Bragg*, and said: "An analysis of the Illinois authorities which have dealt with the problem of classifying such proceedings reveals the conceptual difficulty encountered in attempting to so classify these cases."[52] The court concluded that "[t]here can be no dispute that fines such as the fine imposed in the instant case have a punitive purpose . . ."[53] and that "the criminal nature inherent in such actions" predominates.[54]

In *Recznik* v. *City of Lorain*,[55] the defendant-petitioner was convicted of violating city gambling ordinances. The majority opinion said:

> Since we have concluded that the petitioner's rights under the Fourth and Fourteenth Amendments to the Constitution were

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[47] As stated by the *See* Court: "The only question which this case presents is whether *Camara* applies to similar inspections of commercial structures which are not used as private residences." *Id.* at 542.

In Avery v. Midland County, 390 U.S. 474 (1968), the Supreme Court of the United States said:

> [I]t is now beyond question that a State's political subdivisions must comply with the Fourteenth Amendment [citing in the footnote, among other cases, See v. City of Seattle]. The actions of local government *are* the actions of the State.

Id. at 480.

[48] 38 Ill.2d 225, 230 N.E.2d 868 (1967).

[49] In *Bragg*, the question was raised whether after conviction for violation of a municipal ordinance, the judge had the power to suspend the penalty he had assessed. Initially, however, the court was faced with the problem of whether the Village could properly seek review of the magistrate's decision. This question turned on whether ordinance violation proceedings were civil or criminal in nature. The court, admitting the hybrid nature of the proceeding, held the decision properly reviewable. 38 Ill.2d at 228-29, 230 N.E.2d at 870.

[50] 102 Ill. App. 2d 143, 243 N.E.2d 572 (1968).

[51] *Id.* at 145, 243 N.E.2d at 573.

[52] *Id.* at 150, 243 N.E.2d at 576.

[53] *Id.* at 150, 243 N.E.2d at 575.

[54] *Id.* at 151, 243 N.E.2d at 576.

[55] 393 U.S. 166 (1968).

> infringed by the entry of the police unto his premises, we grant certiorari and reverse.[56]

The minority opinion held "that an officer seeing a person committing a *misdemeanor,* has a duty to arrest" and that the officer did not lack "probable cause to arrest for the *misdemeanors* he actually saw committed."[57] Thus, both the majority and minority opinions treated the city ordinance violations as criminal cases without the slightest equivocation.[58]

Disciplinary Proceeding

In *Spevack* v. *Klein,*[59] a request was made that Spevack, a New York lawyer, produce his records in a disciplinary proceeding. Spevack refused to comply with this request, contending that if he produced his records, the evidence might show that he was involved in soliciting which would result in the deprivation of his right to earn a livelihood through the practice of law. The Supreme Court held that depriving a lawyer of the right to practice law constitutes a "penalty"[60] and is, therefore, protected by the fifth amendment which provides that "[n]o person . . . shall be compelled *in any criminal case* to be a witness against himself."[61] In so holding, the Court had to conclude that a disciplinary proceeding, which may result in the penalty of revocation of a license to practice a trade or profession, is a "criminal case," for otherwise there would be no occasion to apply the fifth amendment prohibition against self-incrimination in *"any criminal case."*[62] It is, therefore, clear that the holding of *Spe-*

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[56] Id. at 168.

[57] *Id.* at 174 (emphasis added).

[58] In Williams v. Oklahoma City, 439 P.2d §965 (Ct. Crim. App. Okla.), *cert. granted,* 393 U.S. 998 (1968), the defendant was prosecuted for the violation of a municipal ordinance of Oklahoma City. He was found guilty and sentenced to ninety days in jail, and fined $50.00. The defendant had a wife and eleven children and worked as a hospital janitor, earning $55.00 per month. The trial court made a finding that the defendant was indigent, and that review could not be had without a transcript of the evidence, which the defendant could not afford to purchase. The trial court denied the defendant's request that he be supplied with a transcript of the evidence, free of charge, because there is no statute authorizing such relief in Oklahoma. The defendant filed an original petition for mandamus in the reviewing court, which tribunal ruled that the decision of the trial court was correct, and denied the writ. On December 16, 1968 the Supreme Court of the United States granted leave to proceed in *forma pauperis* and granted certiorari. The case is now pending on the appellate docket of the United States Supreme Court.

[59] 385 U.S. 511 (1967).

[60] *Id.* at 514-15.

[61] U.S. CONST. amend. VI (emphasis added).

[62] *Id.* (emphasis added). It must not be overlooked that the constitutional privilege against self-incrimination may come into play in criminal cases, civil cases, administrative hearings, congressional investigations and proceedings of all kinds because a self-incriminating statement which is made in a civil case or in any other proceeding may result in the disclosure of evidence either supporting criminal prosecution or leading to evidence which would support criminal prosecution of the person who makes the statement, thereby resulting in self-incrimination. In the *Spevack* case, the only ill

vack v. *Klein* is that a disciplinary proceeding is a "criminal case."[63]

Since the *Spevack* decision, the Supreme Court has set aside other judgments in disciplinary proceedings in light of *Spevack*. In one such case, *Kaye* v. *Coordinating Committee*,[64] the highest court of New York had upheld the disbarment of Louis Kaye,[65] stating:

> Disciplinary proceedings are not criminal proceedings, and the 'refusal to testify raises the legal presumption of the truth of these facts, which must have been known to defendant, and which he failed to contradict.'[66]

In *Zuckerman* v. *Greason*,[67] the New York court upheld the disbarment of Landon Zuckerman,[68] the respondent having been found guilty of the submission of misleading, exaggerated and false medical bills and statements covering lost time and earnings for insurance purposes, building up medical bills by referring claimants to a succession of doctors and using investigators to obtain signed retainers, to obtain statements from parties represented by attorneys and to obtain signatures on blank forms for appointment of guardians ad litem. However, the New York court also took into consideration the fact that:

> [R]espondent, Zuckerman, deliberately refused to cooperate with the court in its efforts to expose unethical practices and to determine whether he had committed any acts of professional misconduct which destroyed the character and fitness required of him as a condition to his retention of the privilege of remaining a member of the Bar.[69]

As in *Kaye*, the United States Supreme Court vacated the disbarment judgment and remanded the case to the New York court for reconsideration in light of *Spevack* v. *Klein*.

In *In re Damisch*,[70] the Supreme Court of Illinois followed *Spevack* in holding that a disciplinary proceeding involved "pun-

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effect on the lawyer would have been that his statement would lead to disbarment, which "is a punishment or penalty imposed on the lawyer," *In re* Ruffalo, 390 U.S. 544, 550 (1968), and therefore "criminal" in effect.

[63] Prior to *Spevack*, disciplinary proceedings, such as disbarment of an attorney, were generally regarded as civil in nature rather than criminal. Cohen v. Hurley, 366 U.S. 117 (1961). *See, e.g., Ex parte* Wall, 107 U.S. 265 (1882); Keithley v. Stevens, 238 Ill. 199, 87 N.E. 375 (1909).

For a view that the *Spevack* decision did not convert a disciplinary proceeding into a "criminal" case, *see* Franck, *The Myth of Spevack v. Klein*, 54 A.B.A.J. 970 (1968). *See also In re* Damisch, 38 Ill.2d 195, 230 N.E.2d 254 (1967), where lip service was paid to the shiboleth that "a disciplinary proceeding is not a criminal prosecution and is not subject to all the rules that govern such a case." 38 Ill.2d at 206, 230 N.E.2d at 260.

[64] 386 U.S. 17 (1967).

[65] *In re* Kaye, 24 App. Div. 2d 345, 266 N.Y.S.2d 69 (1966).

[66] *Id.* at 347, 266 N.Y.S.2d at 70.

[67] 386 U.S. 15 (1967).

[68] *In re* Zuckerman, 23 App. Div. 2d 825, 259 N.Y.S.2d 963 (1965).

[69] *Id.* at 825, 259 N.Y.S.2d at 964.

[70] 38 Ill.2d 195, 230 N.E.2d 254 (1967).

ishment"[71] but persisted in relying upon earlier Illinois decisions of the pre-*Spevack* period in holding:

> [A] disciplinary proceeding is not a criminal prosecution and is not subject to all the rules that govern such a case. E.g., *In re Anderson*, 370 Ill. 515, 522; *In re Needham*, 364 Ill. 65, 68.[72]

In *In re Ruffalo*,[73] the latest Supreme Court case in this area, the Court stated that "[d]isbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. . . . These are adversary proceedings of a quasi-criminal nature."[74]

FEDERAL TEST APPLICABLE BY VIRTUE OF SUPREMACY CLAUSE

Article VI of the Constitution of the United States provides in part:

> This Constitution, and the Laws of the United States . . . shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding.[75]

Therefore, it is submitted that the following tests set forth in the decisions of the Supreme Court of the United States apply:

(1) If the proceeding may result in the "incarceration against one's will," it is a "criminal" proceeding.[76]

(2) If the proceeding may result in the imposition of a fine, it is a "criminal" proceeding.[77]

(3) If the proceeding may result in the deprivation of a privilege or the revocation of a license which is the means of earning a livelihood, it involves the imposition of a "penalty" and is a "criminal" proceeding.[78]

GREAT CHANGES ON THE HORIZON

In light of the above discussed federal constitutional devel-

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[71] *Id.* at 206, 230 N.E.2d at 260.

[72] 38 Ill.2d at 206, 230 N.E.2d at 260.

The *Anderson* case was decided in 1939 and *Needham* in 1936, more than a quarter of a century before the decision in *Spevack*.

The *Damisch* case was not, and, in the opinion of this writer, could not be reviewed by the United States Supreme Court, as the Illinois court said: "We conclude that the appropriate disciplinary measure in this instance is censure, and it is so ordered." 38 Ill.2d at 209, 230 N.E.2d at 262. An order of censure is merely an expression of the court's "displeasure" with the respondent's conduct, but it does not deprive the respondent of liberty, property, or the right to earn a livelihood in his chosen profession. It is, therefore, not a "judgment" which is reviewable by the Supreme Court of the United States. (Research has not disclosed a case directly in point).

[73] 390 U.S. 544 (1968).

[74] *Id.* at 550-51.

[75] U.S. CONST. art. VI.

[76] Specht v. Patterson, 386 U.S. 605 (1967); *In re* Gault, 387 U.S. 1 (1967); Mempa v. Rhay, 389 U.S. 128 (1967).

[77] Camara v. Municipal Court, 387 U.S. 523 (1967); See v. City of Seattle, 387 U.S. 541 (1967).

[78] Spevack v. Klein, 385 U.S. 511 (1967); Kaye v. Coordinating Comm'n, 386 U.S. 17 (1967); Zuckerman v. Greason, 386 U.S. 15 (1967).

opments, certain proceedings must be re-examined from a realistic point of view detached from the fictional labels which tribunals and legislatures have heretofore applied to them.[79]

Post-Conviction: Prior to 1967, a post-conviction proceeding was treated as "civil" in nature.[80] But since the proceeding may result in "incarceration against one's will," it ought to be treated as "criminal" under the *Specht, Gault,* and *Mempa* test. In this connection it should be noted that in *Lane* v. *Brown*[81] the United States Supreme Court treated a post-conviction proceeding as "criminal." Likewise, the Illinois Post-Conviction Hearing Act[82] has codified the defendant's right to counsel at a post-conviction hearing by providing that:

> If the petitioner is without counsel and alleges that he is without means to procure counsel, he shall state whether or not he wishes counsel to be appointed to represent him. If appointment of counsel is so requested, the Court shall appoint counsel if satisfied that the petitioner has no means to procure counsel.[83]

In 1968, the Supreme Court of Illinois reversed many trial court decisions, in post-conviction proceedings, for lack of assistance of counsel.[84] Furthermore, Rule 651(c) and (d)[85] of the Supreme Court of Illinois, effective January 1, 1967, as amended December 14, 1968, effective January 1, 1969, provides:

> Upon the timely filing of a notice of appeal in a post-conviction proceeding, if the trial court determines that the *petitioner is indigent,* it shall order that a *transcript of the record of the post-conviction proceedings, including a transcript of the evidence,* if any, shall be prepared and filed with the Clerk of the Supreme Court *and shall appoint counsel on appeal, both without cost to the petitioner,* [and] [t]he procedure for an *appeal in a post-conviction proceeding* shall be in accordance *with the rules governing criminal appeals,* as near as may be.[86]

Extradition: Prior to 1967, a habeas corpus proceeding

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[79] For a collection of numerous authorities under the sub-title of "Civil Cases Related to Criminal Proceedings" *see* FINS at 160-66.

[80] *E.g.,* McKeag v. People, 7 Ill.2d 586, 131 N.E.2d 517 (1956); People v. Dolgin, 6 Ill.2d 109, 126 N.E.2d 681 (1955); People v. Hryciuk, 5 Ill.2d 176, 125 N.E.2d 61 (1954).

[81] 372 U.S. 477 (1963).

[82] ILL. REV. STAT. ch. 38, §122-4 (1967).

[83] *Id.*

[84] People v. Polansky, 39 Ill.2d 84, 233 N.E.2d 374 (1968); People v. Hunt, 39 Ill.2d 107, 233 N.E.2d 408 (1968); People v. Wilson, 39 Ill.2d 275, 235 N.E.2d 561 (1968); People v. Slaughter, 39 Ill.2d 278, 235 N.E.2d 566 (1968); People v. King, 39 Ill.2d 295, 235 N.E.2d 585 (1968); People v. Smith, 39 Ill.2d 581, 237 N.E.2d 458 (1968); People v. Tyner, 40 Ill.2d 1, 238 N.E.2d 377 (1968); People v. Barnes, 40 Ill.2d 383, 240 N.E.2d 586 (1968); People v. Butler, 40 Ill.2d 386, 240 N.E. 592 (1968); People v. Craig, 40 Ill.2d 466, 240 N.E.2d 588 (1968); People v. Ford, 40 Ill.2d 440, 240 N.E.2d 620 (1968); People v. Terry, 40 Ill.2d 547, 240 N.E.2d 657 (1968); People v. Wilson, 40 Ill.2d 378, 240 N.E.2d 583 (1968): People v. Neber, 41 Ill.2d 126, 242 N.E.2d 179 (1968); People v. Capron, 41 Ill.2d 234, 242 N.E.2d 244 (1968).

[85] ILL. REV. STAT. ch. 110A, §651(c) & (d) (1967).

[86] *Id.* (emphasis added).

under the Uniform Criminal Extradition Act[87] was deemed "civil."[88] But, once again, since the proceeding may result in "incarceration against one's will," it ought to be treated as "criminal" under the *Specht, Gault* and *Mempa* test.

In the recent case of *People ex rel. Harris* v. *Ogilvie,*[89] the Illinois Supreme Court reversed an extradition proceeding because the trial court refused to appoint counsel for the indigent prisoner in the habeas corpus proceeding testing the legality of the arrest on the governor's warrant. However, the court avoided a direct decision of whether extradition was "civil" or "criminal," and relied instead on the wording of Section 10 of the Uniform Criminal Extradition Act,[90] which refers to the prisoner's "right to demand and procure . . . legal counsel."[91]

Habeas Corpus: Prior to 1967, habeas corpus for the purpose of obtaining the release of a person charged with a criminal offense was characterized as "civil."[92] Once again, since the proceeding may result in "incarceration against one's will," it ought to be treated as "criminal" under the *Specht, Gault* and *Mempa* test. Thus, in *Smith* v. *Bennett,*[93] the United States Supreme Court treated an indigent prisoner's petition for habeas corpus as a "criminal" proceeding protected by the Federal Constitution. In *Long* v. *District Court,*[94] the Court also recognized the "criminal" status of habeas corpus by holding that a state must furnish a free transcript of a habeas corpus proceeding to an indigent state prisoner for use on appeal, rejecting Iowa's contention that habeas corpus was a "civil action."[95]

In *Gardner* v. *California,*[96] the Supreme Court held that the denial to an indigent of a free transcript of a state court's habeas corpus hearing violated the prisoner's constitutional rights.

Contempt of Court: The cases heretofore decided have classified contempt of court into two categories: (1) criminal and (2) civil. Criminal contempt involves the imposition of punishment for offending the dignity of the court as an institution of government,[97] while civil contempt involves the imposition of punishment to enforce an order of the court which was made for the benefit of a party to the proceedings.[98] It is well settled

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[87] ILL. REV. STAT. ch. 60, §§18-49 (1967).
[88] Id. at §27.
[89] 35 Ill.2d 512, 221 N.E.2d 265 (1966).
[90] ILL. REV. STAT. ch. 60, §27 (1967).
[91] *Id.*
[92] *E.g.*, People v. White, 26 Ill. App. 2d 279, 168 N.E.2d 48 (1960).
[93] 365 U.S. 708 (1961).
[94] 385 U.S. 192 (1966).
[95] *Id.* at 193.
[96] 393 U.S. 367 (1969).
[97] *See, e.g.*, O'Brien v. People, 216 Ill. 354, 368, 75 N.E. 108, 113-14 (1905).
[98] *See, e.g.*, Wilson v. Prochnow, 359 Ill. 148, 151, 194 N.E. 246, 247 (1934).

that a proceeding for criminal contempt is a "criminal case."[99] On the other hand, civil contempt was, prior to 1967, treated as a "civil case."[100] But since the proceeding, which was formerly denominated as "civil," may result in "incarceration against one's will," is it not "criminal" under the *Specht, Gault* and *Mempa* test?

In cases denominated as "civil contempt," the burden of proof is on the "accused" contemnor to convince the court that he is not guilty. Since, for failure to meet this burden, he is fined or imprisoned, the constitutional validity of this procedure, under the foregoing analysis, is highly questionable.[101]

Furthermore, included in the so-called "civil contempt" category are cases involving the execution of "mandatory" court orders, such as the production of a document or the restoration of property, the failure of which may result in the imprisonment of the contemnor for an indefinite period of time. For example, the court orders a litigant to produce a certain document. The litigant testifies that he has searched for the document and is unable to find it. The judge does not believe the testimony of the accused, holds him in contempt and imposes a sentence that he remain incarcerated until he produces the document. Under these circumstances, he may remain in prison for the rest of his life.[102] Likewise, for example, a litigant is a trustee of an heirloom. He testifies that it was stolen from him. The judge does not believe his testimony, holds him in contempt and imposes a sentence that he remain incarcerated until he produces the heirloom. Under these circumstances, he may remain in prison for the rest of his life. Are the accused contemnors, in the above instances, not entitled to trial by jury, protection against self-incrimination and the other constitutional guarantees of the Federal Bill of Rights?

In *Mahan* v. *Mahan*,[103] a divorce decree was entered in October of 1966. In January of 1968, an injunction was entered

[99] *See, e.g.*, People v. Barasch, 21 Ill.2d 407, 173 N.E.2d 417 (1961). In Bloom v. Illinois, 391 U.S. 194 (1968), the United States Supreme Court reversed the Illinois Supreme Court and held that a person who had been charged with criminal contempt and sentenced to imprisonment for 24 months was improperly denied a trial by jury. On the other hand, in Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968), where persons were found guilty of criminal contempt and sentenced to "10 days in jail and a $50 fine," they were not entitled to trial by jury because the crime involved fell within the category of "petty" offenses.

[100] *See* H. FINS, APPEALS AND WRITS OF ERROR IN ILLINOIS 61 (11th ed. 1962).

[101] The procedure employed has been that the court issues a rule to show cause why the respondent should not be held in contempt. Thus, the burden in such a proceeding is on the "accused" contemnor.

[102] A case involving facts similar to the above example is now pending in the Illinois Appellate Court, City Savings Ass'n v. Mensik, *appeal docketed*, No. 53359, 1st Dist., August 15, 1968.

[103] 101 Ill. App. 2d 155, 242 N.E.2d 11 (1968) (abstract only).

against the defendant restraining him from molesting the plaintiff or her property. Thereafter, a rule to show cause was issued why the defendant should not be held in contempt for violating the injunction on April 6, 1968. A hearing was held and the defendant was adjudged to be in contempt of court and sentenced to one year in the state penal farm. On appeal, the defendant relied on *Bloom* v. *Illinois*[104] and contended that "he was not afforded due process of law in that there was no trial by jury." The Appellate Court of Illinois, Fourth District, recognized the defendant's right of trial by jury in contempt proceedings growing out of the violation of an injunction, but held that the defendant's failure to request a trial by jury in the trial court constituted a waiver of his right to such a trial. The *Mahan* court said:

> We do not see that the *Bloom* decision is applicable here for the reason that the record is devoid of any motion or other timely request by the defendant for a trial by jury. The defendant fully participated in the proceedings below, offered testimony and cross-examined witnesses who appeared in support of the rule to show cause. His contention that the proceedings below amount to a deprivation of due process for want of a jury trial thus has a hollow ring.[105]

Sanity Hearing: Prior to 1967, a proceeding to determine whether a person was sane was considered "civil."[106] But since the proceeding may result in "incarceration against one's will," is it not, under the *Specht, Gault* and *Mempa* test, "criminal"?

Mental Commitment Proceeding: In *People ex rel. Keith* v. *Keith,*[107] the Supreme Court of Illinois held that a proceeding which may result in the confinement of a person because of mental illness is a "civil" case. However, since it too is "incarceration against one's will," is it not a "criminal" proceeding protected by the Federal Constitution under the *Specht, Gault* and *Mempa* test?

In *Narcotic Addiction Control Commission* v. *James,*[108] the New York Court of Appeals held that detention for three days, against his will, of a suspected narcotic addict who was charged with no crime, was not given any notice of the nature of the proceedings, nor an opportunity to contest the finding upon which a determination to restrain him of his liberty was predicated, was so contrary to the fundamental notion of fairness as to constitute a deprivation of liberty without due process of

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[104] 391 U.S. 194 (1968).

[105] 101 Ill. App. 2d 155, 242 N.E.2d 11 (1968) (abstract only, p. 3 memorandum of decision).

[106] ILL. REV. STAT. ch. 38, §104-2 (1965). *See* People v. Scott, 326 Ill. 327, 157 N.E. 247 (1927); People v. Kadens, 399 Ill. 394, 78 N.E.2d 289 (1948); People v. Carpenter, 13 Ill.2d 470, 150 N.E.2d 100 (1958).

[107] 38 Ill.2d 405, 231 N.E.2d 387 (1967).

[108] 22 N.Y.2d 545, 240 N.E.2d 29, 293 N.Y.S.2d 531 (1968).

law, and the subsequent determination that he was an addict, based almost entirely upon information obtained during the period of illegal detention, had to be set aside. The highest court of the State of New York said:

> This case presents for our consideration an attack upon the constitutionality of the procedural and substantive provisions of the Narcotic Control Act of 1966 as they relate to the compulsory treatment of addicts who have neither been charged nor convicted of criminal activity.[109]
>
> . . . .
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> On this appeal appellant argues, first, that the provisions requiring compulsory commitment are unconstitutional for the reason that they authorize the commitment of a person, who has not been convicted of any crime, without a showing that he is dangerous to himself or others or that he has lost his self-control so as to be in need of institutional confinement.[110]
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> . . . .
>
> Although we conclude that the State may compel those addicted to narcotic drugs to undergo rehabilitative care at a State institution under a properly restricted statute, there are several additional questions regarding the constitutionality of the proceedings which ultimately terminate in a commitment. The appellant urges that 'the procedure authorized by section 206 of the Mental Hygiene Law deprived [him] of due process of law.'[111]
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> . . . .
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> The Fourteenth Amendment to the Constitution of the United States provides that no person shall be deprived of liberty without due process of law. The detention of this appellant, who was charged with no crime, against his will for a period of three days, without notice of the nature of the proceeding and an opportunity to contest the finding upon which the determination to restrain his liberty was predicated, is contrary to our most fundamental notions of fairness and constitutes a deprivation of liberty without due process of law. . . ."[112]
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> . . . .
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> Having concluded that the temporary detention of the appellant violated his constitutional rights, it must necessarily follow that the subsequent determination that the appellant was an addict, which was based almost entirely on information obtained during the period of illegal detention, must be set aside. Where we deal with violations of rights that are so fundamental and intrusions on individual freedom that are so unwarranted, we cannot, as the Attorney-General asks us, uphold the subsequent finding of addiction even though the appellant eventually received a hearing. The finding, resting as it does on evidence obtained during the unconstitutional detention of the appellant, cannot stand.
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> To summarize, then, we hold that the State may compel an individual to submit to rehabilitative confinement. We hold, however, that provisions of section 206 of the Mental Hygiene Law as

[109] *Id.* at 548, 240 N.E.2d at 30, 293 N.Y.S.2d at 533.
[110] *Id.* at 550, 240 N.E.2d at 32, 293 N.Y.S.2d at 535.
[111] *Id.* at 551, 240 N.E.2d at 32, 293 N.Y.S.2d at 536.
[112] *Id.* at 552, 240 N.E.2d at 33, 293 N.Y.S.2d at 537.

they effect the proceedings leading up to confinement are unconstitutional, and it is this constitutional infirmity which requires a reversal here.[113]

Licensed Professions and Trades: A number of Illinois statutes give the Department of Registration and Education the power to conduct disciplinary proceedings for the revocation of licenses of physicians, dentists, chiropodists, optometrists, pharmacists, dental hygienists, psychologists, physical therapists, veterinarians, detectives and detective agencies, detection of deception examiners, structural engineers, architects, surveyors, nurses, social workers, funeral directors and embalmers, barbers, beauty culturists, real estate brokers, salesmen, shorthand reporters and tree experts.[114] But since the revocation of the license deprives the licensee of the means of earning a livelihood, it involves, under the *Spevack* test, the imposition of a "penalty" and ought to be treated as a "criminal" proceeding. Is the licensee, by virtue of the sixth amendment to the Constitution of the United States, entitled to a trial by jury? Are the various statutes which have delegated this power of revocation to an administrative agency constitutional?

Civil Service Employees: Disciplinary proceedings to re-

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[113] *Id.* at 553-54, 240 N.E.2d at 33-34, 293 N.Y.S.2d at 537-38.

It is of interest to observe that under the Illinois Mental Health Code of 1967, ILL. REV. STAT. ch 91½, §9-4 (1967), a person who is subjected to a mental commitment proceeding is accorded full right of counsel (as a defendant in a criminal proceeding), and, if he is indigent, counsel is provided for him free of charge. The statute reads as follows:

> At any hearing under this Act, the court shall inform the person asserted to be mentally retarded or to be in need of mental treatment of his right to counsel and ask if he desires counsel of his choice to be summoned or counsel to be appointed by the court, and the court shall require that such person's request for counsel be complied with and that in all events each person is represented by counsel. Counsel shall be allowed time for adequate preparation and shall not be prevented from conferring with the person at reasonable times nor from making such reasonable investigation of the matters in issue and presenting such relevant evidence at such hearing as he believes is necessary to a proper disposition of the proceedings.
>
> 1. If the court determines that the person asserted to be mentally retarded or to be in need of mental treatment is indigent, the court shall appoint as counsel the public defender, if available.
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> 2. If the public defender is not available, the court shall appoint as counsel an attorney at law licensed by this State.
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> 3. Upon the filing with the court of a verified statement of legal services rendered by the attorney appointed for the indigent person pursuant to paragraph (2) of this Section, the court shall allow as attorney fees, and order the county treasurer of the county where the hearing is held to pay to appointed counsel, a reasonable fee stated in the order, not to exceed $75, if no jury, or not to exceed $150 when there is a jury.

See also Harris, *Mental Illness, Due Process and Lawyers*, 55 A.B.A.J. 65 (1969).

[114] The following statutes are applicable to the enumerated professions and vocations: ILL. REV. STAT. ch. 5, §177 (1967); ch. 10½, §13 (1967); ch. 16¾, §14.81 (1967); ch. 23, §5312 (1967); ch. 37, §760 (1967); ch. 38, §§201-17, 202-17 (1967); ch. 91, §§16b.01, 22.16, 35.46, 55.13-5, 62, 72h, 81, 105.13, 124.12-1 (1967); ch. 91½, §416 (1967); ch. 111½, §§73.22, 116.53 (1967); ch. 114½, §8.01 (1967); ch. 131½, §10 (1967); ch. 133, §46 (1967).

move civil service employees from their positions are by various Illinois statutes placed in administrative agencies.[115] But since the proceeding deprives the employee of the privilege which is the means of earning a livelihood, it involves, under the *Spevack* test, the imposition of a "penalty" and is a "criminal" proceeding. Is a civil service employee, by virtue of the sixth amendment to the Constitution of the United States, entitled to a trial by jury? Are the statutes which have delegated this power to an administrative agency constitutional?[116]

Judges: Rule 51 of the Supreme Court of Illinois[117] provides for disciplinary proceedings against judges, which are to be conducted by a commission, and the commission may suspend or remove the judge if it finds him guilty of misconduct. That the draftsmen of the rule treated the proceeding as purely "civil" is clear from the following provisions: "It is the duty of the respondent to file an answer and to co-operate with the commision in ascertaining the truth."[118] Where appropriate, the procedure used in civil cases may be taken as a guide to procedure before the commission."[119] But since the proceeding may deprive the accused judge of his office which is the means of earning a livelihood, it involves, under *Spevack*, the imposition of a "penalty" and should be treated as a "criminal" proceeding. Should the accused judge, by virtue of the sixth amendment to the Constitution of the United States, be entitled to a trial by jury? Is rule 51 valid under the Federal Constitution?

Paternity Act: A proceeding under the Illinois Paternity Act[120] to establish that the defendant is the natural father of an illegitimate child and to compel the father to support the child provides for enforcement by imprisonment of the defendant.[121] Prior to 1967, the proceeding was treated as "civil."[122] But since the proceeding may result in "incarceration against one's will," should it not be treated as "criminal" under the *Specht, Gault* and *Mempa* test?

Malice Gist of Action: In tort cases where there is a

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[115] Drezner v. Civil Serv. Comm'n, 398 Ill. 219, 75 N.E.2d 303 (1947); Harrison v. Civil Serv. Comm'n, 1 Ill.2d 137, 115 N.E.2d 521 (1953); DeGrazio v. Civil Serv. Comm'n, 31 Ill.2d 482, 202 N.E.2d 522 (1964).

[116] *See* Greco v. State Police Merit Bd., 105 Ill. App. 2d 186, 245 N.E.2d 99 (1969).

[117] ILL. REV. STAT. ch. 110A, §51 (1967).

[118] ILL. REV. STAT. ch. 110A, §51(c) (1967).

[119] ILL. REV. STAT. ch. 110A, §51(d) (1967).

[120] ILL. REV. STAT. ch. 106½, §§55, 60 (1967).

[121] *Id.*

[122] *See* FINS at 162.

In People *ex rel* Adams v. Sanes, 41 Ill.2d 381, 243 N.E.2d 233 (1968), the Illinois Supreme Court recognized the defendant's constitutional right to counsel in a proceeding under the Illinois Paternity Act, but the court found as a fact that the defendant had expressly waived that right in the trial court.

finding and judgment that "malice is the gist of the action," the judgment may be enforced by a body execution, that is, imprisonment of the defendant.[123] But since the proceeding may result in "incarceration against one's will," should it not be treated, under the *Specht, Gault* and *Mempa* test, as "criminal"?

In *Wright* v. *Crawford,*[124] decided by the Court of Appeals of Kentucky (the highest court of that state), the facts were as follows: The plaintiff brought a "civil" action for malicious assault against the defendant seeking to recover compensatory and punitive damages. The defendant appeared in the trial court *pro se.* The jury assessed $526.80 as compensatory damages and $2,000.00 as punitive damages. Under Kentucky law this "civil" judgment could be enforced by imprisonment. The defendant, Wright, *pro se,* then filed an original mandamus in the Court of Appeals of Kentucky against the trial judge and the clerk of the trial court to provide the defendant with counsel and a transcript for appeal, free of charge, asserting that he was indigent. The Kentucky Court of Appeals granted the mandamus and said:

> Without entering upon full consideration or discussion of whether 'due process' demands appointment of counsel for an indigent litigant in a civil case, we are persuaded that the statutorily permitted imprisonment of Wright (KRS 426, 390) brings this case within the rationale of the rule applicable to appointment of counsel for litigants in criminal cases. We are unable to perceive a valid distinction between the criminal judgment which imposes jail sentence and the civil judgment which does the same. The litigant's 'liberty' is as surely impaired by one as the other. Therefore, for the purposes at bar, *if* it is ultimately adjudicated that Wright is a pauper, he has the same rights as an indigent in a criminal case. *Gideon* v. *Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799, 93 A.L.R.2d 733, requires appointment of counsel; *Douglas* v. *People of State of California,* 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811, assures counsel on appeal. *Griffin* v. *People of State of Illinois,* 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 guarantees a transcript. Cf. *Davenport* v. *Winn.,* Ky., 385 S.W.2d 185.
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> Although the specific prayer of the present petition is imperfectly worded, the plain import of the entire procedure is Wright's counsel-less effort to be adjudged a pauper and afforded counsel on appeal with an adequate record.
>
> It is ordered that the trial court afforded Wright a hearing on the issue of his indigence, and if it is adjudged that he is indigent then counsel for him on appeal shall be assigned by the trial court and record and transcript shall be furnished to him, cost free, for use on appeal.[125]

Punitive Damages: In cases involving intentional torts,

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[123] ILL. REV. STAT. ch. 77, §5 (1967).
[124] 401 S.W.2d 47 (Ky. Ct. App. 1966).
[125] *Id.* at 49.

such as assault and battery, libel and slander, or fraud, punitive damages may be allowed.[126] Similarly, under the Illinois Anti-trust Act,[127] "three times the amount of actual damages" may be recovered,[128] which is another form of punitive damages. The very word "punitive" means "as a punishment." It is of interest to observe that the same facts which subject a defendant to the payments of treble damages make him liable to a prosecution by the State of Illinois for a crime punishable "by a fine of up to $50,000, or by imprisonment not to exceed six months, or both."[129] Since the defendant, in these situations, is being punished by being compelled to pay more than the actual damages which the plaintiff has suffered, the defendant is subjected to the imposiiton of a "penalty" or fine." Under the test of *Spevack, Camara* and *See,* should it not be treated as a "criminal" proceeding?

DEFENDANT ENTITLED TO SAFEGUARDS OF CRIMINAL PROCEEDINGS

Compulsory Pleading by Defendant: If the proceeding involved is "criminal," then compelling the defendant to answer the complaint or allowing the allegations of the complaint to stand admitted if the defendant fails to do so[130] is self-incrimination in direct violation of the fifth amendment to the Constitution of the United States. Are Rules 51(c)[131] and 751(c)[132] of the Supreme Court of Illinois, which, respectively, require an accused judge and an accused lawyer to answer the complaint, constitutionally valid?

Default Judgment: If a defendant in a civil proceeding fails to appear and answer the complaint, the plaintiff's allegations stand admitted and a judgment by default is entered against the defendant. On the other hand, in a criminal case, the defendant may stand mute and the plaintiff must prove each and every material element of the case. Therefore, judgment by default does not exist in a criminal proceeding. Since some legal proceedings, which were previously considered as "civil" are to be treated as "criminal," should not default judgments in such cases be abolished and, if entered, be considered as a nullity?

Right to Counsel: The sixth amendment[133] to the Constitution of the United States guarantees a defendant in a criminal

[126] *See, e.g.,* Gass v. Gamble-Skogmo, Inc., 357 F.2d 215 (7th Cir. 1966); Miller v. Simon. 100 Ill. App. 2d 6, 241 N.E.2d 697 (1968); Lorillard v. Field Enterprises, Inc., 65 Ill. App. 2d 65, 213 N.E.2d 1 (1965).

[127] ILL. REV. STAT. ch. 38, §60-7 (1967).

[128] *Id.*

[129] *Id.* at §60-6.

[130] *See* ILL. REV. STAT. ch 110, §40 (1967); FED. R. CIV. P. 7; FED. R. CIV. P. 8.

[131] ILL. REV. STAT. ch. 110A, §51(c) (1967).

[132] ILL. REV. STAT. ch. 110A, §751(c) (1967).

[133] U.S. CONST. amend. VI.

case "the Assistance of Counsel for his defense" and indigent defendants are entitled to have counsel appointed for them by the court.[134] Since some legal proceedings, which, prior to 1967 were considered as "civil," are now to be treated as "criminal," should courts not be required to appoint lawyers for indigent defendants in such cases?

Calling Defendant as Witness: Prior to 1967, the Supreme Court of Illinois had held that in a disciplinary proceeding against a lawyer (which was treated as "civil") the prosecution may call the accused lawyer as an adverse witness under section 60[135] of the Civil Practice Act.[136] However, if the proceeding involved is "criminal," then compelling the defendant to testify is a clear violation of the fifth amendment[137] to the Constitution of the United States which provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . ."[138] This is precisely what *Spevack* v. *Klein* decided.

Production of Documents by Defendant: In a "civil" proceeding, the defendant may be compelled to produce documents for inspection prior to trial and as evidence at the trial under rules 204, 214 and 237 of the Supreme Court of Illinois.[139] But if the proceeding involved is "criminal" then compelling the defendant to produce documents constitutes self-incrimination in direct violation of the fifth amendment to the Constitution of the United States. This again is precisely what *Spevack* v. *Klein* decided.

Proof Beyond Reasonable Doubt: In civil cases, the plaintiff need prove his case only by a preponderance of the evidence. On the other hand, in criminal cases, the prosecution has the burden to prove guilt beyond a reasonable doubt. Therefore, in a proceeding, which, prior to 1967 was considered "civil" but is now treated as "criminal," the prosecution must prove guilt beyond a reasonable doubt and not merely by a preponderance of the evidence.[140] Furthermore, "[i]t is always the duty of the court to resolve the circumstances in evidence upon a theory of innocence rather than upon a theory of guilt where it is reasonably possible to do so."[141] In addition, "[w]here two equally reasonable hypotheses exist, the law requires the adoption of the one which is consonant with the innocence of the accused."[142]

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[134] *E.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963).
[135] ILL. REV. STAT. ch. 110, §60 (1967).
[136] *In re* Eaton, 14 Ill.2d 338, 152 N.E.2d 850 (1958); *In re* Royal, 29 Ill.2d 458, 194 N.E.2d 242 (1963).
[137] U.S. CONST. amend. V.
[138] *Id.*
[139] ILL. REV. STAT. ch. 110A, §§204, 217, 237 (1967).
[140] *In re* Urbasek, 38 Ill.2d 535, 232 N.E.2d 716 (1967).
[141] People v. Bentley, 357 Ill. 82, 99, 191 N.E. 230, 237 (1934).
[142] People v. Ibom, 25 Ill.2d 585, 594, 185 N.E.2d 690, 696 (1962).

Trial by Jury: The sixth amendment[143] to the Constitution of the United States provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."[144] If the proceeding involved is "criminal," the accused must be granted a trial by jury.[145] Since a proceeding which may result in the deprivation of a privilege or the revocation of a license which is the means of earning a livelihood is a "criminal" prosecution, is not the constitutional validity of statutes and rules of court providing for administrative hearings of accused lawyers, judges, physicians, dentists, pharmacists, engineers, architects, surveyors, real estate brokers, and insurance brokers, without trial by jury, questionable?

Double Jeopardy: Prior to 1967, it was common practice to proceed with disciplinary proceedings against lawyers who had been criminally convicted for income tax evasion. The proceedings resulted, in most cases, in a suspension from the practice of law for several years.[146] Since disciplinary proceedings were, prior to 1967, considered "civil," there was no "double jeopardy" involved. But now that *Spevack* v. *Klein* has determined that depriving a person of a license which is the means of earning a livelihood constitutes the imposition of a "penalty," the disciplinary proceeding resulting in a suspension involves additional punishment (that is, a second "penalty") for the same tax evasion for which the defendant has already paid a penalty in the criminal conviction.[147] Does this constitute "double jeopardy" prohibited by the fifth amendment to the Constitution of the United States? It must not be overlooked that if the convicted person is legally or morally unfit to engage

[143] U.S. CONST. amend. VI.

[144] *Id.*

[145] The United States Constitution guarantees trial by jury in criminal cases which do not fall within the category of "petty" offenses. Duncan v. Louisiana, 391 U.S. 145 (1968); Bloom v. Illinois, 391 U.S. 194 (1968); Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968).

[146] *See In re* Teitelbaum, 13 Ill.2d 586, 150 N.E.2d 873, *cert. denied*, 358 U.S. 881 (1958) (three year suspension); *In re* Greenberg, 21 Ill.2d 170, 171 N.E.2d 615 (1961) (two year suspension); *In re* Revzan, 33 Ill.2d 197, 210 N.E.2d 519 (1965) (two year suspension); *In re* Sullivan, 33 Ill.2d 548, 213 N.E.2d 257 (1965) (three year suspension); *In re* Shavin, 40 Ill.2d 254, 239 N.E.2d 790 (1968), *cert. denied*, 393 U.S. 1019 (1969) (two year suspension).

[147] Formerly, it was held that where the same act constitutes a violation of state and federal law, two prosecutions may be had without violating the double jeopardy principle. Now that the "double jeopardy" prohibition of the fifth amendment is applicable to state as well as to federal prosecutions, double punishment for the same act is abhorrent to the constitutional protection. Furthermore, the former distinction, which was based on the source of the law involved, is a play on semantics, grossly unrealistic, and violates the true spirit of due process of law. A sovereign should not be allowed to "foreclose the exercise of constitutional rights by mere labels." N.A.A.C.P. v. Button, 371 U.S. 415, 429 (1963).

The "source of law" distinction between state and federal origin has already been rejected by the Supreme Court of the United States in Murphy

in the practice of law, he should be disbarred for professional incompetency. But suspension is imposed as a deterrent or as retaliation and is purely penal in nature.

Additionally, prior to 1967, the law was that a lawyer who had been indicted for the commission of a criminal act, tried, found not guilty and acquitted, could, nevertheless, be subjected to disciplinary proceedings for the commission of the very same act of which he had been previously found not guilty and acquitted.[148] But now that *Spevack* v. *Klein* has determined that depriving a person of a license which is the means of earning a livelihood constitutes the imposition of a "penalty," does the disciplinary proceeding constitute "double jeopardy" prohibited by the fifth amendment to the Constitution of the United States?

Statute of Limitations: Prior to 1967, no statute of limitations was applicable to disciplinary proceedings.[149] But now

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v. Waterfront Comm'n, 378 U.S. 52 (1964). In *Murphy*, persons had been subpoenaed to testify at a hearing conducted by the Waterfront Commission. Although, they were granted immunity from prosecution under state laws, they refused to testify "on the grounds that the answers might tend to incriminate them under federal law, to which the grant of immunity did not purport to extend." 378 U.S. at 54. The Supreme Court of the United States reversed prior rulings on this point and said: "We hold that the constitutional privilege against self-incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law." 378 U.S. at 77-78.

> [W]e hold the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him.

Id. at 79.

The "source of law" distinction between state and federal origin was also rejected by the United States Supreme Court in Marchetti v. United States, 390 U.S. 39 (1968); Grosso v. United States, 390 U.S. 62 (1968) (where the Court held that the fifth amendment's protection against self-incrimination available to a person whose compliance with a federal tax statute would incriminate the taxpayer under a state statute); Lee v. Florida, 392 U.S. 378 (1968) (where the Court held that evidence which had been obtained in violation of a federal statute was not admissible in a state prosecution).

It is of interest to note that in disciplinary proceedings based on a federal conviction, the respondent is not allowed to contradict the purported facts upon which the federal conviction is based, as "[t]he record of conviction of respondent is conclusive of his guilt and it has been established in this State that we cannot go behind such record." *In re* Teitelbaum, 13 Ill.2d 586, 590, 150 N.E.2d 873, 875, *cert. denied*, 358 U.S. 881 (1958). In the disciplinary proceeding, the respondent is limited to the introduction of "facts and circumstances in aggravation or mitigation of each case in an effort to determine an appropriate penalty." *In re* Sullivan, 33 Ill.2d 548, 554, 213 N.E.2d 257, 260 (1966). The conviction is "conclusive evidence of guilt; and that such conviction *per se* justifies disciplinary action. . . . " and the court is limited "to consider the facts and circumstances in aggravation or mitigation in each case in determining the penalty to be imposed." *In re* Shavin, 40 Ill.2d 254, 255, 239 N.E.2d 790, 791 (1968), *cert. denied*, 393 U.S. 1019 (1969). The accused lawyer is thus deprived of an opportunity to prove himself not guilty in the state proceeding, but is nevertheless subjected to a second punishment. *See In re* Ruffalo, 390 U.S. 544, 546 (1968). This again violates the true spirit of due process of law.

[148] *In re* Browning, 23 Ill.2d 483, 179 N.E.2d 14 (1962).

[149] People *ex rel.* Healy v. Hooper, 218 Ill. 313, 75 N.E. 896 (1905);

that *Spevack* v. *Klein* has determined that depriving a person of a license which is the means of earning a livelihood constitutes the imposition of a "penalty," does not the statute of limitations apply as in other criminal cases?[150]

Appeal by Plaintiff After Trial on Merits: In Illinois "civil" proceedings, both plaintiff and defendant have a constitutional right of appeal.[151] On the other hand, the Illinois Constitution provides that "after a trial on the merits in a criminal case, no appeal shall lie from a judgment of acquittal."[152] If the proceeding involved was, prior to 1967, "civil" but is now "criminal," the plaintiff or prosecution may not appeal from a judgment in favor of the accused after a trial on the merits.

OBJECTIVE RE-EXAMINATION NECESSARY

Habit is a very powerful resistant to change. The human thinking process is strongly dominated by the habit of considering problems from a particular point of view for a long time and unconsciously accepting that point of view as the correct one. As a result, judges who have been exposed to a certain environment bring with them thinking habits which are beneficial or detrimental to the future development of the law. Change in approach to a legal problem is necessarily the result of conscious effort, a task which very few persons welcome. Consequently, judges who have formed the habit of treating a particular procedure as "civil" are reluctant to consider it as "criminal." Furthermore, the new approach may require a change in the structure of the legal system, such as from "trial by committee" or "trial by commission" to "trial by jury." The result is that habit makes human beings adhere to the old and reject the new. These obstacles may make the road ahead a difficult one.

In the light of recent federal constitutional developments and the exhortation of the Supreme Court of the United States that "a State cannot foreclose the exercise of constitutional rights by mere labels"[153] the legal profession must awaken to the realization that the difference between "civil" and "criminal" cannot rest on arbitrary labeling by courts and legislatures, but requires careful re-examination of legal consequences to distinguish reality from fiction.

People *ex rel.* Stead v. Phipps, 261 Ill. 576, 104 N.E. 144 (1914); People *ex rel.* Chicago Bar Ass'n v. Sherwin, 364 Ill. 350, 4 N.E.2d 477 (1936).

[150] Section 3-5 of the Criminal Code of 1961, ILL. REV. STAT. ch. 38, §3-5 (1967), provides that prosecution for an offense "must be commenced within 3 years after the commission of the offense if it is a felony or within one year and six months after the commission if it is a misdemeanor."

[151] ILL. CONST. art. VI, §§5, 7 (1964).

[152] ILL. CONST. art. VI, §7 (1964).

[153] N.A.A.C.P. v. Button, 371 U.S. 415, 429 (1963).