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Executive And Judicial Banishment Compared

in cases involving speedy trial. This would seem proper, for as Judge Wright points out in his dissent, "Unlike Continental concepts of Criminal justice, under our law a man charged with crime is presumed innocent. But, under today's decision, an innocent man may be held in jail for almost six months awaiting his trial. Under this ruling, for the first six months after accusation, the presumption of innocence—and the right to a speedy trial—mean very little to a defendant unable to make bond."[35]

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EXECUTIVE AND JUDICIAL BANISHMENT COMPARED

Banishment[1] of an individual from his society has frequently been made a condition of a suspended sentence or a conditional pardon. This presents an interesting problem and a seeming conflict. It is generally held that a state may grant pardons conditioned upon a person's leaving the state,[2] but cannot make such banishment a condition of a suspended sentence.[3] The two recent cases of *Mansell v. Turner*[4] and *Bird v. State*[5] illustrate these two seemingly divergent positions.

In the *Mansell* case, the defendant was a convicted burglar, but was granted a termination of sentence by the Utah Board of Pardons conditioned on his leaving the state of Utah. The defendant agreed to these conditions, but upon his release ignored them, and was returned to the state's prison. He petitioned for a writ of habeas corpus, claiming that the conditions amounted to a banishment and was therefore void as against public policy. The petition was denied on the ground that the Board's power to pardon is plenary and therefore in-

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[35]Ibid.

[1]Banishment is defined as a form of punishment inflicted for criminal offenses by compelling the criminal to quit a city, place or country for a period of time or even for life. Black, Law Dictionary (4th ed. 1951).

[2]E.g., Kavalin v. White, 44 F.2d 49 (10th Cir. 1930); Ex parte Hawkins, 61 Ark. 321, 33 S.W. 106 (1895); Ex parte Marks, 64 Cal. 29, 28 Pac. 109 (1883); In re Cammarata, 341 Mich. 528, 67 N.W.2d 677 (1954); People v. Potter, 1 Parker, Crim. R. 47 (N.Y. Sup. Ct. 1845); State v. Barnes, 32 S.C. 14, 10 S.E. 611 (1890).

[3]E.g., People v. Lopez, 81 Cal. App. 199, 253 Pac. 169 (Dist. Ct. App. 1927); People v. Baum, 251 Mich. 187, 231 N.W. 95 (1930); Ex parte Sheehan, 100 Mont. 244, 49 P.2d 438 (1935); State v. Hatley, 110 N.C. 522, 14 S.E. 751 (1892); People v. Wallace, 124 N.Y.S.2d 201 (Suffolk County Ct. 1953); State v. Baker, 58 S.C. 111, 36 S.E. 501 (1900).

[4]14 Utah 2d 352, 384 P. 2d 394 (1963).

[5]231 Md. 432, 190 A.2d 804 (1963).

cludes the power to attach conditions, and that the condition imposed was not unconstitutional.

In the *Bird* case, the appellant was convicted of assault with intent to murder, a statutory offense in Maryland. She was sentenced to a term of not more than ten years, but on her suggestion, the court suspended the sentence on condition that she return to her native Puerto Rico and remain there for at least ten years. She challenged both the judgment and the sentence. The Maryland Court of Appeals sustained the jury verdict of guilty but upheld the contention that the sentence of banishment was beyond the power of the trial court and therefore void. The court further held that an entire new proceeding was not required, but that the case could be remanded for resentencing alone.

It may at first seem strange that either of these situations would ever confront the courts. The problem arises, however, when the defendant, who has either failed to leave or returns to the place from which he was banished, is imprisoned, and then brings a petition for a writ of habeas corpus contesting the validity of the sentence or conditional pardon. The purpose of this discussion will be to examine first the cases involving the *Mansell* situation and secondly those involved in the *Bird* situation. An attempt will be made to set forth the rationales expressed by the courts in support of these holdings and to investigate whether any recent cases are likely to affect either line of decisions.

The doctrine of the *Mansell* case, allowing banishment as a condition to a pardon,[6] is substantiated by the great weight of authority.[7] If a condition is attached to a pardon, it may be either precedent or subsequent, provided only that it is not illegal, immoral, or impossible to perform.[8] The courts generally espouse one of three rationales in

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[6]A pardon may be defined as an executive act of grace by which an individual is exempted from punishment for a crime he has committed. 67 C.J.S. Pardons § 1 (1950); 5 Wharton's Criminal Law Procedure, § 2196 (12th ed. 1957). The Supreme Court of the United States has said a pardon is the determination that the public welfare will be better served by inflicting less punishment than the fixed judgment. Biddle v. Perovich, 274 U.S. 480 (1927).

[7]For decisions prior to 1927, see Annot., 60 A.L.R. 1410, 1415-16 (1929). For subsequent decisions, see Kavalin v. White, 44 F.2d 49 (10th Cir. 1930); Pippin v. Johnson, 192 Ga. 450, S.E.2d 712 (1941); People ex rel. Ross v. Becker, 382 Ill. 404, 47 N.E.2d 475 (1943); In re Cammarata, 341 Mich. 528, 67 N.W.2d 677 (1954).

[8]E.g., Kavalin v. White, 44 F.2d 49 (10th Cir. 1930); Ex parte Hawkins, 61 Ark. 321. 33 S.W. 106 (1895); Ex parte Marks, 64 Cal. 29, 28 Pac. 109 (1883); State ex rel. O'Conner v. Wolfer, 53 Minn. 135, 54 N.W. 1065 (1893); People v. Potter, 1 Parker, Crim. R. 47 (N.Y. Sup. Ct. 1845); State v. Barnes, 32 S.C. 14, 10 S.E. 611

sustaining such conditions. First, it is said that since the executive's power is plenary, he may grant something less than a full pardon; or put more concisely, the greater power also includes the lesser.[9] A second rationale is based on the idea that a conditional pardon is like a contract, gift, or a deed in that it requires delivery by the executive and acceptance by the grantee.[10] Under this reasoning the grantee is not being forced to leave the state against his will as he could refuse the pardon. The third rationale is that since the object of a conditional pardon is reformation, a prisoner should not be deprived of the opportunity to avoid further punishment and make a fresh start elsewhere.[11]

If the grantee, in violation of the condition subsequent of his pardon, returns to the society[12] from which he agreed to absent himself, the pardon is terminated and he may be returned to prison, regardless of his reason for returning.[13] Courts have held that pardons conditioned on banishment are not violative of public policy nor of the constitutional prohibition against cruel and unusual punishment, but are in fact sanctioned by legislation.[14]

In view of the foregoing discussion, it may seem anomalous that the *Bird* case, disallowing banishment as a condition to a suspended sentence, is also supported by the great weight of authority. However, as distinguished from *Mansell,* the question in the *Bird* case is whether or not the judiciary has the power of the executive to effect banishment

(1890). In the case of banishment as a condition to a pardon, the acceptance by the grantee before the pardon is effective is a condition precedent while the grantee's remaining away is a condition subsequent to the validity of the pardon.

[9]Kavalin v. White, 44 F.2d 49 (10th Cir. 1930); Ex parte Hawkins, 61 Ark. 321, 33 S.W. 106 (1895); Ex parte Kelly, 155 Cal. 39, 99 Pac. 368 (1908); People v. Potter, 1 Parker, Crim. R. 47 (N.Y. Sup. Ct. 1845).

[10]State v. Smith, 17 S.C.L. 283 (Ct. App. 1829); Ex parte Davenport, 110 Tex. Crim. 326, 7 S.W.2d 589 (1927).

[11]Ex parte Paquette, 112 Vt. 441, 27 A.2d 129 (1942).

[12]The particular society may be any political unit: a county, Pippin v. Johnson, 192 Ga. 450, 15 S.E.2d 712 (1941); a state, Ex parte Davenport, 110 Tex. Crim. 326, 7 S.W.2d 589 (1927); or a nation, In re Cammarata, 341 Mich. 528, 67 N.W.2d 677 (1954); People v. Potter, 1 Parker, Crim. R. 47 (N.Y. Sup. Ct. 1845).

[13]Pippin v. Johnson, 192 Ga. 450, 15 S.E.2d 712 (1941). Here, a defendant returned to a county, in violation of a conditional pardon that she remain away, for the sole purpose of obtaining medical treatment, on credit, which was needed to save her life. The court held that in spite of her motives, her re-entry terminated the conditional pardon and she was subject to being returned to jail.

[14]People v. Potter, 1 Parker, Crim. R. 47 (N.Y. Sup. Ct. 1945); State v. Smith, 17 S.C.L. 283 (Ct. App. 1829); State v. Addington, 18 S.C.L. 516 (Ct. App. 1831); see generally annot., 60 A.L.R. 1410 (1929).

of one from his society.[15] The answer is clearly that it does not, for several reasons.

First, it is said that to permit one community to "dump" its convicted criminals on another is against public policy.[16] In the leading case on the subject, *People v. Baum*,[17] the court, referring to the practice of one state sending its criminals to another said:

> "It would tend to incite dissension, provoke retaliation, and disturb that fundamental equality of political rights among the several states which is the basis of the Union itself. Such a method of punishment... is impliedly prohibited by public policy."[18]

It is in this area that the two situations concerning banishment may appear hardest to reconcile. Where a pardon is involved the courts say banishment is not against public policy,[19] yet this is a primary reason given for disallowing banishment as a condition to a suspended sentence.

A second reason sometimes given for disallowing the court to pass a sentence of banishment is that it tends to usurp the power of the legislature[20] and the prerogative of the executive.[21] Punishment is prescribed by the legislature and applied by the courts. The courts should not attempt to inflict punishment outside the form and degree prescribed by legislation. For this reason, several courts have stated that banishment as a punishment would be valid if permitted by statute.[22] However, it seems the legislatures have seen fit to grant

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[15]Again, the term society may refer to any particular political unit. Judicial banishment has been disallowed from a county, Ex parte Scarborough, 76 Cal. App. 2d 628, 173 P.2d 825 (Dist. Ct. App. 1946); a state, State v. Baker, 58 S.C. 111, 36 S.E. 501 (1900); and a nation, People v. Cortez, 19 Cal. Rptr. 50 (Dist. Ct. App. 1962).

[16]E.g., People v. Blakeman, 170 Cal. App. 2d 596, 339 P.2d 202 (Dist. Ct. App. 1959); People v. Baum, 251 Mich. 187, 231 N.W. 95 (1930); see annot., 70 A.L.R. 100 (1931); State v. Doughtie, 237 N.C. 368, 74 S.E.2d 922 (1953); State v. Baker, 58 S.C. 111, 36 S.E. 501 (1900).

[17]251 Mich. 187, 231 N.W. 95 (1930).

[18]231 N.W. at 96.

[19]Note 15 Supra. But, in his concurring opinion in Mansell, Justice Crockett suggests such a condition would be against public policy if the power were merely exercised by a state to rid itself of its less desirable citizens.

[20]Ex parte Sheehan, 100 Mont. 244, 49 P.2d 438 (1935); People v. Wallace, 124 N.Y.S.2d 201 (Suffolk County Ct. 1953).

[21]Millsaps v. Strauss, 208 Ark. 265, 185 S.W.2d 933 (1945); Burnstein v. Jennings, 231 Iowa 1280, 4 N.W.2d 428 (1942); Ex Parte Sheehan, 100 Mont. 244, 49 P.2d 438 (1935).

[22]Ex parte Scarborough, 76 Cal. App. 2d 648, 173 P.2d 825 (Dist. Ct. App. 1946); Bird v. State, 231 Md. 432, 190 A.2d 804 (1963); Ex parte Sheehan, 100 Mont. 244, 49 P.2d 438 (1935); People v. Wallace, 124 N.Y.S.2d 201 (Suffolk County Ct. 1953).

this power to the executive or one of his agencies rather than the Courts, and the latter are thereby precluded from exercising this discretionary power under the doctrine of separation of powers, inherent in the American system of government. "The power to suspend sentence and the power to grant reprieves and pardons, ... are totally distinct and different.... The former was always a part of the judicial power; the latter was always a part of the executive power."[23]

Considering banishment as a form of punishment,[24] there is a third possible reason why banishment may be considered a void condition to a suspended sentence. Possibly it amounts to a violation of the constitutional prohibition against cruel and unusual punishments.[25] However, several cases have held that banishment, whether it is a condition to a pardon[26] or a suspended sentence,[27] does not amount to a cruel and unusual punishment. The courts have had difficulty in deciding what constitutes cruel and unusual punishment, the older cases indicating that this provision was meant to protect against physical tortures,[28] such as beheading, burning at the stake, use of the wheel or the rack, disemboweling alive, and other ancient forms of punishment.

A few recent federal cases indicate that something less than "physical torture or lingering death" may amount to cruel and unusual punishment.[29] Illustrative of this point is the United States Supreme Court's decision in *Trop v. Dulles*,[30] where the Court held unconstitutional a provision depriving a native-born American citizen of his citizenship because of a court martial conviction for desertion.

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[23]People ex rel. Forsythe v. Court of Sessions, 141 N.Y. 288, 36 N.E. 386, 388 (1894).

[24]United States v. Ju Toy, 198 U.S. 253 (1905). For a general discussion of this point, see Navasky, Deportation as Punishment, 27 U. Kan. City L. Rev. 213, 218-22 (1958).

[25]"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const. amend. VIII.

[26]People v. Potter, 1 Parker, Crim. R. 47 (N.Y. Sup. Ct. 1845); State v. Smith, 17 S.C.L. 283 (Ct. App. 1829); Ex parte Davenport, 110 Tex. Crim. 326, 7 S.W.2d 589 (1927); see Annot., 60 A.L.R. 1410, 1415 (1929).

[27]People v. Baum, 251 Mich. 187, 231 N.W. 95 (1930); Ex parte Sheehan, 100 Mont. 244, 49 P.2d 438 (1935); People v. Wallace, 124 N.Y.S.2d 201 (Suffolk County Ct. 1953); Legarda v. Valdez, 1 Philippine Rep. 146 (1902).

[28]Wilkerson v. Utah, 99 U.S. 130, 135-36 (1878); Weems v. United States, 217 U.S. 349 (1910); State v. Woodward, 68 W. Va. 66, 69 S.E. 385 (1910); Legarda v. Valdez, 1 Philippine Rep. 146 (1902).

[29]Robinson v. California, 370 U.S. 660 (1962); Trop v. Dulles, 356 U.S. 86 (1958); Dear Wing Jung v. United States, 312 F.2d 73 (9th Cir. 1962).

[30]356 U.S. 86 (1958).

The Court held denationalization subjected an individual to a fate of statelessness, a fate forbidden by the eighth amendment. Admittedly, this penalty was not excessive, since desertion was also punishable by death. Moreover, the death penalty is recognized not to be either cruel or unusual.[31] But, the Court said that just because the death penalty does not violate the constitutional prohibition does not mean anything short of death is permissible.[32] The eighth amendment, though derived from the Magna Carta and the English Declaration of Rights of 1688, draws its meaning from an evolving standard of decency designed to protect succeeding generations of Americans.[33] Banishment from one's country is a punishment universally decried by civilized people; the destruction of one's status in society is even more primitive than torture, and the punishment of statelessness is, therefore, prohibited by the eighth amendment.[34]

Recent decisions of the United States Supreme Court indicate that through the due process clause of the fourteenth amendment[35] at least some of the eighth amendment's prohibition against cruel and unusual punishments applies to the states. In light of the *Trop* decision, it may be that if a state conditions a pardon or suspended sentence on banishment, it will be struck down as violative of the fourteenth amendment. Such a decision is certainly within the realm of foreseeability, but it is submitted that banishment does not amount to a cruel and unusual punishment.

Considering first a conditional pardon, it is important to remember that in such a situation, banishment serves an entirely different purpose than it does for a suspended sentence. It is not penal but rather is corrective and rehabilitative in nature, and the fact that there is some restraint of conduct does not necessarily make it penal.[36] Also, banishment has a much different effect on the criminal's status when granted as a condition to a pardon than when imposed as a condition of a suspended sentence:

> "The suspension of the sentence simply postpones the judgment of the court temporarily or indefinitely, but the convic-

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[31]Id. at 99; In re Kemmler, 136 U.S. 436, 447 (1890) (dictum); See generally, Note, 36 N.Y.U.L. Rev. 846, 859 (1961).

[32]356 U.S. at 99.

[33]Trop v. Dulles, 356 U.S. 86 (1958); Ex parte Pickens, 101 F. Supp. 285 (D. Alaska 1951); 24B C.J.S. Crim. Laws § 1978 (1962).

[34]356 U.S. at 100-02.

[35]Robinson v. California, 370 U.S. 660, 666-67 (1962); Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947).

[36]11 B.U.L. Rev. 278 (1931).

> tion and liability following it, and all civil disabilities, remain and become operative when judgment is rendered. A pardon reaches both the punishment prescribed for the offense and the guilt of the offender. It releases the punishment, and blots out of existence the guilt, so that, in the eye of the law, the offender is as innocent as if he had never committed the offense."[37]

Therefore, since the banishment is not penal, it certainly could not be considered cruel and unusual punishment.

The problem of banishment as a part of a sentence is more difficult. In spite of the *Trop* decision forbidding involuntary expatriation,[38] it is submitted that banishment from a state, county, or city can be distinguished. In the case of expatriation, no other country would be duty-bound to accept the victim as its citizen and he could conceivably be a "man without a country," having no place to settle or reside. A United States citizen, however, has the right of free ingress and egress from state to state,[39] and would not face the same problem of being stateless and unaccepted in any land as would a person who has been involuntarily expatriated.

Also, there is some logical inconsistency in stating that banishment is a cruel and unusual punishment. A prison sentence is almost always the convicted criminal's alternative to banishment. Certainly, a convict would prefer to be free with only a restriction on his ability to enter a particular state than to be imprisoned and lose all freedom of movement. From the convict's viewpoint, banishment is hardly cruel and unusual when he is faced with the alternative punishment of imprisonment. The development of the eighth amendment now protects a person against disproportionate penalties[40] and mental suffering,[41] as well as physical torture or lingering death. Banishment from a state or lesser political subdivision can hardly be dispropor-

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[37]Supra note 23.

[38]Supra note 31. The Supreme Court in Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), forbade involuntary expatriation, although not basing its decision on the cruel and unusual punishment provision of the eighth amendment.

[39]The Article IV privileges and immunities clause applies to state citizenship, and as a result each citizen is guaranteed the right of free ingress and egress from state to state. Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1868). The fourteenth amendment privileges and immunities clause applies to rights of federal citizenship and again, it guarantees the right of free ingress and egress from state to state. Twining v. New Jersey, 211 U.S. 78, 97 (1908).

[40]Weems v. United States, 217 U.S. 349 (1910). This can also be inferred from Trop v. Dulles, 356 U.S. at 99, where the Court states that any punishment short of death is not permissible just because the death penalty is not cruel and unusual in some instances.

[41]Supra note 30.