

CHALLENGING "PENAL" STATUTES BY DECLARATORY ACTION

By EDWIN BORCHARD *

ONE of the principal purposes of the declaratory action is the removal of clouds from legal relations. By dissipating peril and insecurity and thus stabilizing legal relations, it avoids the destruction of the status quo, and assures a construction or interpretation of the law *before* rather than after breach or violence.

The aim of this article is to point out the inadequacies in the existing methods of challenging statutes, especially police power statutes carrying a penalty for non-compliance. These methods compel either enforcement or a threat of enforcement as a condition of adjudication; they fail to distinguish different types of "criminal" statutes, thus either abusing or unduly limiting the scope of injunctive relief; and they hamper and impede a more intelligent method of adjudicating challenges to the constitutionality or applicability or construction of so-called "penal" statutes, ordinances and regulations.¹

Possibly in no branch of litigation is the declaration more useful than in the relations between the citizen and the administration. With the growing complexity of government and the constantly increasing invasions of private liberty, with ever widening powers vested in administrative boards and officials, the occasions for conflict and dispute are rapidly augmenting in frequency and importance. Yet the very fact that such disputes turn mainly upon questions of law, involving the line marking the boundary between private liberty and public restraint, between private privilege and immunity, on the one hand, and public right and power, on the other, makes this field of controversy peculiarly susceptible to the expeditious and pacifying ministrations of the declaratory judgment.

It is manifest that when the cumbersome and technical writs of certiorari, injunction, mandamus, quo warranto, habeas corpus, prohibition, are directed against public bodies and officials, what is really sought is an adjudication on the law, establishing and determining their powers

*Hotchkiss Professor of Law, Yale Law School.

1. See Comment (1943) 43 COL. L. REV. 213.

and privileges. Yet under the antiquated common law notion that courts exist only for purposes of compulsion and condemnation, disputes as to legal rights had perforce to be framed in the guise of combats looking to coercion of the defendant. The technicalities with which the law and its practitioners traditionally endow its instrumentalities have encrusted these extraordinary remedies for controlling the administration with a mass of procedural refinements alien to their original purpose and crippling to their efficiency for a twentieth century society; hence, a citizen seeking a declaration of the illegality of an administrative act often finds himself enmeshed in the intricacies of certiorari, injunction, mandamus, quo warranto, habeas corpus, or prohibition, and may never reach the substantive goal he has in view. At all events, he has often been forced into a mystic maze, whereas he wished merely to ascertain whether the regulation or order served upon him, or to which he had been subjected, was valid or not, or, if valid, what it meant.

The imposition of governmental requirements as a condition of the exercise of private rights, such as engaging in business, erecting buildings, or using public facilities, is an inherent element of modern government. Such requirements are frequently accompanied by the sanction of a criminal penalty for violation. But in a constitutional government only legal demands need to be obeyed, and the question arises whether the legality of the particular requirement can be put to the test in advance of enforcement or only after it has been imposed and observed, or, in event of refusal to obey, only on the suit for a criminal penalty. Speed is here a factor, and it is a sound view that the administration should not be unduly hampered by the courts in the enforcement of its demands.

By the construction placed upon declaratory actions in many jurisdictions the individual, threatened by the imposition of governmental demands and requirements, such as license, fee, tax, or police-power restriction, may put to the test the legality of the restriction without risking the penalties of disobedience or the hazards and expense of injunction. Thus businessmen, notified to change their methods of doing business and threatened with a criminal penalty for violation, have claimed a declaration of their privilege to conduct their business free from the requirement and penalty and have obtained a conclusive construction of the administrative order before changing the status quo, without chancing the risks and precarious outcome of a bill of injunction.

"CASE" OR "CONTROVERSY"

After the *Anway* case in Michigan² went off on the false theory that the power to render declaratory judgments empowered the court to give advisory opinions, the statutes of several states were supplied with the

2. *Anway v. Grand Rapids Ry. Co.*, 211 Mich. 592, 179 N. W. 350 (1920).

introductory phrase "in cases of actual controversy" or "actual antagonistic assertion and denial of right."³ Besides emphasizing the controversial character of justiciable issues, this phrase indicated that no physical wrong or even threatened wrong was required to make an issue justiciable, and the United States Supreme Court has so construed the term "cases of actual controversy" in the Federal Act.

The Supreme Court, in its most elaborate analysis of this supposed limitation on federal jurisdiction, has remarked that the term "cases of actual controversy" is designed to preserve constitutional requirements; that the word "actual" is one of "emphasis rather than of definition"; and that "controversy" contemplates a "justiciable controversy," hence "appropriate for judicial determination," and is thus "distinguished from a difference or dispute of a hypothetical or abstract character, [that is,] from one that is academic or moot." The controversy must be "definite and concrete, touching the legal relations of parties having adverse legal interests." It must be a "real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." The Supreme Court then held that there was an actual controversy in the claim of an insurance company against the insured for a declaration that: in fact the insured was not at a certain date totally disabled as he claimed to be; he was not therefore relieved of the obligation to pay premiums; the company was privileged to consider the policies as lapsed for non-payment; it was under no duty to continue the policies in force or to pay disability benefits except to the amount of the \$45 which the company conceded; the company was not obliged to wait until the insured or his beneficiary got ready to sue, perhaps years hence, for in the meantime witnesses would be dispersed and the company would be obliged to maintain reserves. Since the insured would have had an action against the company to maintain the policies in force or to sue for disability benefits, the Supreme Court considered that the issue was not less justiciable because the company initiated the suit. "The character of the controversy . . . is essentially the same whether it is presented by the insured or by the insurer. . . . It is the nature of the controversy, not the method of its presentation or the particular party who presents it, that is determinative."⁴

Naturally this important decision did not purport to indicate all the types of cases which are appropriate to adjudication by declaratory action. There was in the case some evidence, a fact not noticed or in any way

3. California, Hawaii, Kansas, Virginia. Later the clause was prefixed to the amended Michigan and the federal statute. See BORCHARD, *DECLARATORY JUDGMENTS* (2d ed. 1941) 40.

4. *Aetna Life Ins. Co. v. Haworth*, 300 U. S. 227, 239 *et seq.* (1937) and cases cited therein; *Ashwander v. T. V. A.*, 297 U. S. 288, 325 (1936).

material to the decision, of a pre-trial antagonistic assertion of right or claim between the parties, so that the "innovation" merely consisted in allowing the debtor or party charged to initiate the action against the creditor or claimant for a declaration of non-liability or immunity. It is hardly doubtful that the Court would have sustained the propriety of the action even though the policy-holder had before trial made no answer to the company's contention and offer—or they to his—since his interest with respect to all the claims advanced by the company was manifestly adverse. It has now become common for an insurance company to seek a declaration of immunity, on the ground of non-coverage or breach of covenant, from the obligation to defend the insured or pay any eventual judgment the injured person may recover against the insured.⁵ No correspondence, no assumption of adverse position prior to the service of the pleadings is necessary, since the contract or statute determines the legal relations of the parties. Different is the case of the infringer's or alleged infringer's suit disclaiming infringement or contesting the validity of the patent, since his power to initiate an action necessarily depends upon a patentee's prior claim of infringement.⁶

In the leading case of *Nashville, Chattanooga and St. Louis Ry. v. Wallace*,⁷ the Court took occasion to overrule the muddled dicta of earlier opinions⁸ and made for the first time a considered analysis of a declaratory judgment, concluding in that case that a declaratory action was proper to claim exemption on federal constitutional grounds from a Tennessee tax statute. The Court pointed out—a matter which will be emphasized in this article—that the conditions precedent to an injunction are by no means necessary to a justiciable controversy looking to a declaratory judgment. Said Justice Stone for a unanimous Court:

"As the prayer for relief by injunction is not a necessary prerequisite to the exercise of judicial power, allegations of threatened irreparable injury which are material only if an injunction is asked, may likewise be dispensed with if, in other respects, the controversy presented is, as in this case, real and substantial."⁹

5. See BORCHARD, *op. cit. supra* note 3, at 645 *et seq.*

6. See *Dewey & Almy Chemical Co. v. American Anode, Inc.*, 47 F. Supp. 921 (D. Del. 1942), and BORCHARD, *op. cit. supra* note 3, at 807.

7. 288 U. S. 249 (1933).

8. *Piedmont & Northern Ry. v. United States*, 280 U. S. 469 (1930); *Willing v. Chicago Auditorium Ass'n*, 277 U. S. 274 (1928); *Liberty Warehouse Co. v. Burley Tobacco Growers' Coop. Marketing Ass'n*, 276 U. S. 71 (1928); *Liberty Warehouse Co. v. Grannis*, 273 U. S. 70 (1927).

9. 288 U. S. at 264. It has become common practice to issue declarations, while denying injunctions, whether especially requested or not. *Cf.* *New York & Porto Rico Steamship Co. v. United States*, 32 F. Supp. 538 (E. D. N. Y. 1940); *Gully v. Interstate Natural Gas Co.*, 82 F. (2d) 145 (C. C. A. 5th, 1936), *cert. denied*, 298 U. S. 688 (1936); *Black v. Little*, 8 F. Supp. 867 (E. D. Mich. 1934); BORCHARD, *op. cit. supra* note 3, at 428.

The Court reiterated its earlier conclusion that process of execution is not an indispensable adjunct of a judgment or of judicial power, but rather that adjudication or determination of contested issues between adverse parties is the essence of the judicial function.

There remains, then, in each case only the duty of determining whether the facts of the case present the conditions of justiciability, conditions which have been given a constitutional importance by identifying them with the elements supposedly inherent in the broad term "cases" or "controversies" of Article III of the Federal Constitution.

Here there is still a certain opportunity for narrowness of construction, subconsciously derived from the Supreme Court's disposition to avoid the decision of cases involving constitutional questions, a purpose which induces excessively strict requirements for justiciability. While thus having its origin in the desire to avoid the decision of constitutional issues, the federal tests of justiciability have inevitably exerted a restrictive influence in cases other than constitutional¹⁰ and in courts other than federal.¹¹ While courts in other English-speaking countries, and particularly federal courts, are equally alert to avoid decisions in the abstract,¹² it is

10. For example, in patent cases, where both validity and infringement are in issue, the decision must rest on the narrower ground of infringement where possible, not the broader ground of validity. Where judgment in a patent suit holds the patent valid but not infringed, the issue of validity is wrongly, it is submitted, considered moot, the successful defendant, alleged infringer, being allowed to appeal on the issue of validity only for the purpose of having it struck from the findings. See *Electrical Fittings Corp. v. Thomas & Betts Co.*, 307 U. S. 241 (1939), and criticism in BORCHARD, *op. cit. supra* note 3, at 815. Actually, but not admittedly, this rule seems to be modified by the recent decision of the Supreme Court in *Altvater v. Freeman*, 63 Sup. Ct. 1115, decided May 24, 1943. Because the licensee-infringer pleaded a counterclaim challenging the validity of the patent, the dispute on validity, raising issues additional to the limited claims involved in the main suit, was held not to be moot but adjudicable. Perhaps after a while a counterclaim will be held unnecessary to keep in the case the "raging" issue of validity of the patent. The dissent by Frankfurter, J., seems to consider the issue of validity justiciable throughout. Judge Frank in his concurring opinion in *Aero Spark Plug Co. v. B. G. Corp.*, 130 F. (2d) 290, 292 (C. C. A. 2d, 1942), made an able argument in urging that the court proceed to find *invalidity*, where that is possible, since the public also has an interest in knowing whether a patent is valid or invalid. Yet in *Cover v. Schwartz*, 133 F. (2d) 541 (C. C. A. 2d, 1943), where the losing plaintiff on appeal dropped the charge of infringement but concentrated the argument and brief on the central issue of invalidity, as found by the lower court, the majority of the court, by Frank, J., ruled that there was no longer a "case" or "controversy," and that the plaintiff had thus deprived the court of all jurisdiction to proceed. See the strong dissenting opinion of Judge Clark, at 547, which seems sounder. The validity of a written instrument or of the right claimed under it is one of the commonest subjects of declaratory adjudication. BORCHARD, *op. cit. supra* note 3, at 505, 563, 591, 606, 638, 802.

11. See, *e.g.*, *Dep't of State v. Kroger Grocery & Baking Co.*, 46 N. E. (2d) 237 (Ind. 1943). See discussion and authorities on *Injunctions* in 28 AM. JUR. (1940) § 233 *et seq.*

12. Two such cases, involving the construction of statutes in New Zealand under Section 3 of the Declaratory Judgments Act, 1908, were *New Zealand Educational In-*

believed that numerous courts would have readily found justiciability in such cases as *New Jersey v. Sargent*¹³ and *United States v. West Virginia*,¹⁴ which the United States Supreme Court refused to decide as insufficiently concrete and specific. Courts in those jurisdictions seem to be less inhibited and display a well-developed sense of the social function of courts.¹⁵

stitute v. Wellington Education Board, [1926] N. Z. 615; Dairy Proprietary Ass'n v. New Zealand Dairy-Produce Control Board, [1926] N. Z. 535.

13. 269 U. S. 328 (1926). Dismissed because a power license had not yet been issued on the rivers in question by New Jersey or the Federal Power Commission. How concrete the facts must be before adjudication is undertaken is often a question of personal judgment. The United States Supreme Court is not hospitable to attempts to invoke the original jurisdiction of the Court.

14. 295 U. S. 463 (1935). This case involved a litigation between the United States and West Virginia—three private corporations being added defendants—as to which had jurisdiction to issue power licenses on the New and Kanawha Rivers, West Virginia. That depended on whether they were navigable streams or not. The United States maintained that the dams built under license from the state were an obstruction, which it sought to enjoin. The aim was to compel the corporations to take out a Federal Power Commission license. The three corporations successfully moved to dismiss on the ground of lack of original jurisdiction over them in the United States Supreme Court and the state. Because the United States did not assert the invasion by this disputed licensing power of West Virginia of a federal "property right," the Court concluded it had no jurisdiction. In fact, the United States had also built dams on the Kanawha River. Because it involved "only" a dispute as to which authority had jurisdiction over the rivers—very acrimonious and pointed up by the three licenses actually issued—the Court thought the setting too vague for an adjudication, although it is not uncommon in lower courts for competing authorities to sue each other on the issue as to which had jurisdiction in a particular case. See *Curry v. McCanless*, 307 U. S. 357 (1939); BORCHARD, *op. cit. supra* note 3, at 901, 911, 914. Had *United States v. West Virginia* arisen where the navigability was either admitted by the demurrer or actually, though not theoretically, decided in the United States District Court, with proper citation of the affected power companies, it is quite possible that the Court would have perceived a justiciable controversy in the dispute between federal and state authority as to which of them had jurisdiction to issue power licenses on the rivers. Cf. Comment (1943) 56 HARV. L. REV. 800.

15. The difference in policy is indicated, on the one hand, by *Langer v. State*, 69 N. D. 129, 284 N. W. 238 (1939), on the other, by *Seiz v. Citizens Pure Ice Co.*, 207 Minn. 277, 290 N. W. 802 (1940). In the former, the State Budget Board obtained a judgment against numerous departments, boards and commissions of North Dakota declaring defendants' disputed statutory duties, the court clarifying the constitutional and legislative provisions bearing on the subject. The opinion, calling attention to the distinctions between advisory opinions and declaratory judgments, demonstrates that a contest between public officers as to their respective rights and duties or jurisdiction may with perfect propriety be regarded as justiciable if the court so desires, and that a state court ought not to withhold from the people on technical grounds such a stabilizing function. The Kentucky and Tennessee courts have recognized the social importance of this judicial service. See also the decisions of Canadian and Australian courts on federal powers in BORCHARD, *op. cit. supra* note 3, at 773. In the *Seiz* case in Minnesota an employee sued an employer for a declaration that an amendment, depriving the employee of the protection of unemployment insurance, was unconstitutional. Because plaintiff was not then unemployed, and because his claim was allegedly against a fund though actually to establish defendant's duty to continue payment into the fund, the suit was

For these reasons there was at one time some fear that the term "cases of actual controversy" would be so construed as to demand practically the equivalent of a threatened wrong and thus impair considerably the utility of the declaratory judgment. Experience has not justified the fear. While numerous courts are still suspicious of declaratory procedure, most courts have carried out the statutes' direction for a liberal construction and have given the words mentioned the connotation of a bill to remove clouds from legal relations generally or a bill *quia timet*, demanding from the defendant, not necessarily a pre-trial dispute of the plaintiff's legal position, but merely the status of a party having an interest potentially adverse to the plaintiff. This interest may be represented by a claim or record which disturbs the title, peace or freedom of the plaintiff, so that any claims, demands, challenges, records, or merely adverse interests which, by casting doubt, jeopardy, insecurity or uncertainty upon the plaintiff's rights or status, damage his pecuniary or material interests, establish a condition of justiciability.¹⁶ This disturbance or unsettlement sometimes requires a sensitive appreciation of what is jeopardy and insecurity and of the source from which such jeopardy and insecurity may emanate. On the formal side, all that the courts have asked are the flexible requirements of the English and Scotch law.¹⁷

"That the question must be real, and not theoretical; the person raising it must have a real interest, and there must be some one having a real interest in the question who may oppose the declaration sought."¹⁸

dismissed as a "difference of opinion," hypothetical, advisory, abstract, etc. This seems exceptionally narrow.

16. It had until recently been assumed that an indispensable condition of a "case" or "controversy" was the requisite legal interest in the plaintiff to obtain an adjudication. This conception is now slightly expanded in that the federal courts have sustained the power of Congress under various federal statutes to authorize some person or body having an economic but not necessarily a legal interest—a "person aggrieved or whose interests are adversely affected"—to intervene or prosecute an appeal from the determination of an administrative commission to the higher federal courts, acting in this respect as a sort of private Attorney-General to protect the public interest. See the analytical opinion of Frank, J., in *Associated Industries of New York State v. Harold Iches*, decided February 8, 1943 (C. C. A. 2d); *Scripps-Howard Radio, Inc. v. Federal Communications Commission*, 316 U. S. 4 (1942); *Federal Communications Commission v. Sanders Brothers Radio Station*, 309 U. S. 470 (1940). In *National Broadcasting Co. v. Federal Communications Commission*, 132 F. (2d) 545 (App. D. C. 1942), the words "person aggrieved or whose interests are adversely affected" were construed to cover private interests, not necessarily financially impaired but adversely affected through substantial electrical interference by the grant of a radio license to another station. That they may intervene as a matter of right was held on appeal, 63 Sup. Ct. 1035 (U. S. 1943), decided May 17, 1943. For public intervention in the public interest, see *Securities and Exchange Comm'n v. U. S. Realty Co.*, 310 U. S. 434 (1940).

17. See BORCHARD, *op. cit. supra* note 3, at 160; *Russian Commercial & Industrial Bank v. British Bank for Foreign Trade*, [1921] 2 A. C. 438.

18. See *Miller v. Miller*, 149 Tenn. 463, 487, 261 S. W. 965, 972 (1924).

In fact, where the action is designed to dissipate the uncertainty or assure the validity of the plaintiff owner's or lessor's title, the defendant purchaser or lessee may have only a potential but not an actual adverse interest;¹⁹ yet the appearance of adversity in litigation and presentation of opposing views suffices to establish justiciability. Even a default judgment should be granted if the court is convinced that it has all the facts and that the adjudication will serve a useful purpose. Section 6 of the Uniform Declaratory Judgments Act provides that the decision must "terminate the uncertainty *or* controversy" giving rise to the proceedings.

While not all courts have been equally receptive or hospitable to the social advantages of preventive justice afforded by the declaratory procedure,²⁰ few courts in fact have limited the utility of the statute by construing narrowly the phrase "in cases of actual controversy." It has been done on a few occasions,²¹ and there is always the danger that the full potentialities of the Act will be impaired by limitations judicially injected into the phrase. There is always the danger that in actions begun by the party charged the court will demand from the defendant more than a potentially antagonistic position or interest, insisting an actual threat, as if injunction were sought.²² This danger is most noticeable in a chal-

19. See *In re Kariher's Petition*, 284 Pa. 455, 131 Atl. 265 (1925).

20. Some, like Maryland and Pennsylvania, misconstrue the Act as if it provided an exclusive remedy only, not to be used in the alternative where another remedy could have been brought. See BORCHARD, *op. cit. supra* note 3, at 318 *et seq.*

21. The impropriety of a demand that "controversy" precede the litigation and that potential adversity of interest is not sufficient to create justiciability is indicated by *Di Fabio v. Southard*, 106 N. J. Eq. 157, 150 Atl. 248 (1930); *Wardrop Co. v. Fairfield Gardens*, 237 App. Div. 605, 262 N. Y. Supp. 95 (1st Dep't 1933); and, in part, *Lyman v. Lyman*, 293 Pa. 490, 143 Atl. 200 (1928), discussed by John A. Schroth, Jr., in (1935) 20 CORN. L. Q. 1, 21-25. Most of the cases have not construed "actual controversy" in this narrow sense. In actions to remove clouds from title and now from legal relations more generally, courts have conceded that the potential controversy is, after litigation commences, an actual controversy if the party in peril or insecurity cites a defendant having adverse interests for a declaration of the invalidity of the cloud. See *Fidelity National Bank & Trust Co. v. Swope*, 274 U. S. 123, 131 (1927). Bond validation statutes and decisions are a familiar example. See BORCHARD, *op. cit. supra* note 3, at 145-47. Justice Stone supplied a useful test in the *Swope* case—and Chief Justice Hughes in the *Haworth* case—by concluding that since it would undoubtedly be a case or controversy if the defendant had sued for a declaration or injunction, "they cannot be deemed any the less so because through a modified procedure the parties are reversed and the same issues are raised and finally determined at the behest of the city." In this statement the Court would doubtless support the initiative of any party in peril or insecurity who might have been made a defendant in a reverse action. The controversy at the trial is usually clear and is more than an adequate compliance with the conditions of justiciability.

22. That the United States Supreme Court has advanced beyond this point is indicated in the *Swope* and *Haworth* cases, *supra*. Even in some of the constitutional challenges to the enforcement of statutes a "threat" is little more than constructive and not really present. See *Beal v. Missouri Pacific R. R.*, 312 U. S. 45 (1941); *Currin v. Wallace*, 19 F. Supp. 211 (E. D. N. C. 1937), 95 F. (2d) 856 (C. C. A. 4th, 1938), 306 U. S. 1 (1939). See also *Asbury Hospital v. Cass County*, 7 N. W. (2d) 438 (N. D. 1943).

lence to the constitutionality or construction of statutes, particularly statutes or ordinances carrying a penalty, where the law has by loose interpretation gotten into a position no longer responsive to private and public needs.

CHALLENGING STATUTES

Section 2 of the Uniform Declaratory Judgments Act provides that "any person . . . whose rights, status or other legal relations are affected by a statute, municipal ordinance . . . may have determined any question of construction or validity arising under the . . . statute, ordinance . . . and obtain a declaration of rights, status, or other legal relations thereunder."²³

In English-speaking jurisdictions, Acts of Parliament and local laws, ever since Sir George Turner's Act of 1850, have been the subject of declaratory construction and interpretation.²⁴ Section 3 of the New Zealand Declaratory Judgments Act expressly provides what is implied in other jurisdictions:

"Where any person has done or desires to do any act the validity, legality, or effect of which depends on the construction or validity of any statute, or any regulation made by the Governor-General in Council under statutory authority, or any by-law made by a local authority . . . such person may apply to the Supreme Court by originating summons . . . for a declaratory order determining any question as to the construction or validity of such statute, regulation, by-law . . . or of any part thereof."²⁵

As stated in *Harcourt v. Attorney-General*:

"The Declaratory Judgments Act . . . is a statute which authorizes His Majesty's subjects to ascertain by an authoritative pronouncement the precise meaning of the law they are called upon to obey."²⁶

That the United States Supreme Court is not oblivious to the social advantage of adjudication *before* violation is indicated by the remark of Justice Butler in *Terrace v. Thompson*:

23. Section 11 of the Uniform Act provides that in any such proceeding where the statute or ordinance is alleged to be unconstitutional, the Attorney-General of the state shall also be served with a copy of the proceedings and be entitled to be heard. This anticipated the provisions of the Federal Act of 1937 as to federal statutes.

24. See BORCHARD, *op. cit. supra* note 3, at 764.

25. *Id.* at 1050. The act or proposed act to be passed upon must be in actual contemplation, not hypothetical. See *Parapara Iron-Ore Co. v. Barnett*, [1913] N. Z. 1112. The usual conditions of justiciability must be present. See cases cited *supra* note 12.

26. [1923] N. Z. 686 at 690.

"They are not obliged to take the risk of prosecution, fines and imprisonment and loss of property in order to secure an adjudication of their rights."²⁷

In the twentieth century, with its kaleidoscopic changes and the resulting necessity of new legislation and regulation to maintain the social equilibrium, much of it carrying a criminal penalty, there has been a special need for a speedy determination of the constitutionality and construction of legislation and regulations imposing burdens on the individual. Some of these relate to public duties required of all or of a class of citizens; others relate to individual burdens. To make it, as our courts generally do in these cases,²⁸ a condition of justiciability, that the affected group or individual await a *threat* of the District Attorney or the Attorney-General to *enforce* the statute or regulation before challenging the legality or applicability of the statutory burden, overlooks the fact that the injury is done, in most cases, by the *enactment* of the damaging statute or regulation, long before or even quite without any "threat" of enforcement by an official. Justiciability or the right to initiate an action—in British jurisdictions by "originating summons"—is created by the jeopardy or restriction placed by the statute upon the plaintiff's freedom of action. The statute or regulation now constitutes the cloud which plaintiff has the right to challenge and, if successful, to remove.

In spite of the circuitry of the rationalization in *Ex parte Young*,²⁹ it matters or should matter not in the slightest what the District Attorney thinks about the statute—whether he likes it or not, whether he intends to enforce it or not, whether he threatens or not. The fear, jeopardy, danger and insecurity are created by the statute, not by the District Attorney. A statute is supposed to be enforced by the enforcing officer; if he fails to do so, he is derelict in his duty. If he is summoned as a defendant by a complaining petitioner, it may be assumed that he will defend the statute or assign the defense to some officer who will support it. It is not

27. 263 U. S. 197, 216 (1923). This was an injunction restraining enforcement against plaintiff, proposing to enter upon a lease of land to a Japanese, of a Washington state prohibition under penalty to transfer agricultural land to a person ineligible for citizenship. See also *Dill v. Hamilton*, 137 Neb. 723, 726, 291 N. W. 62, 64 (1940) (claimed privilege to conduct Spiritualist seances as not constituting a public exhibition for gain): "Plaintiffs, seeking a declaratory judgment, are not required in advance to violate a penal statute as a condition of having it construed or its validity determined." Cf. *Sage-Allen Co., Inc. v. Wheeler*, 119 Conn. 667, 673, 179 Atl. 195, 197 (1935): "Certainly these plaintiffs may justly claim that the court should declare whether or not the regulation is valid that they may, without actually violating it, be authoritatively apprised of their rights."

28. *Tileston v. Ullman*, 63 Sup. Ct. 493 (U. S. 1943); *Watson v. Buck*, 313 U. S. 387 (1941); *Ex parte La Prade*, 289 U. S. 444 (1933); *Liberty Warehouse Co. v. Grannis*, 273 U. S. 70 (1927); *Ex parte Young*, 209 U. S. 123 (1908).

29. 209 U. S. 123 (1908).

his function to review the conclusion of the legislature and the Governor as to the constitutionality of the statute. The injured or jeopardized citizen should not be obliged to wait upon the whims of a District Attorney until he makes up his mind and announces his determination as to whether or not he will enforce the law. Yet the United States Supreme Court may be forcing this conclusion upon the country and frustrating preventive relief both by raising high the barriers to injunction and by insisting on a personal threat of the Attorney-General.³⁰

The assumption made in *Ex parte La Prade*³¹ that since, under the *Ex parte Young* doctrine, the suit is brought against the defendant not as an Attorney-General but as an individual, he, and his successor, must, before suit is justified, make up his mind whether the statute is constitutional and whether he will enforce it, seems utterly unsustainable. The mistakes of *Ex parte Young* should be extinguished, not perpetuated. Law enforcement may by dereliction or hesitation become lax, with resulting responsibility to the government and the people as a whole; but the injured or jeopardized citizen should not be obliged to change his mode of life or livelihood in fear of criminal prosecution without opportunity to challenge the damaging statute until the District Attorney chooses to "threaten" him with enforcement.

The awkwardness of the requirement that the Attorney-General must "threaten" is illustrated by the recent case of *Southern Pacific Company v. Conway*.³² There the company had challenged in a federal court the constitutionality of an Arizona Train Limit statute, much like that in the *La Prade* case,³³ which limited freight trains to ninety cars and passenger trains to fourteen. Conformity with the statute required an expenditure of at least \$300,000 a year. The penalty for non-conformity would have cost the railroad cumulative penalties of \$1,600 to \$37,000 per day, depending on the density of traffic. Since the Attorney-General was given the mandatory duty to enforce the statute, he was made the defendant. He informed the court, however, that there had been as yet no violation, that he did not know whether he would enforce the law or not, and that he had made no threat of enforcement. In spite of the mandatory wording of the statute, he insisted that since he had not determined upon its constitutionality he was under no duty to enforce it. The lower court, affirmed by the circuit court of appeals, dismissed the suit, although the

30. See *Watson v. Buck*, 313 U. S. 387 (1941). Black, J., went even further in demanding that the threat relate to the particular provision of the statute under challenge. What was said concerning the power of equity to enjoin enforcement of a "criminal" statute, confining it to "exceptional circumstances" and where "the danger of irreparable loss is both great and immediate" must be read in the light of the fact that a federal injunction against a state statute was sought.

31. 289 U. S. 444 (1933).

32. 115 F. (2d) 746 (C. C. A. 9th, 1940).

33. 289 U. S. 444 (1933).

Attorney-General after the first judgment actually prosecuted the Southern Pacific under the law in two state cases. While the circuit court of appeals conceded that justiciability was thereupon created, amendment to the complaint or a remand to the district court was not allowed, but instead a dismissal ordered, requiring a new action. The court relied upon *Ex parte La Prade*, which considered the issue as personal to the Attorney-General, and therefore demanded a personal threat.³⁴

Yet, in *Beal v. Missouri Pacific Railroad*,³⁵ in which a federal injunction was sought to prevent state criminal prosecution of the railroad's alleged violation of the Nebraska Full Train Crew law, the Attorney-General had merely stated that if he thought it "necessary and proper to do so" he would cause a single test suit to be instituted in the state courts for one alleged violation. Justiciability was not questioned, but the federal court declined to exercise its equitable power unless the prospective damage to the railroad was irreparable—which was not shown, though alleged. It was not a lack of justiciability nor even an unwillingness to enjoin a criminal prosecution, but the undesirability, except in extreme cases, of a federal injunction against the exercise of state jurisdiction which motivated the policy.³⁶ Only by a similarly reasoned self-restraint could the *Conway* decision have been justified,³⁷ although the obligations and the penalties in the Arizona case were so heavy and cumulative, even before judgment, that the injury might well have been considered irreparable.

POLICE POWER STATUTES AND JUSTICIABILITY

We do not now address ourselves to statutes or ordinances providing an amendment, revision or reorganization of governmental or public powers or duties. Such statutes have frequently been placed in issue by the enacting and challenged public authority itself, by the Attorney-General,

34. See Note (1941) 50 YALE L. J. 1278, 1280. The current Supreme Court seems to insist on a personal threat as indispensable to justiciability. See *Watson v. Buck*, 313 U. S. 387 (1941). But in that case they permitted the substitution of two successor Attorneys-General on motion, saying nothing about *Ex parte La Prade*.

35. 312 U. S. 45 (1941).

36. The same indisposition to permit federal injunctions against the enforcement of state statutes is manifested in *Marsh v. Buck*, 313 U. S. 406, 136 A. L. R. 1426, 1438 (1941); *Watson v. Buck*, 313 U. S. 387 (1941). See also *Injunctions* in 28 AM. JUR. (1940) § 237.

37. In *Socony-Vacuum Oil Co. v. City of New York*, 247 App. Div. 163, 168, 287 N. Y. Supp. 288, 294 (1st Dep't 1936), the court stated: "The mere continued existence of Article 88 under the color of right and authority constitutes a continuing threat to collect, exact and enforce the tax." Cf. *Chester T. Fosgate Co. v. Kirkland*, 19 F. Supp. 152 (S. D. Fla. 1937); *Crockett County v. Walters*, 170 Tenn. 337, 95 S.W. (2d) 305 (1936); *Acme Finance Co. v. Huse*, 192 Wash. 96, 73 P. (2d) 341 (1937). See also *Euclid v. Ambler Realty Co.*, 272 U. S. 365 (1926); *Pierce v. Society of Sisters*, 268 U. S. 510 (1925).

by an officer affected by the act, by a governmental unit challenging a redistribution of public powers or burdens, by a private corporation or individual deleteriously affected, and on occasion by a taxpayer whose interest is either proved or assumed.³⁸

We are here concerned with statutes under the police power addressed to or aimed at a particular class of individuals or corporations engaged in a specific business or to a group in which the plaintiff is ostensibly or actually included. The statute, therefore, directly impinges upon the plaintiff's freedom of action, requiring him under penalty to change his business practices or restricting him from doing what he claims a constitutional privilege to do without restraint. Where the statute merely authorizes an administrative body or commission to select the subject of its inhibitions, the affected individual may before challenge have to await administrative action, depending upon the nature of the statute. The result is the same. Such statutes may:

(1) strike very directly at the affected plaintiff, *e.g.*, where dentists are prohibited from advertising and plaintiff is a disgruntled dentist challenging the restriction;³⁹

(2) strike more indirectly, by drawing the circle of prohibition so widely as to include plaintiffs who ought or claim they ought on constitutional grounds to have been excluded; (Examples of this kind are statutes, ordinances or regulations prohibiting the giving of all contraceptive advice, and making no exception for physicians advising married women whose lives are in danger;⁴⁰ prohibiting all sales of stock on margin, even in furtherance of non-gambling, valid business transactions;⁴¹ requiring all tin containers to be stamped, and making no exception for cans already packed;⁴² prohibiting zoning ordinances and allowing for no exceptions in cases of special hardship.)⁴³

38. See BORCHARD, *op. cit. supra* note 3, at 877 *et seq.*

39. See *Semler v. Oregon State Board of Dental Examiners*, 148 Ore. 50, 34 P. (2d) 311 (1934), *aff'd*, 294 U. S. 608 (1935) (dentists); *Sage-Allen Co. v. Wheeler*, 119 Conn. 667, 179 Atl. 195 (1935) (optometrists; state board); *Shelton v. City of Shelton*, 111 Conn. 433, 150 Atl. 811 (1930) (milk dealers); *Howard Co. v. New Jersey State Board of Optometrists*, 29 A. (2d) 742 (N. J. Eq. 1943) (advertising; injunction granted against revoking license for noncompliance); *Erwin Billiard Parlor v. Buckner*, 156 Tenn. 278, 300 S. W. 565 (1927) (pool rooms restricted in one county only).

40. See *Tileston v. Ullman*, 63 Sup. Ct. 493 (U. S. 1943). *Cf.* *Jacobson v. Massachusetts*, 197 U. S. 11 (1905). See Comment on *Tileston* decision in (1943) 16 SO. CALIF. L. REV. 224. See also *Martin v. City of Struthers*, 63 Sup. Ct. 862, 867 (U. S. 1943) (prohibiting ringing of door bells and summoning inmates, but making no exception for distribution of religious literature). See also *Murdock v. Pennsylvania*, 63 Sup. Ct. 870, 872 (U. S. 1943) (prohibiting canvassing and soliciting without a license, but making no exception for religious literature).

41. See *Otis v. Parker*, 187 U. S. 606 (1903).

42. See *Polk Co. v. Glover, County Solicitor*, 305 U. S. 5 (1938).

43. See *Nectow v. City of Cambridge*, 277 U. S. 183 (1928).

(3) draw the circle of statutory or administrative prohibition so small that it constitutes discrimination against a special class of individuals, each of whom may complain; (An ordinance closing laundries during certain hours applied only to Chinese laundries⁴⁴, and restrictions as to hours of labor in certain industries only, where it is claimed there is no basis for the classification⁴⁵, belong in this category.)

(4) purport to cure an evil, which is conceded, but the challenge is directed to the appropriateness of the statutory cure, as in sterilization statutes⁴⁶ and other deprivations of civil liberties;⁴⁷ (Such statutes cannot be challenged until there is an attempted enforcement against a particular victim.)

(5) prohibit or require a specific practice and the affected plaintiff claims that the requirement is unconstitutional;⁴⁸ [This case is somewhat analogous to those described under (1).]

(6) prohibit a general practice, but as a matter of statutory construction the affected plaintiff claims that his special practice does not fall within the general terms or that it is privileged; (Thus the validity or invalidity of the practice as a matter of statutory construction is placed in issue.)⁴⁹

These constitute some of the principal types of police power regulations which an affected victim may challenge. We shall now see how it came

44. See *Yick Wo v. Hopkins*, 118 U. S. 356 (1886). *Cf.* *Cox v. New Hampshire*, 312 U. S. 569 (1941); *Douglas v. Noble*, 261 U. S. 165 (1923).

45. See *Radice v. New York*, 264 U. S. 292 (1924). *Cf.* *Tigner v. Texas*, 310 U. S. 141 (1940) (exempting agricultural producers from anti-trust law).

46. See *Skinner v. Oklahoma ex rel. Williamson, Attorney-General*, 316 U. S. 535 (1942); *Buck v. Bell*, 274 U. S. 200 (1927); (1942) 51 *YALE L. J.* 1380.

47. See *Osborn v. Ozlin*, 310 U. S. 53 (1940); *Louis K. Liggett Co. v. Baldridge*, 278 U. S. 105 (1928); *cf.* *Thornhill v. Alabama*, 310 U. S. 88 (1940), and cases cited at 98; *Miller v. Schoene*, 276 U. S. 272 (1928).

48. See *Minersville School District v. Gobitis*, 310 U. S. 586 (1940), overruled in *West Virginia State Board of Education v. Barnette*, 11 U. S. L. WEEK 4472 (U. S. 1943) (flag salute); *Currin v. Wallace*, 306 U. S. 1, 9 (1939) (tobacco auctioning regulations); *Grosjean v. American Press Co.*, 297 U. S. 233 (1936) (circulation tax); *Hamilton v. Regents of the University of California*, 293 U. S. 245 (1934) (military training); *State of New York ex rel. Bryant v. Zimmerman*, 278 U. S. 63 (1928) (publicity to secret societies); *Meyer v. State of Nebraska*, 262 U. S. 390 (1923) (teaching foreign languages in private schools prohibited).

49. See *Dep't of State v. Kroger Grocery & Baking Co.*, 46 N. E. (2d) 237 (Ind. 1943) (that plaintiff's vitamin tablets are not "drugs" but "foods"); *State ex rel. Public Service Comm. v. Blair*, 140 S. W. (2d) 865 (Mo. 1941) (that plaintiffs, as contract carriers, were exempt from the jurisdiction of the Commission); *Chung Mee Restaurant Co. v. Healy*, 86 N. H. 483, 171 Atl. 263 (1934) (that plaintiff's method of conducting a dance floor without license was lawful within meaning of statute); *Multnomah County Fair Ass'n v. Langley*, 140 Ore. 172, 13 P. (2d) 354 (1932) (that plaintiff's method of conducting horse races was lawful under the statute); *Richmond Ass'n of Credit Men v. Bar Ass'n of City of Richmond*, 167 Va. 327, 189 S. E. 153 (1937) (that plaintiff's system of collecting accounts was legitimate and not practicing law contrary to statute).

about that a threat to enforce the regulation, rather than the enactment of it, is required as a condition of justiciability.

THE ASSUMED REQUIREMENT OF OFFICIAL "THREAT"

Our law has worked itself through several stages into the awkward and false position of requiring a preliminary personal "threat" as a condition of justiciability. It has done this:

(1) by assuming that injunction was the only vehicle of preventive relief, and then abusing the injunction to grant a declaration, to the confusion of both;

(2) by considering a personal threat the only condition of an injunction, whereas threat is only one species of the genus "jeopardy";

(3) by rationalizing, in *Ex parte Young*, an involved and untenable reconciliation between a suit against the state under the Eleventh Amendment and a suit—if the statute is ultimately found unconstitutional—against a supposedly tort-feasing Attorney-General, stripped of his official protection, under the Fourteenth;

(4) by creating the requirement, in *Ex parte La Prade*, that when the Attorney-General retires for any reason, his successor must personally renew the original threat in order to permit a suit to continue—a deplorable rule perpetuated in Federal Rule 25 (d);

(5) by considering every police power statute or regulation sanctioned by a penalty as a "criminal" statute and by failing to distinguish in matters of construction between *malum in se* and *malum prohibitum*;

(6) by granting or refusing, haphazardly, without clear criteria (a) injunctions against enforcement of "criminal" statutes or (b) declarations of their constitutionality or construction.

INJUNCTION AS A VEHICLE OF ADJUDICATION

It is commonly assumed that short of a criminal prosecution by public authority⁵⁰ the affected individual's only method of testing the constitutionality or construction of a statute is by writ of injunction to prevent enforcement. The utmost confusion prevails in the application of accepted conceptual standards because of traditionally rigid views as to what is a "criminal" statute or regulation, as to when equity may or should anticipate or impede the enforcement of the "criminal" law, and as to whether the conditions of an injunction, imminent and irreparable injury and inadequacy of legal remedy, are indispensable conditions or merely dispensable slogans designed to afford plaintiff a vehicle for adjudication. The effort to do justice in particular cases has produced frequent relaxation

50. The Government may also be authorized by special statute to proceed by injunction to restrain the private offense or to sue for civil penalties. Cf. Federal Trade Commission Act, 38 STAT. 717 (1914), 15 U. S. C. §41 (1940), and Wheeler-Lea Amendments of 1938, 52 STAT. 111 (1938), 15 U. S. C. §41 (1940).

in the application of these maxims, so that the construction of most of their elements has been qualified and therefore left uncertain. The Supreme Court on several occasions has made the statement that "equity jurisdiction may be invoked when it is essential to the protection of the rights asserted, even though the complainant seeks to enjoin the bringing of criminal actions."⁵¹ In later cases, however, the Court has insisted not only on allegations of unconstitutionality but also on "exceptional circumstances," "great and immediate danger of irreparable loss,"⁵² which, strictly construed, could bar an injunction in many cases and compel a criminal prosecution as the only vehicle of adjudication. This position must be justified on the balancing of interests in particular cases—the importance of the private need for the precise construction of the statutory requirement against the importance of the public interest in a criminal prosecution, functionally speaking.

Similar considerations have induced a willingness to observe a vague distinction between statutes which directly impose under penalty an obligation or prohibition and statutes which merely authorize an administrative commission to make or enforce regulations with penal sanctions by denominating the latter as "quasi-criminal" statutes⁵³ and thereby opening the equitable channel, by injunction or declaratory action, to their construction and interpretation. Even as to general statutes carrying a penalty, the courts have invented a number of exceptions to the maxim of equitable impotence to enjoin criminal prosecutions by invoking, on a charge of unconstitutionality, the concept of immediately impending irreparable injury to property⁵⁴ or the person,⁵⁵ the danger of a multi-

51. See *Shields v. Utah Idaho Central R. R.*, 305 U. S. 177, at 183 (1938); *Utah Fuel Co. v. National Bituminous Coal Commission*, 306 U. S. 56, 59 (1939); *Terrace v. Thompson*, 263 U. S. 197, 214 (1923); *Truax v. Raich*, 239 U. S. 33, 37, 38 (1915); *Philadelphia Co. v. Stimson*, 223 U. S. 605, 621 (1912).

52. *Watson v. Buck*, 313 U. S. 387 (1941). Opinion by Black, J., who had dissented in *Gibbs v. Buck*, 307 U. S. 66, at 79 (1939), and in effect induced a change in the policy of the Court which may greatly limit the power to challenge by injunction in the federal courts perhaps any statute, but particularly a state statute. The statute was a Florida Act prohibiting combinations in restraint of trade. That may have been a subconscious operative factor. But the court has shown little awareness in this respect of any difference among types of statutes carrying a criminal penalty. See the cases cited in *Douglas v. City of Jeannette*, 63 Sup. Ct. 877, 881, decided May 3, 1943, where there occurs the remark: "The lawfulness or constitutionality of the statute . . . may be determined as readily in the [pending state] criminal case as in a [federal] suit for an injunction." Since the Court found the bill to be without equity, injunction was properly denied, but it would be unfortunate to convey the impression that the Court prefers a criminal over a civil proceeding in a matter involving merely constitutionality or statutory construction. This close limitation on injunctions seems bound to influence state courts. •

53. See Note (1943) 43 COL. L. REV. 213.

54. See *Salny, Equity Jurisdiction to Enjoin Statutory Enforcement* (1939) 8 MASS. L. SOC. J. 398; (1933) 27 ILL. L. REV. 560; (1935) 13 NEB. L. BULL. 406; (1940) 28 AM. JUR. § 233 *et seq.*

55. See *Terrace v. Thompson*, 263 U. S. 197 (1923); *American Steel & Wire Co. v. Davis*, 261 Fed. 800 (D. Ohio 1919); *Long, Equitable Jurisdiction to Protect Personal*

plicity of vexatious prosecutions⁵⁶ or the cumulation of severe penalties.⁵⁷ In the determination of the circumstances under which these conditions prevail, and as to what actually is "irreparable injury,"⁵⁸ the courts have a wide latitude, so that the injunction process may almost be said to be subjectively discretionary, albeit subject to a few rules. Where police action or a criminal proceeding is pending or in the offing, where the offense involves moral turpitude or criminal intent, where the accused seems plausibly guilty, where the issue of constitutionality or construction turns not on questions of law or simple facts but on complicated or seriously disputed questions of fact, a court may and generally does refrain from exerting its equitable jurisdiction and considers a criminal trial preferable.⁵⁹ A balance of considerations necessarily dictates the preference.

The suggestion that the opportunity of becoming a defendant in a criminal trial is an adequate remedy at law and thus a bar to a bill of injunction is either not advanced at all or, where it is advanced, seems discreditable to the court.⁶⁰ The liability to be tried as a criminal is no "remedy" but a hazard, which the law should help the much regimented citizen to avoid by construing and interpreting inhibitory statutes in a civil proceeding where possible.⁶¹ Evidence of this fact may be observed

Rights (1923) 33 YALE L. J. 115; Chafee, *The Progress of the Law, 1919-1920* (1921) 34 HARV. L. REV. 388, 407.

56. See *Mobile v. Orr*, 181 Ala. 308, 61 So. 920 (1913); *Foley v. Ham*, 102 Kan. 66, 169 Pac. 183 (1917); (1924) 34 YALE L. J. 204.

57. See *Ex parte Young*, 209 U. S. 123 (1908). Cf. Comment (1928) 26 MICH. L. REV. 415. See also *Derby Oil Co. v. City of Oxford*, 134 Kan. 59, 4 P. (2d) 435 (1931), noted in (1932) 45 HARV. L. REV. 741 (estoppel).

58. See Comment (1936) 46 YALE L. J. 255. In the following cases the United States Supreme Court declined to pass on the constitutionality of legislation on petition for injunction on the ground that irreparable injury was not shown: *Douglas v. City of Jeannette*, 63 Sup. Ct. 877 (U. S. 1943) (license tax on distribution of religious literature); *Watson v. Buck*, 313 U. S. 387 (1941) (copyright combination); *Beal v. Missouri Pacific R. R.*, 312 U. S. 45 (1941) (Full Train Crew Law plus federal self-restraint against injunction of state proceeding); *Premier-Pabst Sales Co. v. Grosscup*, 298 U. S. 226 (1936) (liquor license law); *Moor v. Texas & New Orleans R. R.*, 297 U. S. 101 (1936) (Cotton Control Act); *Spielman Motor Sales Co. v. Dodge*, 295 U. S. 89 (1935) (National Industrial Recovery Act).

59. See cases cited *supra* notes 52 and 54, and in Comment (1937) 46 YALE L. J. 855.

60. See *Bookbinder's Trade Ass'n v. Book Manufacturers Institute*, 7 F. Supp. 847 (S. D. N. Y. 1934), (1935) 3 GEO. WASH. L. REV. 248; *Royal Farms Dairy v. Wallace*, 7 F. Supp. 560 (D. Md. 1934); *Shredded Wheat Co. v. City of Elgin*, 284 Ill. 389, 120 N. E. 248 (1918), criticized in BORCHARD, *op. cit. supra* note 3, at 967; *Stewart v. Her-ten*, 125 Neb. 210, 249 N. W. 552 (1933), an unsound decision.

61. See remarks of Desmond, J., in *New York Foreign Trade Zone Operators v. State Liquor Authority*, 285 N. Y. 272, 34 N. E. (2d) 316 (1941). Cf., however, with great respect to the distinguished writing justice, the rather callous position of the Supreme Court with that of the English Court of Appeal. *Supreme Court*: "No citizen or member of the community is immune from prosecution, in good faith, for his alleged

in those cases which regard the impending commencement of a suit by the Attorney-General as a sufficient ground for the issuance of an injunction, where there is an allegation, plausibly supported, that the governing statute or regulation is unconstitutional.⁶²

The fact should not be overlooked that the sanctions of the criminal law are not the only ones available to an administration in enforcing police power statutes and regulations. Administrative tribunals, civil proceedings for injunction, forfeiture or penalty, juvenile courts, licensing authorities play an increasing role in supplanting or supplementing the crude sanctions of the criminal law.⁶³ Against these, with their narrower halo of judicial sanctity, there is much less disposition to refuse injunction or declaration, the statute or regulation when entrusted to their administration being often characterized as "quasi-criminal."

The cases indicate that injunctions have often been granted where there was no evidence of irreparable injury, inadequacy of legal remedy or emergency warranting the use of so drastic a remedy as peremptory injunction. In *Terrace v. Thompson*,⁶⁴ *Pennsylvania v. West Virginia*,⁶⁵ *Pierce v. Society of Sisters*,⁶⁶ *Village of Euclid v. Ambler Realty Co.*,⁶⁷ and numerous other police power cases, none of the conditions warranting the grant of injunction were present, yet that seemed to the Court the only available vehicle of adjudication. This was really an abuse

criminal acts. The imminence of such a prosecution, even though alleged to be unauthorized and hence unlawful is not alone ground for relief in equity which exerts its extraordinary powers only to prevent irreparable injury to the plaintiff who seeks its aid," *Beal v. Missouri Pacific R. R.*, 312 U. S. 45, 49 (1941), quoted in *Watson v. Buck*, 313 U. S. 387, 400 (1941). The defendant of course was a corporation. Said the *English Court of Appeal* in a leading opinion in a declaratory judgment action: "It would be a blot on our system of law and procedure if there is no way by which a decision on the true limit of the power of inquisition vested in the Commissioners can be obtained by any member of the public aggrieved, without putting himself in the invidious position of being sued for a penalty." Farwell, J., in *Dyson v. Attorney-General*, [1911] 1 K. B. 410, 421 (C. A.). See BORCHARD, *op. cit. supra* note 3, at 968.

62. See *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 392 (1894); *Smyth v. Ames*, 169 U. S. 466 (1898). Day, J., in *Dobbins v. Los Angeles*, 195 U. S. 223, 241 (1904), said: "It is well settled that where property rights will be destroyed unlawful interference by criminal proceedings under a void law or ordinance may be reached and controlled by a decree of a court of equity." The recent harsher remarks concerning the refusal to enjoin a criminal prosecution have been made in cases where a federal injunction against state proceedings under an allegedly unconstitutional statute was sought. Cf. *Beal* and *Watson* cases, *supra* notes 30, 52, 61.

63. Cf. Warner and Cabot, *Changes in the Administration of Criminal Justice During the Past Fifty Years* (1937) 50 HARV. L. REV. 583, 609 *et seq.*

64. 263 U. S. 197 (1923).

65. 262 U. S. 553 (1923).

66. 268 U. S. 510 (1925).

67. 272 U. S. 365 (1926). See *Miller v. Standard Nut Margarine Co.*, 284 U. S. 498 (1932), where tax collection was enjoined, thus limiting a statute in order to make a declaration on validity; cf. Comment (1932) 45 HARV. L. REV. 1221.

of the injunction in order to grant a declaration of rights, which should have been sought and granted—at least now—*co nomine* without circumlocution.

This expansive use of the injunction beyond the proper limits of that procedure has had two results, apart from confusing the law of remedies. It has caught numerous plaintiffs in the tangled maze of procedure relating to injunction, whereas all they desired was a ruling on the substantive merits;⁶⁸ and it has produced a concerted attack on the alleged abuse of the injunction, reflected in a flood of anti-injunction statutes and bills in labor and other specific types of cases.⁶⁹ The better practice is to ask in the prayer for relief for both a declaration of rights and an injunction, since the denial of the injunction instead of dismissing the action or denying relief may nevertheless result in a declaration of rights, all that the petitioner in most cases really needs.⁷⁰ In a recent Tennessee case, the owners of a pool room in Memphis sought, on the ground of unfair and unconstitutional discrimination against pool rooms in a single county, to

68. See *Hurley v. Kincaid*, 285 U. S. 95 (1932), in which the petitioner by injunction against federal flood control officers sought to determine that the overflow of land constituted a "taking" of his land entitling him to compensation. The case was in the federal courts five times on the issue whether he was entitled to an injunction. On the last occasion the Supreme Court denied the injunction, still without passing on the substantive issue raised. A declaration was all the petitioner really needed. See discussion in BORCHARD, *op. cit. supra* note 3, at 434.

69. The Johnson Acts of 1934, 48 STAT. 775 (1934), 28 U. S. C. §41(1) (1940), and 1937, 50 STAT. 752 (1937), 28 U. S. C. §380a (1940), denying federal courts the power to issue injunctions against state rates and taxes under certain circumstances are probably designed to prevent federal adjudication and not merely injunction. The Supreme Court followed the Johnson Act principle and its own reluctance to interfere with state jurisdiction in declining to issue a federal declaratory judgment holding invalid the collection by Louisiana officials of certain unemployment insurance taxes alleged to be unwarranted. *Great Lakes Dredge & Dock Co. v. Huffman, Administrator*, 63 Sup. Ct. 1070, decided May 24, 1943. See BORCHARD, *op. cit. supra* note 3, at 367. That the Court's policy of withholding its equity jurisdiction to restrain the enforcement of state laws (Illustrations by Black, J., in *Burford v. Sun Oil Co.*, 63 Sup. Ct. 1098 at 1107, note, decided May 24, 1943) has gradually led to the practical abrogation of the diversity jurisdiction in these cases is evidenced by the majority (5) and minority (4) opinions in *Burford et al. v. Sun Oil Co.*, *supra*. Even though Justice Douglas in a concurring opinion (with Murphy, J.) rejects the imputation of the minority (by Frankfurter, J.) that "the enforcement of state rights created by state legislation and affecting state policies is limited to the state courts," the margin of permissible federal jurisdiction must now be pretty narrow. If the Supreme Court continues to show such deference to state adjudication and to withhold federal jurisdiction, as evidenced in the *Bcal* and *Watson* cases, they will make it exceedingly difficult ever to obtain an injunction in the federal courts against the enforcement of state statutes, will make section 266 of the Judicial Code of minor importance, and will render the Fourteenth Amendment involuntarily primarily only after the exhaustion of proceedings in the state courts.

70. See the list of cases in BORCHARD, *op. cit. supra* note 3, at 436, where this practice was followed.

have declared unconstitutional and to enjoin the enforcement of a statute which under penalty required them to restrict their business.⁷¹ While the court refused on traditional grounds to enjoin the prosecution of a criminal offense, they nevertheless issued a declaration of unconstitutionality, which settled the case. In reality, courts that are aware of the utility of a declaratory judgment do not need the aid of a specific prayer for declaratory relief but may on their own motion, if for any reason they find an injunction not appropriate, issue instead a declaration of rights, which usually serves fully the purpose of the litigants.⁷²

PERSONAL THREAT AS A CONDITION OF INJUNCTION AND JUSTICIABILITY

Since the United States Supreme Court, correspondingly influencing inferior courts, has fallen into the baleful but sporadic habit of regarding a police power statute not as a regulatory restriction upon the plaintiff's freedom of action but as a mere occasion, if invalid, for a "personal tort" by the Attorney-General, the courts have centered their attention not on the compulsive effects and implications of the statute but on the wrongful "threat" of the Attorney-General or other enforcing officer. This demand for proof of "threat" has become something of a fetish. Unless an appropriate official "threatened" to enforce a statute against the plaintiffs, they were presumably legally unaffected by the statute although gravely jeopardized economically or socially.

There are six objections which may appropriately be directed against this unsound view:

(a) It rests on a premise contrary to fact, since petitioners are placed in jeopardy by a *statute* or *ordinance* requiring them under penalty to change their mode of life or business, to which a threat by the Attorney-General only adds weight but of which it is not the source. The jeopardy lies in the statute, not in the Attorney-General, and it is the statute that they challenge and not the Attorney-General's threat. A threat in any event is only *one* type of jeopardy, which may be created—and therefore initiates justiciability—by an event, like war; by a document, like a statute or a deed; by a personal act, like an unjust charge or claim; or, among other challenges, by a threat of an enforcing officer, alone or, as usual, in combination with other operative facts.⁷³

71. See *Erwin Billiard Parlor v. Buckner*, 156 Tenn. 278, 300 S. W. 565 (1927).

72. See also Federal Rule 57, Committee Note: ". . . when coercive relief only is sought but is deemed ungrantable or inappropriate, the court may *sua sponte*, if it serves a useful purpose, grant instead a declaration of rights. *Hasselbring v. Koepke*, 263 Mich. 466 (1933)."

73. The decision in *Tileston v. Ullman*, State's Attorney, 63 Sup. Ct. 493 (U. S. 1943), presents a curious history. Here Dr. Tileston sought a declaratory judgment, on proof of the medical necessity for giving contraceptive advice to three named married women

(b) The Court itself has recognized the irrelevance of any threat by the Attorney-General by permitting without threat an injunction against the enforcement of numerous state statutes and ordinances which exposed to danger and loss the plaintiff's property or personal freedom of action, such as in *Euclid v. Ambler Realty Co.*,⁷⁴ *Pierce v. Society of Sisters*,⁷⁵

whose lives would have been endangered by pregnancy, that an 1879 Connecticut statute which penalized the giving of such advice by *anyone* was too broad, and by prohibiting physicians in such circumstances was unconstitutional under the state and federal constitutions. The Court concluded, *per curiam*, that the doctor had no standing to challenge the fact that his *patients'* lives were thereby endangered, and that while invoking his "liberty" to give the necessary advice and practice medicine in an orthodox way, he had not in the complaint properly invoked the Fourteenth Amendment. But the Court went further. They raised but did not pass upon the question of justiciability, "case or controversy." They demanded a "threat." In actual fact, the physician had with his counsel visited the State's Attorney, told him the dilemma he faced, and asked whether, if he gave the advice, the State's Attorney would prosecute. Such a prosecution had taken place recently in another case, *State v. Nelson*, 126 Conn. 412, 11 A. (2d) 856 (1940). The State's Attorney answered in the affirmative, whereupon Dr. Tileston sued him for a declaration that he was privileged and would not, if he gave the advice, violate the statute, since the statute as drawn was unconstitutional. The stipulation reads (para. 15): "The defendants, State's Attorney and City Attorney, in the course of their public duty, *intend to prosecute* any offense against said statutes and common law, and claim or may claim that the prescription, advice, procurement, delivery and instruments proposed by plaintiff to be given as aforesaid would constitute such offenses" (italics supplied). This claim the physician denied. The Court in its *per curiam* opinion emphasized the words "claim or may claim" and in the argument queried whether this could constitute a "threat." Apart from the fact that a State's Attorney's "threat" should have been deemed immaterial in the face of the earlier prosecution and the manifestly ostensible violation of the statute involved in giving the prohibited advice, the statement that the enforcement officers "intend to prosecute" was an adequate threat. What they may claim in the course of the prosecution is incidental. Nothing needed to be said on that subject. The fact is that if they prosecuted at all, they would have to claim that giving such advice offended the statute. The case illustrates the irrelevant by-paths into which the supposed requirement of a "threat" can lead the courts. See criticism of the decision in the *Tileston* case by Professor Carpenter in (1943) 16 So. CALIF. L. REV. 224. Says Professor Carpenter: "If the plaintiff had given advice which was prohibited by the statute and was being prosecuted for its violation, he would have standing to question the constitutionality of the statute. The purpose of declaratory relief which is to make it possible for him to determine his constitutional rights in advance, without undergoing the hazard of fine and imprisonment, is defeated by this decision." For a similar argument, in reverse, *i.e.*, because the injured person could as plaintiff have sued the insurance company, the company was justified in making him an added defendant in their declaratory suit against the insured, disclaiming liability under the policy, see *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U. S. 270 (1941).

74. 272 U. S. 365 (1926). See also *Pennsylvania v. West Virginia*, 262 U. S. 553, 593 (1923), where suit to enjoin West Virginia from restraining production of domestic natural gas for West Virginia uses was brought a few days after the Act went into effect. No effort to enforce or threat was made. Said Justice Van Devanter: "One does not have to await the consummation of threatened injury to obtain preventive relief." The injury was not imminent.

75. 268 U. S. 510 (1925).

Terrace v. Thompson,⁷⁶ *Carter v. Carter Coal Co.*,⁷⁷ *Gibbs v. Buck*,⁷⁸ *Cur-
rin v. Wallace*.⁷⁹ In all these cases, where the statute placed the plaintiff in jeopardy, no threat was uttered or required by the Court as a condition of justiciability. Even a disclaimer of any duty to enforce did not bar the injunction. The inconsistency in the application of the Court's requirement is apparent.

(c) The Court recognizes that where freedom of speech is impaired by a statute, it is the statute and not the administrative application which is challenged and under review. As announced in *Thornhill v. Alabama*:⁸⁰

"Where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression."⁸¹

This statement recognizes that the rule has an application wider than cases involving free speech and evidences the Court's appreciation of the fact that the statute is the source of the grievance and not the administrative accusation or enforcement.

(d) Since the "threat" of enforcement is viewed as a condition precedent of justiciability, and since such threat is deemed the individual act of some person, the injunction came naturally to be looked upon as an instrument to restrain an imminent wrong, incidental to which the justification for the alleged wrong, the statute, would have to be passed upon. The procedural vehicle, instead of the substantive issue at stake, thus focussed the Court's attention. On the foundation of an erroneous theory which pictured a high public official of the state as a common tortfeasor, there was built a superstructure of further fictions which distorted the judicial process and cloaked the error in the guise of a constitutional truth.

76. 263 U. S. 197 (1923).

77. 298 U. S. 238 (1936). See also *City Bank Farmers Trust Co. v. Schnader*, 291 U. S. 24, 34 (1934).

78. 307 U. S. 66 (1939).

79. 306 U. S. 1 (1939). There are many state cases illustrating the point. See, e.g., *Sage-Allen Co. v. Wheeler*, 119 Conn. 667, 179 Atl. 195 (1935); *Bronxville Associates v. Brady*, 36 N. Y. S. (2d) 308 (Westchester County Sup. Ct. 1942); *Kirn v. Noyes*, 262 App. Div. 581, 31 N. Y. S. (2d) 90 (1941); *American Federation of Labor v. Bain*, 165 Ore. 183, 106 P. (2d) 544 (1940). In the following cases there was no threat to enforce or prosecute: *Sandelin v. Collins*, 1 Cal. (2d) 147, 33 P. (2d) 1009 (1934); *Adams v. Slavin*, 225 Ky. 135, 7 S. W. (2d) 836 (1928); *Bank of Yorktown v. Boland*, 280 N. Y. 673, 21 N. E. (2d) 191 (1939); *Chamberlin v. Andrews*, 271 N. Y. 1, 2 N. E. (2d) 22 (1936); *Brown v. University of New York*, 242 App. Div. 85, 273 N. Y. Supp. 809 (3rd Dep't 1934); *Shelton Hotel Co. v. Bates*, 4 Wash. (2d) 498, 104 P. (2d) 478 (1940); *Minister of Customs v. McParland*, [1909] 29 N. Z. 279.

80. 310 U. S. 88, 98 (1940).

81. Citing *Schneider v. State*, 308 U. S. 147, 155, 162-63 (1939); *Stromberg v. California*, 283 U. S. 359, 368 (1931). Cf. *Lanzetta v. New Jersey*, 306 U. S. 451 (1939).

(e) The Attorney-General becomes the only one who as of right can challenge the statute. By the mere process of refraining from a "threat" to enforce or prosecute he can frustrate all opportunity of the victim or taxpayer or affected citizen to raise the issue. Thus he alone can control the possibility of litigation and the public must assume all the risks of observing an unconstitutional statute or exposing its members to a criminal prosecution.

(f) The requirement of a "threat" has led to some extraordinary examples of construction, enabling the courts to construe acts and words strictly and narrowly, so that action which will appear to some courts as a sufficient evidence of threatened serious consequences resulting from violation will appear to others as innocuous statements.⁸²

THE RATIONALIZATION OF EX PARTE YOUNG—THE PERSONAL TORT

The Fourteenth Amendment provides that no state may deprive a person of life, liberty or property without due process of law or deny to any person within the jurisdiction the equal protection of the laws. State action is therefore deemed necessary, and a statute or ordinance is the clearest expression of state action. But the Eleventh Amendment provides in effect that no state may be sued in the federal courts without its consent. How then reconcile the Fourteenth Amendment, which permits certain suits against the state or its officers, with the Eleventh Amendment, which ostensibly prohibits suits against the state?

Instead of concluding on the basis of plentiful authority that the Eleventh Amendment only prohibited suits designed to extract money from the public treasury or coerce a state to perform an obligation, for which Chief Justice Marshall had laid ample foundation,⁸³ Justice Peckham in *Ex parte Young* gave the prohibition a literal interpretation. He then followed that mistake by another more devious holding that the challenge to the constitutionality of a statute must be directed not against the state as a party but against the enforcing officer who, when enforcing an unconstitutional statute, is really not an authorized official of the state—the

82. The Supreme Court is narrower in this respect than other courts and may influence them to restrict the injunctive relief and adjudication. In the *Tilston* case, 63 Sup. Ct. 493 (U. S. 1943), another conviction under the same statute and the State's Attorney's statement that he "intends to prosecute" left the Supreme Court uncertain that there was a "threat," although it never occurred to the Connecticut courts to raise such a question. In *Watson v. Buck*, 313 U. S. 387, 399 (1941), a three-judge federal court finding that "defendants have threatened to and will enforce such State Statutes," was deemed insufficient because they did not find "any threat to enforce any specific provision" of the statute. The Court construed the activities of the several Attorneys General defendants as a mere expression of readiness "to perform their duties under their oath of office should they acquire knowledge of violations."

83. See *Osborn v. Bank of the United States*, 9 Wheat. 738, 846 (U. S. 1824); *Cohens v. Virginia*, 6 Wheat. 264, 406 (U. S. 1821).

only reason for making him a defendant and essential under the Fourteenth Amendment—but a wrongdoing individual tortfeasor unprotected by the mantle of the state and therefore exposed to personal liability. He might thus incur heavy damages.⁸⁴ Justice Peckham was bothered by the conviction that he must avoid permitting the state to be made a party, and therefore conceived the “wrongdoing” enforcement officer, even if commanded to enforce, as an escape from this dilemma.⁸⁵ But the escape was awkward, since the suit would necessarily proceed against the defendant as a state officer. If the statute proved on trial to be valid, he was a law-abiding individual and nothing derogatory was said about him; but if the statute after trial and appeal was found unconstitutional, then we are told that from the very beginning he was an individual tortfeasor, taking advantage of his official position and a defective statute to injure the plaintiff. And if in the process of adjudication through several courts the judicial opinion fluctuated between constitutionality and unconstitutionality, the defendant’s status must also have varied. An intelligent bar was expected to accept this inconsistency.⁸⁶

Justice Peckham realized that the statute imposed a duty of enforcement on the Attorney-General. In obedience to that duty he may have had to commence a mandamus proceeding in the name of the state. The threat of enforcement involved in commencing proceedings was enough to justify injunction, if accompanied by an allegation of unconstitutionality. He is the enforcing officer, and as legal representative of the state must be named in the bill of complaint as a party, in order to avoid the awful inference that the state is being sued without its consent. If the governing statute should be held unconstitutional after trial and appeal, he loses whatever protection the statute gave him and stands, whether as plaintiff or defendant, as a naked wrongdoer stripped of the mantle of legal protection. In that event, the legal duty to enforce becomes, instead, an *ex post facto* duty not to commit a personal wrong, a trespass, as any inci-

84. Unless he is to be protected by the doctrine of *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U. S. 371 (1940), and *State v. Gardner*, 54 Ohio St. 24, 42 N. E. 999 (1896), that an unconstitutional statute *can* create legal rights and afford protection to an officer acting thereunder. But this further weakens Justice Peckham’s rationalization.

85. The result is curious. On a criminal prosecution the accused may attack the state statute and use the state’s name in his moving papers, by way of defense, counterclaim or on the appeal, but on a civil challenge there is a fear that, though the state is actually challenged, it may be made a party by name. Only the Attorney-General may be a party, not as an officer of the state, necessary under the Fourteenth Amendment, but as a private individual, assumed to be necessary under the Eleventh. Thus at the same time he is a public officer and a private individual, justifying the strange caption in *Watson v. Buck*, 313 U. S. 387 (1941), *infra* note 86.

86. The result is that we find curious captions in suits challenging constitutionality, such as “*Gene Buck . . . v. J. Tom Watson (Gibbs) Individually and as Attorney General of Florida, et al.*,” 313 U. S. 387, 136 A. L. R. 1426, 1438 (1941).

dental commencement of an enforcement suit would be. But he has to eat the suspect to find out whether it is a mushroom or a toadstool. "Acting within the scope of his employment" becomes a nugatory defense, since an unconstitutional statute is a mere nothing. This is a reiteration of the overruled view of *Norton v. Shelby County*.⁸⁷ The poor Attorney-General in some states has not even the protection that minor officials enjoy under declaratory judgments statutes,⁸⁸ of initiating a proceeding to establish against challenge the constitutionality of the statute they are being asked to enforce.⁸⁹

Thus the unfortunate Attorney-General is in a dilemma and bound to suffer disadvantages in either case. If he fails to perform his mandatory duty to enforce, he faces impeachment and removal from office; if he does his duty, he faces denunciation and liability as a trespasser. His unhappy lot is not mitigated by any reward for guessing correctly whether the legislature and executive went astray in enacting the statute. In any event, he must review for himself the constitutionality of what they have done and stake his future on choosing the lesser of the evils involved in the dilemma Justice Peckham has created for him. He is like the submarine officer under the unratified Washington Treaty of 1922. If he obeys his orders and launches a torpedo, he is liable to be punished as a pirate; if he disobeys, he gets shot.

Justice Peckham did catch a glimpse of the easy road out of the maze he had devised, but, not clearly seeing the exit, took the wrong fork and remained entangled. He correctly concluded that a petition for habeas corpus against a state official on the ground that the imprisonment or detention was in violation of the Federal Constitution was not considered,

87. 118 U. S. 425, 442 (1886), overruled by the *Chicot County* case, 308 U. S. 371 (1940).

88. Before the Declaratory Judgments Act, even minor officials had generally to assume the risks of constitutionality of the statute under which they were required to act. Note the officer's dilemma in *Norwood v. Goldsmith*, 168 Ala. 224, 53 So. 84 (1910). Cf., under the declaratory judgments procedure, *Graham v. England*, 154 Tenn. 435, 288 S. W. 728 (1926), and cases discussed in BORCHARD, *op. cit. supra* note 3, at 974 *et seq.* Public officers can now avoid these risks.

89. "But we have held that when an officer of the State is confronted with an uncertain problem of what the law means which requires certain acts on his part, or whether the law is valid, and he proposes to pursue a certain course of conduct in that connection, which would injuriously affect the interests of others who contend that he has no legal right thus to act, there is thereby created a controversy between them and the Declaratory Judgments Act furnishes a remedy for either party against the other to declare the correct status of the law. The purpose is to settle a controversy between individuals, though some of them may be State officers. *Curry v. Woodstock Slag Corp.*, 242 Ala. 379, 6 So. (2d) 479." Quoted from *State v. Louis Pizitz Dry Goods Co.*, 11 So. (2d) 342, 345 (Ala. 1943). In the *Curry* case, a declaration against the Commissioner of Revenue, it was expressly held, with much authority cited, that such a suit was not a "suit against the State." See also BORCHARD, *op. cit. supra* note 3, at 888 *et seq.*

even though somewhat coercive, a prohibited suit against the state. Said he:

"The right to so discharge has not been doubted by this court, and it has never been supposed there was any suit against the State by reason of serving the writ upon one of the officers of the State in whose custody the person was found. . . ."

He then went on to say:

"It is somewhat difficult to appreciate the distinction which, while admitting that the taking of such a person from the custody of the State by virtue of service of the writ on the state officer in whose custody he is found, is not a suit against the State, and yet [maintains that] service of a writ on the Attorney General to prevent his enforcing an unconstitutional enactment of a state legislature is a suit against the State."⁹⁰

Had the learned Justice stopped right there, he would have found the road back and solved the puzzle he had invented. Attorney-Generals and enforcing officers could freely, as public officials, have been named as defendants in actions to challenge an oppressive statute. Their personal opinion as to whether they should or should not carry out their statutory duty, whether the statute was constitutional or deserved enforcement, would have been, as it should be, immaterial. But evidently the Justice did not fully believe in his own demonstration, for he must, after all, have considered a suit against the Attorney-General a suit against the state, at least if the statute proves unconstitutional, and thus devised the complicated and untenable rationalization discussed above. This is on a par with Justice Sanford's assertion in the discredited and essentially overruled case of *Liberty Warehouse Co. v. Grannis*⁹¹ that the Attorney-General had not displayed any personal antagonism to the Warehouse Company⁹² and therefore the tobacco auctioning statute could not be judicially challenged.

But the result is more unfortunate than a mistaken theory. Since the Attorney-General was sued as an individual, he could, by refraining from enforcement or threat, by mere equivocation, frustrate any test of constitutionality. He could by inaction defeat justiciability. This is what happened in *Southern Pacific Company v. Conway*.⁹³ Although charged

90. 209 U. S. 123, 168 (1908).

91. 273 U. S. 70 (1927), essentially overruled in *Nashville, Chattanooga & St. Louis Ry. v. Wallace*, 288 U. S. 249 (1933). See BORCHARD, *op. cit. supra* note 3, at 172 *et seq.*

92. "While the Commonwealth Attorney is made a defendant as a representative of the Commonwealth, there is no semblance of any adverse litigation with him individually. . . ." 273 U. S. 70, 73 (1927).

93. 115 F. (2d) 746 (C. C. A. 9th, 1940).

mandatorily with the enforcement of the Arizona Train Limit Law, the Attorney-General moved to dismiss the suit of the railroad challenging its constitutionality, on the ground that he, the Attorney-General, really in defiance of the statute and of his duty, had taken no action and uttered no threat. He contended, therefore, that he was not a proper party defendant because he was sued not as a state enforcement officer but as a private individual who, having taken no action, was not a wrongdoer. Disclaiming any personal interest as an individual in the enforcement of the Train Limit Law, he contended that he could not be sued as Attorney-General because that would be a suit against the state. While the circuit court of appeals refused to accept that theory, they did conclude that his personal opinion or absence of opinion and inaction were operative facts which defeated justiciability.⁹⁴

Thus, in spite of many Supreme Court cases which have admitted declarations or injunctions against state statutes solely on the basis of their impingement upon and violation of petitioner's constitutional rights, other cases have adhered to all the mystical rationalization of *Ex parte Young* and have demanded an enforcement officer's threat as a condition of justiciability. They have thereby made the challenge to a statute dependent upon the personal whims of the Attorney-General or district attorney who can defeat justiciability by inaction, by admitting that he had no opinion, by conceding or refusing to deny unconstitutionality. He thus becomes a sort of third house of the legislature, usurping the powers of the judiciary, passing upon the statutes enacted by the legislature and the Governor, with full power to prevent a test of constitutionality.⁹⁵ This is the anomalous situation that an erroneous theory can create.

94. This is squarely contrary to the modern view that administrative agencies or officers, in spite of their oath of office, have no business or power to pass on questions of constitutionality, especially of their governing statute. Such a function is reserved exclusively to the judiciary, a function which even they are reluctant to exercise. *United States v. Butler*, 297 U. S. 1, 67 (1936). As stated by the United States Court of Appeals in *Panitz v. District of Columbia*, 112 F. (2d) 39, 42 (App. D. C. 1940): "It is this consideration for the orderly, efficient functioning of the processes of government which makes it impossible to recognize in administrative officers any inherent power to nullify legislative enactments because of personal belief that they contravene the constitution," citing *Op. Atty. Gen. to the President*, March 26, 1937, reprinted in SWISHER, *SELECTED PAPERS OF HOMER CUMMINGS* (1939) 273. See also 38 *Op. Atty. Gen.* 252 (1935).

95. Even though the Attorney-General has a large measure of discretion, and notwithstanding Justice Butler's belief in *Ex parte La Prade*, 289 U. S. 444 (1933), that his oath of office made him in some way responsible for the observance of constitutionality, he is not supposed to ignore the express words of a statute. "He must obey the mandate of the statute and he must bring the complaint and since it is a public action and he charged with the statutory duty of conducting such actions, he must, to the best of his ability, fulfill this public duty, as Attorney General, and his duty as a lawyer to protect the interest of his client, the people of the state," *Levitt v. Attorney General*, 111 Conn. 634, 641, 151 Atl. 171, 174 (1930). Even where the language of the statute is per-

ACCENTUATING THE ERROR—EX PARTE LA PRADE AND RULE 25(d)

It was bad enough to have *Ex parte Young* convert the Attorney-General into an individual tortfeasor in order to justify an injunction to restrain the enforcement of an unconstitutional statute. Yet we might have rid the law of the preposterous rationalization of Justice Peckham but for the perpetuation and incrustation of the misconception in Justice Butler's opinion and dictum in *Ex parte La Prade*. Quite independently of the issue of constitutionality, this decision maintained that as a condition of continuing a suit in the federal courts against the successor of the original Attorney-General, the new Attorney-General, having no privity with the first, must on his own account personally renew the original threat. Referring to the second Attorney-General as the petitioner, Justice Butler stated, without necessity:

"Plaintiffs did not allege that petitioner threatened or intended to do anything for the enforcement of the statute [the Arizona Train Limit Law]. The mere declaration of the statute that suits for recovery of penalties shall be brought by the Attorney-General is not sufficient. Petitioner might hold, as plaintiffs maintain, that the statute is unconstitutional and that, having regard to his official oath, he rightly may refrain from effort to enforce it."⁹⁶

Thus the bog grew deeper and thicker. It was responsible for the strange opinion in *Southern Pacific Company v. Conway*,⁹⁷ for Judge Wilbur, writing the opinion, had sat on the three-judge court in the *La Prade* case

missive, when the statute is for the benefit of the public—which is the assumption in most police power statutes—the Attorney-General has no discretion not to enforce the statute. See *Supervisors v. United States, ex rel.*, 4 Wall. 435 (U. S. 1866). *Fidelity & Casualty Co. v. Brightman*, 53 F. (2d) 161 (C. C. A. 8th, 1931), involved a statute giving a bank commissioner full discretion in exercising administrative duties over banks, where he was held not responsible for errors of judgment. It seems incongruous to assume that an Attorney-General's opinion on the constitutionality of a statute he is under a mandatory duty to enforce should be deemed to relieve him of that duty. His opinion seems irrelevant. It certainly does not bind his successors or the judiciary. See *Austin v. Barrett*, 41 Ariz. 138, 144, 16 P. (2d) 12, 14 (1932); *Leddy v. Cornell*, 52 Colo. 189, 120 Pac. 153 (1912); *People ex rel. Brundage v. Peters*, 305 Ill. 223, 137 N. E. 118 (1922).

96. 289 U. S. 444, 458 (1933). He adds that the theory of *Ex parte Young* had been adopted by the court in "numerous decisions," citing *Hopkins v. Clemson Agricultural College*, 221 U. S. 636, 642 *et seq.* (1911); *Truax v. Raich*, 239 U. S. 33, 37 (1915); *Terrace v. Thompson*, 263 U. S. 197, 214 (1923) (no threats); *Sterling v. Constantin*, 287 U. S. 378, 393 (1923). But the *Young* theory in the last case is expressed more mildly: "The applicable principle is that where state officials, purporting to act under state authority, invade rights secured by the Federal Constitution, they are subject to the process of the federal courts in order that the persons injured may have appropriate relief." The Court added, "The Governor of the State, in this respect, is in no different position from that of other state officials." The Court asserted categorically all that needed to be said: "The suit is not against the State."

97. 115 F. (2d) 746 (C. C. A. 9th, 1940).

below, a decision which warranted affirmance, not reversal. Since the problem in the *La Prade* case was exclusively one of substitution, Justice Butler's insistence on the Attorney-General's personal threat and personal opinion of constitutionality as a condition of justiciability might be considered a dictum. But it gave new life to the often disregarded conception of the Attorney-General as a personal tortfeasor, to the requirement of a preliminary "threat," and to the conditions of injunctive relief. Disregarding the fact that the Attorney-General was sued only in his official capacity and that this had been said in several cases without circumlocution not to constitute a prohibited suit against the state, the court revived the idea of personal guilt as the condition of adjudicating the constitutionality of a statute. How an officer carrying out his mandatory duty to enforce a statute can be charged with "abuse of his office,"⁹⁸ has never been satisfactorily explained. The "abuse" would seem to lie in the principal, the legislature, not the agent, the hapless officer. Recognizing the "inherent difficulty" in all these cases, the Court felt logically bound to say that since the first Attorney-General was sued in tort as a personal wrongdoer, the second had to be sued under the same theory, and since there was no privity between the two, the second would have to be charged with the same wrongful acts as had been the first before substitution was permissible.⁹⁹

Rule 25(d). The Federal Rules of court concerning substitution have a statutory origin. Professor J. W. Moore in his standard work on *Federal Practice*¹⁰⁰ states that the Supreme Court in 1898 pointed out the injustice involved in the common law rule that an action against a federal public officer abated on his separation from office.¹⁰¹ Thereupon Congress passed a statute providing an easy method of substituting as a party the successor in office.¹⁰² In 1922 the Supreme Court called attention to the fact that state officers should be included in the rule, whereupon Congress in 1925 in the course of a comprehensive amendment to the Judicial Code

98. Justice Butler in the *La Prade* case, referring to *Gorham Mfg. Co. v. Wendell*, 261 U. S. 1 (1923), says that Taft, C. J., in that case said: ". . . the inherent difficulty in all these cases is not in the liability and suability of the successor in a new suit. It is in the shifting from the personal liability of the first officer for threatened wrong or abuse of his office to the personal liability of his successor when there is no privity between them, as there is not if the officer sued is injuring or is threatening to injure the complainant, without lawful official authority. There is no legal relation between wrong committed or about to be committed by the one, and that by the other." See *Ex parte La Prade*, 289 U. S. 444, 459 (1933).

99. In *Watson v. Buck*, 313 U. S. 387 (1941), the Court seems to have overlooked *Ex parte La Prade*, and permitted two substitutions of defendant Attorneys General, on motion.

100. See Commentary on Rule 25(d) in 2 MOORE'S FEDERAL PRACTICE (1938) 2432.

101. See *United States ex rel. Bernardin v. Butterworth*, 169 U. S. 600, 605 (1898).

102. 30 STAT. 822 (1899), 28 U. S. C. § 780(a) (1940).

amended the statute accordingly.¹⁰³ It provided in effect that where a federal or state officer "dies, resigns, or otherwise ceases to hold such office," it shall be competent for the federal court in which a suit is pending against such officer, on notice or consent, "to permit the cause to be continued and maintained by or against the successor in office," if "it be satisfactorily shown to the court that there is a substantial need for so continuing and maintaining the cause."¹⁰⁴

Then came the Supreme Court's *La Prade* decision in 1933, which undertook to add to the requirements of the statute in suits against state officers—since the Arizona statute was construed not to allow substitution—an allegation and showing that the successor adopted or threatened to adopt the attitude of his predecessor before substitution could be permitted. As to federal officers the Court thought this requirement was not necessary since Congress had made the successor officially responsible for the acts of his predecessor, whereas Congress could not do this in the case of state officers. Thus the unfortunate emendation of the 1925 Act found its way into the new Federal Rules when either federal or state officers are charged with enforcing an unconstitutional statute. Rule 25 (d) now reads:

"Substitution . . . may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing a law averred to be in violation of the Constitution of the United States."¹⁰⁵

Just what is meant by "adopts or continues or threatens to adopt or continue" is still unclear. But it manifests the unjustified conception originating in *Ex parte Young* that the mandatory official duty to enforce a statute implies a personal delinquency of the enforcing officer if the statute

103. See *Irwin v. Wright*, 258 U. S. 219, 223 (1922); amendment in 43 STAT. 941 (1925), 28 U. S. C. § 780 (1934); MOORE, *loc. cit. supra* note 100. See also *Atchison, Topeka and Santa Fe Ry. v. La Prade*, 2 F. Supp. 855, 858 (D. Ariz. 1933).

104. The three-judge district court in the *La Prade* case gave the provision a sensible construction. They said: "The Arizona statute involved herein imposes the duty on the Attorney General of the state, and him alone, to enforce the Train Limit Law. It is a continuing statutory duty devolving upon each succeeding Attorney General of the state. . . . The plaintiff's cause of action, in so far as the same may depend upon the threatened injury, does not rest upon any expression of intent on the part of the defendant other than his oath of office, as the threat is contained in the language of the statute. When the defendant *La Prade* took the oath of office, it became his sworn duty to enforce the law. As long as there is an Attorney General in the state, the threat of prosecution is always present, and the injury, if any, resulting therefrom, is always impending," citing *Pennsylvania v. West Virginia*, 262 U. S. 553 (1923). 2 F. Supp. 855, 858.

105. In non-constitutional cases, the only averment necessary under the first part of Rule 25 (d) is "that there is a substantial need for so continuing and maintaining" the action. 2 MOORE, *op. cit. supra* note 100, at 2433.

should after test prove unconstitutional. This, it is submitted, is an unfortunate view of official duty, totally unnecessary to preserve the guaranties of the Fourteenth Amendment, and deserving of the earliest possible abrogation by a new rules committee, by the Court itself, or, if necessary, by Congress.

CHALLENGING "PENAL" STATUTES

The common law is distinguished by its capacity to make distinctions between varying fact situations. Its instinct for analytical jurisprudence and its shunning of general theories have either commended or condemned it. Yet in the field of statutes regulating commercial or civil life, the appendage of a penalty to the regulation seems to anesthetize the imagination and the power of analysis. The presence of the sanction, the least important element of the regulation, seems to arouse all the latent slogans of the criminal law, and in one hopper for identical treatment are thrown murder, robbery, a purported violation of the anti-trust law, a physician's challenge to a rigid law prohibiting information on birth control, statutes regulating horse racing, tobacco auctioning, optometry, railroading, and a thousand other police power measures which the legislature thinks can be more effectively enforced by the sanction of a penalty.

On the side of administration, some distinctions are made in the application of these statutes, by the regular police or by administrative commissions. But when it comes to challenging their constitutionality or construction, many courts, declining to exercise their analytical powers, call them all "criminal statutes," some insisting on a criminal prosecution as the only vehicle of adjudication, some declining injunction against the enforcement of a "criminal" statute, except under special circumstances.¹⁰⁶

106. See *supra* p. 460. For an example of judicial narrowness, see *Dep't of State v. Kroger Grocery & Baking Co.*, 46 N. E. (2d) 237 (Ind. 1943). In this case two lower Indiana courts had issued a declaratory judgment on Kroger's petition, after challenge by the Board of Pharmacy, that certain vitamin tablets which Kroger was selling were accessory food factors and, after expert testimony, did not contain any chemical, drug or medicine which was poisonous or a "prescription" or "pharmaceutical specialty," and, hence, were not prohibited under certain statutes and orders limiting the sale of such articles to drug stores, as the Board of Pharmacy had claimed. The real issue was the proper classification of the vitamin tablets as "foods" or "drugs," and no question was raised as to the propriety of an adjudication by declaratory judgment. Instead of appreciating the social utility of such a civil judgment, the Indiana Supreme Court ordered the dismissal of the action for want of jurisdiction on the ground that presumably only a "criminal prosecution" could decide such a momentous issue, since it denied the jurisdiction of equity altogether, including the power even to issue an injunction "to restrain criminal prosecutions" or the "operation of criminal statutes," on the ground, wrong in fact, that "no property rights are here involved." The court (Shake, J.) denied the propriety of a declaratory judgment on the supposed ground that it "would not be a bar to a criminal prosecution . . . nor" available in such prosecution as an adjudication of the facts in issue. That the disputed legislation was not a "criminal

The fact that the motive of the actor, the intent to defy the social *mores*, is the primary element in determining criminality, seems to be disregarded as a basis of classification in the face of a penal sanction. The fact that civilians, notably businessmen affected by these police power measures, have every desire to obey a regulatory law but need a key to its meaning, and have the right, preserved by state and federal constitutions, to challenge its constitutionality, if they consider themselves unduly restricted, seems not to excite the requisite attention. The result is that whereas on the substantive side the distinction between *malum in se* and *malum prohibitum* is well observed, on the procedural side it seems to be forgotten.

Here then lies a field in which general theories need analysis in the interests of an intelligent administration of law. Once it is recognized that the much regimented business or professional man is not a murderer or robber and is entitled to procedural consideration somewhat different in complexion, the instrumentalities of the law may be re-examined to discover whether the legal interests of the business and professional man challenging regulatory statutes or ordinances can be adjudicated only by the crude machinery and orientation of the criminal law or whether there is not a healthier, a more efficient and intelligent method of considering his legal and judicial problems. Once it is realized that a criminal prosecution is, except for extreme cases of defiance, an improper and socially undesirable method of adjudication, and that the injunction should be confined to exceptional cases of emergency and immediately threatened irreparable injury, it will be discovered by a process of elimination and classification that the most practical way of adjudicating the great bulk of the issues between the business man and the government is the action for a declaratory judgment of constitutionality or construction.

Analysis of the Conception "Criminal Law." The necessity for a breakdown of the broad and indiscriminate conception "criminal act," both for substantive and procedural reasons, has attracted various reformers and must have been present in the minds of courts which grant injunctions against the enforcement of statutes with a penalty as a sanction. In his penetrating paper "What is Crime?"¹⁰⁷ Mr. William M. Ivins of New York objects to the loose criteria used in determining "criminality," to the failure to consider ethical standards as an element, to the thousands

statute" at all but the Board of Pharmacy's police power regulation, that a criminal prosecution was a crude and actually inappropriate vehicle of adjudication, that a declaratory judgment was the civilized method of deciding the issue, seems not to have occurred to the court. Cf. the much more intelligent decision in *New York Foreign Trade Zone Operators v. State Liquor Authority*, 285 N. Y. 272, 34 N. E. (2d) 316 (1941); *BORCHARD, op. cit. supra* note 3, at 1033.

107. See (1911) 1 *ACAD. OF POL. SCI. PROC.* 531 *et seq.* See also 2 *AUSTIN, LECTURES ON JURISPRUDENCE* (5th ed. 1885) 572, for distinction between *malum in se* and *malum prohibitum*, and *MAY, LAW OF CRIMES* (4th ed. by Sears and Weihofen 1938) 6.

of laws which undertake to produce salvation by legislation, and to the practice of calling any law with a penal sanction a "criminal" law. He considers it crude to determine the relation between the individual and the group by the methods of criminal procedure. Among other things, he says:

" . . . criminality is a temperament, a state of mind, which, for the purposes of the law, is evidenced by an overt and provable fact—with this result, that we have the congenital or temperamental criminal, who is also an offender against universal ethical standards, and the occasional offender, who violates a particular decree of the legislature, which has no necessary relation to any ethical standards." These two have . . . nothing in common, and their classification for treatment in a single class or group leads to the most profound miscarriage of law and to the most shameful demonstration of the ignorance of the people as to the relation, and the importance of the relation, of the individual to the state."¹⁰⁸

He considers police power legislation as a modern category not connected with the historical origins of the criminal law in offenses against the life, liberty and property of individuals, but consisting of prohibitions and regulations in the interests of community life. In their transgression he finds no violation of any ethical rule, and courts, it may be said, have acceded to this view by dispensing with any evidence of *mens rea*. Chief Justice Taft in *United States v. Balint* remarked:

"Many instances of this [punishment without knowledge or intent that a statute is being violated] are to be found in regulatory measures in the exercise of what is called the police power where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes as in cases of *mala in se*." (Citing cases).¹⁰⁹

This is a recognition of the distinction between two types of offenses. While it calls attention to the difference in the social objectives of the two classes, and therefore to the necessity for differentiating in the matter of *mens rea*, it fails to discuss the reasons for adjudicating differently the issue of the constitutionality or construction of the two types of offenses. Particularly because police power measures aim at social betterment, are

108. See (1911) 1 ACAD. OF POL. SCI. PROC. 531, 532.

109. 258 U. S. 250, 252 (1922). Part of this quotation is repeated by Frankfurter, J., in *United States ex rel. Marcus v. Hess*, 63 Sup. Ct. 379, 389 (U. S. 1943). Justice Rugg of the Massachusetts Supreme Judicial Court in *Commonwealth v. Mixer*, 207 Mass. 141, 142, 93 N. E. 249, 250 (1910) lists many cases in which police power or regulatory measures have been violated and the offender held guilty although he did not know that he was violating any law or intend to violate any law. Guilty knowledge was not necessary to violate the statute or to be found guilty.

regulatory and not "criminal" in character, and may be violated and punished without any guilty intent, there is all the more reason why the affected victim or target of the regulation should have full opportunity to determine, in advance of violation or prosecution, the preliminary and essential question of the constitutionality and construction of the statute or ordinance he is expected to obey. Other English-speaking jurisdictions are familiar with this procedure,¹¹⁰ and on occasion our courts have conceded its practical value.¹¹¹ There is every reason why it should be made an integral part of American civil procedure.

In these cases injunction is common, provided irreparable injury is shown, since these offenses are of a kind that are *malum prohibitum*, where no public purpose is impaired by adjudicating the construction of the statute before the offense is committed and without compelling the commission of an offense as a condition of adjudication. These considerations are absent in the case of crimes that are *mala in se*. If a person is about to commit murder, robbery, or any other felony, no one would suggest that he obtain an injunction or a declaration before commission of the offense to find out what the statute means. The intent, purpose and *mens rea* of the prospective offender and the nature of the regulation he is supposed to be violating are crucial to the issue of determining whether an injunction against enforcement or a declaration as to construction should precede the commission of the offense or should be denied before the offense has been committed, and a criminal trial substituted.

Mr. Ivins in his article remarks that the generic word "crime" is only a noise, becoming a name only when attached to a particular act; but he denies the power of the legislature to turn every regulation or prohibition into a crime by appending a penal sanction. Such a power, he says, "[would] take criminality out of all human categories, [and] place it purely and simply in the category of legislative theory." He adds:

"One of the consequences which follows is the natural and necessary bankruptcy of the criminal law, the impossibility of establishing a science or an art of criminality which has any relation with our actual science or actual art of legislation, the making unintelligible of all theories of delictuosity, the mingling and confusing of all theories of punibility, the impossibility of criminal statistics. . . ." ¹¹²

He concludes by saying:

"Legislative declarations of this kind are, therefore, not categorical but hypothetical, purely probative in requirement and without place in the moral order. They do not fall properly under the category

110. See, *e.g.*, Section 3 of the New Zealand Declaratory Judgments Act, 1908, 8 Edw. VII, No. 220.

111. See, *e.g.*, *Terrace v. Thompson*, 263 U. S. 197 (1923); *New York Foreign Trade Zone Operators v. State Liquor Authority*, 285 N. Y. 272, 34 N. E. (2d) 316 (1941).

112. (1911) 1 ACAD. OF POL. SCI. PROC. 531, 553.

'crime,' but simply under the category 'forbidden and penalized,' *i.e.*, the category in which might may exercise itself quite independently of any consideration but temporary political expediency. It does not follow that everything that is punishable is a crime, unless it be crime because that is the very definition of crime."¹¹³

Other commentators have sought to deal with the difficulties created by the all-inclusive term crime and the necessity for differentiation. The *Harvard Law Review*,¹¹⁴ following the late Professor Beale, sought to make a division between real crimes and what they called public torts. The latter were *mala quia prohibita* only and should be treated as civil injuries. They included, according to the *Review*, three classes—injuries to public property, public nuisances and police offenses. They infringe the public interest in health and security. But the conception was left cloudy by the statement that the legislature could, if they thought the offense serious, punish it as a "crime," and that the penalty should be considered compensatory and not intended as punishment. The distinguishing character of this "public tort" was that no *mens rea* was required, unless expressly demanded by the legislature, that trial by jury was not constitutionally necessary, that the plea of double jeopardy was unavailing, and that it was not necessary for the prosecution to prove its case beyond a reasonable doubt.¹¹⁵ The fact that judicial authority could be cited for these propositions is an indication that, while the nomenclature has not been officially adopted, the need for subdivision of the term "crimes" is apparent.

In 1937 an effort was made in Wisconsin to make a new classification of regulatory offenses and to substitute, where appropriate, civil for criminal liability as a sanction. A writer in the *Wisconsin Law Review*¹¹⁶ describes the effort of Mr. John E. Conway, with the support of Governor La Follette, to find workable criteria of classification for criminal and civil prosecution and explains that the reasons for the reform lie in the loose employment of the term "criminal" law, the resulting disrespect for law, the inefficiency of social control thereby entailed, the injustice inflicted on individuals who have no anti-social intent to violate the law, and that the safeguards of criminal procedure actually hamper enforcement of minor offenses and technical regulations better administered by experts.¹¹⁷

113. *Id.* at 556.

114. See (1922) 35 HARV. L. REV. 462, relying on BEALE, CASES OF CRIMINAL LAW (3d ed. 1915) 81.

115. An editor in (1927) 12 IOWA L. REV. 407 makes the distinction between (a) true crimes and (b) public torts, as to misdemeanors only, and follows in general the classifications of the *Harvard Law Review*.

116. (1937) 12 WIS. L. REV. 365.

117. Mr. Conway's major proposal would take out of the category of "criminal" offenses those in which punishment is made absolute regardless of a *mens rea*, unless the

Canada has to some extent had occasion to analyze crimes as distinguished from police power measures since the British North America Act of 1867 gives the Dominion jurisdiction over criminal law, whereas Section 92, No. 15 of the Act provides that "the imposition of punishment, by fine, penalty, or imprisonment, for enforcing any law of the province" is within the jurisdiction of the provinces. Under No. 13 the province also has jurisdiction of "property and civil rights in the province." The administration of justice in civil and criminal courts is also a provincial matter. But procedure in criminal matters is federal.

While this division of powers between the Dominion and the provinces is bound to produce some overlapping and jurisdictional difficulties, it has

legislature expressly provides that they shall not be prosecuted on the civil side and makes *mens rea* an element of the offense. If punishable by fine, it shall also be a civil offense only. Crimes at common law and those indicating a dangerous personality should alone be left in the category of offenses punishable criminally. His introductory explanation states:

"The study is primarily concerned with the substantive criminal law of Wisconsin. It proceeds upon the assumptions that (1) law as a means of social control would be made more effective if the substantive criminal law were revised to make it conform more closely to the popular idea of what that law ought to be, especially in the field of criminal intent; (2) since there seems to be a general feeling that respect for criminal law is in some ratio inversely proportional to the number of crimes on the statute books, and since the indiscriminating use of criminal law as a means of social control results in placing the stigma of crime on persons not truly criminal, the use of criminal law should be restricted to those cases where it alone can provide adequate means of control; (3) because the safeguards of criminal procedure hamper enforcement and prosecution of many minor offenses, and because many regulatory statutes require administration by technical experts to make enforcement effective, any act should be removed from the criminal code when it can be shown that some type of civil procedure would produce better results. . . . See Sayre, *Public Welfare Offenses* (1933) 33 Col. L. Rev. 55, 69. And see Philip F. LaFollette, *Enforcement of the Criminal Law* (1925) 16 Reports of State Bar Assoc. of Wis. 143, 146." (1937) 12 Wis. L. Rev. 365, 366.

Mr. Conway's revisor's bill unburdening the criminal law of Wisconsin by making most of the offenses subject to civil prosecution only, was approved by a committee of the Wisconsin Bar Association (1937 Proc., vol. 27, p. 75) but has not yet been enacted by the legislature.

Professor Hall has expressed his criticism of the indiscriminating use of the term "criminal law" as follows: "The fact that in so many of these crimes a reasonable mistake of fact is not a defense has aided their enforcement but has greatly diminished, if not entirely removed, the feeling that it is "wrong" to violate a statute merely because it provides for penal sanctions. People believe that criminal liability should be avoided, as one would avoid a reef, in self protection; but no moral constraint dictates obedience to our modern bureaucracies. Such an indiscriminate use of the criminal law weakens its hold as the arbiter of respectable conduct." Hall, *The Substantive Law of Crimes, 1887-1936* (1937) 50 HARV. L. REV. 616, 623.

In *Patton v. United States*, 281 U. S. 276 (1930), the Supreme Court recognized the distinction between major and minor offenses, between "crimes" and misdemeanors or petty offenses, by saying: "The word 'crimes' in Article III, Section 2, of the Constitution, should be read in the light of the common law, and so read, it does not include petty offenses." See *Schick v. United States*, 195 U. S. 65 (1904).

on the whole resulted in an attempt of the courts to discover what are matters of "criminal law" within federal jurisdiction, and to leave to provincial jurisdiction matters of local regulation not deemed important enough to warrant federal and uniform control. While the distinction cannot be said to follow that between *mala in se* and *mala prohibita*, there is an attempt to prevent the Dominion from encroaching on the provinces' jurisdiction over property and civil rights. As described in a recent case which went to the Privy Council:

"In deciding whether a statute falls within the authority of the Legislature enacting it, the question must be decided from the whole aspect of the enactment. The Dominion cannot, therefore, by purporting to create penal sanctions under s. 91 (27) appropriate to itself exclusively a field of jurisdiction, in which, apart from such procedure, it could exert no legal authority, and if legislation is found, when examined as a whole, to be in form criminal but in aspects and for purposes wholly within the legislative authority of the provinces, and to deal with matters exclusively committed to the Provinces, it cannot be upheld. But when a provincial statute is found in aspects and in purposes wholly within one of the sections exclusively allotted to the Provinces but liable in its effect incidentally to trench on powers exclusively given to the Dominion, such incidental or collateral effect cannot be held to invalidate the Act."¹¹⁸

Among matters that have been decided to be within the provincial penal jurisdiction are the regulation of marketing, highway and motor control, the care of children, the regulation of the consumption of liquor, the revocation of optometrists' licenses, regulating miniature golf courses, fixing the price of milk, the Security Frauds Prevention Act, the prohibition of slot machines as a means of suppressing gaming houses, the regulation of the closing hours of stores and shops, penalties for the ill treatment or neglect of infants, the regulation of dance halls, poor laws and state aid to people in distress, and similar matters. On the other hand, aside from the control of the more important crimes¹¹⁹ and matters of inter-provincial commerce, the Dominion has been allowed to exercise control over such police matters as Sunday law observance, the narcotic drug traffic, champerty, the Food and Drugs Act, false registration in hotels,

118. *Re Reciprocal Ins. Legislation*, 41 Can. Crim. Cas. 336 (P. C. 1924), [1924] A. C. 328, summary in 1 CHITTY, ABRIDGMENT OF THE CANADIAN CRIMINAL CASE LAW (1925) 269. See also *id.* at 265-77. See also CANADIAN ENCYCLOPAEDIC DIGEST (Ontario ed., Supplement to Apr. 30, 1938, ed. by Fowler and Guest, 1938) 189, 193. See also LEFROY, CANADA'S FEDERAL SYSTEM (1913) 319 *et seq.*, and appendix, 789-91.

119. See CRANKSHAW'S CRIMINAL CODE OF CANADA (6th ed. 1935); SNOW'S CRIMINAL CODE OF CANADA (5th ed. by Popple, 1939); WHARTON, PRINCIPLES OF CANADIAN CRIMINAL LAW (1926); CANADIAN CRIMINAL CASES ANNOTATED (77 vols. to 1941).

and penalties, other than license withdrawal, for driving while intoxicated. The division is not, therefore, altogether clear, although in its main outlines it does purport to distinguish what the courts have denominated criminal law from local police measures for the protection of civil and property rights, even by fine, penalty or imprisonment.

Canada's experience indicates a constitutional appreciation of the distinction between major offenses and police power legislation designed to accomplish social betterment and civil regulation.

ADVANTAGES OF CIVIL ADJUDICATION

The confusion in the courts as to what is meant by "criminal" law, the failure to make distinction between crimes involving turpitude and police power measures carrying a penalty, the uncertain standard of "irreparable injury," the frequent absence of any emergency, have made it in many cases quite unpredictable when an injunction against the enforcement of a statute carrying penalties will be granted or refused. In particular cases in which injunction was granted or refused without reference to the procedural conditions of injunctive relief, as in the cases of *Pennsylvania v. West Virginia*,¹²⁰ *Pierce v. Society of Sisters*,¹²¹ *Euclid v. Ambler Realty Co.*,¹²² and *Terrace v. Thompson*,¹²³ it is clear that the injunction was merely invoked as a vehicle of substantive adjudication and what was really granted was a declaratory judgment on the merits. Where injunction or declaration was denied on jurisdictional grounds, as in the Indiana case of *Department of State v. Kroger Grocery*,¹²⁴ it was justified on the mechanical "reason" that equity should not foreclose an eventual "criminal prosecution," although a criminal prosecution was a crude and inappropriate method of adjudicating the statutory classification of plaintiff's product as "food" or "drug" within the meaning of certain regulatory administrative orders. So the issue of the validity of plaintiff's challenged conduct within the meaning of a law, requiring little more than a construction or interpretation of the law in its relation to particular unchanging facts, has been adjudicated or not, according to the predilection of the court for criminal trial, without any guiding criteria.

We have already observed¹²⁵ that the failure to distinguish between injunction and declaratory judgment has resulted in a considerable abuse of the injunction, in court demands for a "threat" as a condition of justiciability where jeopardy alone should have been asked for, and in much

120. 262 U. S. 553 (1923).

121. 268 U. S. 510 (1925).

122. 272 U. S. 365 (1926).

123. 263 U. S. 197 (1923). See also *Gully v. Interstate Natural Gas Co.*, 82 F. (2d) 145 (C. C. A. 5th, 1936).

124. 46 N. E. (2d) 237 (Ind. 1943). See note 106 *supra*.

125. See pp. 459, 464 *supra*.

confusion in the appreciation of the conditions warranting a challenge to the constitutionality or construction of regulatory statutes. In the present closing sections of this article we hope to demonstrate that, in the absence of moral turpitude, the simplest method of challenging regulatory statutes carrying a penalty is by action for a declaration of validity or invalidity or for construction.

At least one purpose of the declaratory judgment was correctly announced by the New York Court of Appeals in a leading case, as follows:

"The general purpose of a declaratory judgment is to quiet and stabilize uncertain or disputed jural relations either as to present or prospective obligations, and no limitation has been placed, or attempted to be placed, upon its use."¹²⁶

An excellent statement of the point we are here seeking to make with reference to the disputed construction of statutes was announced by United States District Judge Cavanah in *Sunshine Mining Co. v. Carver*,¹²⁷ a case frequently quoted and cited. This was an action seeking, after challenge, a declaratory judgment that the penal section of the Wages and Hours provision of the Fair Labor Standards Act could not validly be applied to the plaintiffs for their practice in deducting the lunch period from the hours of labor prevailing in their mine. Judge Cavanah remarked:

". . . ordinarily an injunction would not be granted against a prosecuting officer to enforce the violation of a criminal statute, but where additional procedure is now granted under the Declaratory Judgment Act, granting to the citizen the right to raise the issue as to whether their conduct does or does not violate the criminal law, and affects his property rights, he is not required to wait indefinitely under such suspension. Where there are unexecuted threats, could not the plaintiff, engaged in business, be in a position to challenge the validity of the claim of the Wage and Hour Division of the Department of Labor and the Department of Justice, that its business is conducted not in violation of law, by assuming the initiative?

"Such a transfer of interpretation of statute, from criminal to a civil Court, should be approved where the plaintiff under this new additional remedy, the Declaratory Judgment Act, shows a substantial controversy existing. It is a too narrow view of the judicial functions and under the Declaratory Judgment Act to assert that the only method of trying the validity of the business practice here is to wait until the prosecution occurs."¹²⁸

126. See *James v. Alderton Dock Yards*, 256 N. Y. 298, 176 N. E. 401 (1931). Quoted by Justice Dore in *Socony-Vacuum Oil Co. v. City of New York*, 247 App. Div. 163, 165, 287 N. Y. Supp. 288, 292 (1st Dep't 1936).

127. 34 F. Supp. 274 (D. Idaho 1940).

128. *Id.* at 280. See also Note (1940) 129 A. L. R. 751.

It will be recalled that the United States Supreme Court in the *Haworth* case¹²⁹ made special mention of the fact that it made no difference in the matter of justiciability whether insurer or insured (creditor or debtor, claimant or claimee, prosecutor or accused) initiated the action for a declaratory judgment. The issue was not thereby changed. The question whether the victim or target of a police power measure should be entitled to challenge the meaning or applicability or constitutionality of the statute becomes then only a question of policy. Every practical consideration, in our opinion, justifies the view that the declaratory action of the victim or party charged is the most efficient of all methods of raising these issues.

CONSTITUTIONALITY (VALIDITY), APPLICABILITY (IMMUNITY),
CONSTRUCTION

It really makes little difference whether the proceeding to contest the statute challenges its constitutionality, its applicability to the plaintiff, or its construction in a particular case. Some of these claims often overlap. For example, it not infrequently happens that a statute must first be construed before its constitutionality or applicability can be determined, as was necessary in deciding whether the supply of credit information by a credit agency to business men constituted a "sale" within the meaning of the law governing payment of sales taxes.¹³⁰ Nor does it make any difference whether the sanction which creates the plaintiff's dilemma and resulting justiciability is found in a tax, the requirement of a license, the danger of losing a license, a forfeiture or civil penalty, a criminal penalty or prosecution. All of these sanctions jeopardize the plaintiff who claims the privilege of acting free from the imposition of such a burden, threat, danger or penalty. What is important is that courts of equity, invoked by injunction or declaration, should no longer be able to turn away a petitioner claiming the privilege of conducting his business, *e.g.*,

129. *Aetna Life Ins. Co. v. Haworth*, 300 U. S. 227 (1937).

130. See *Dun & Bradstreet v. City of New York*, 276 N. Y. 198, 206, 11 N. E. (2d) 728, 732 (1937), where the Court of Appeals, by Hubbs, J., remarked: "The undisputed facts in this case make it peculiarly one where the remedy of a declaratory judgment should be granted. That remedy is applicable in cases where a constitutional question is involved or the legality or meaning of a statute is in question and no question of fact is involved. In such cases, pure questions of law are presented. It would be difficult to imagine a case where that remedy would be more applicable." The court was not quite correct in the inference that if there was a disputed question of fact a declaration is barred. That is not so. See *Rockland Light & Power Co. v. City of New York*, 289 N. Y. 45, 43 N. E. (2d) 803 (1942); BORCHARD, *op. cit. supra* note 3, at 391. It seems too bad that the New York Court of Appeals by repetition gives currency to the error that the declaratory judgment is an extraordinary remedy which can only be granted when no other remedy is available. Actually, the court seldom acts on that erroneous assumption, which is in conflict with the plain wording of the statute. See BORCHARD, *op. cit. supra* note 3, at 315, 327.

marketing his goods in interstate commerce free from the requirement of a heavy municipal tax, by remanding him to the criminal courts with the ingenuous remark that if the ordinance is valid he ought to pay, and if invalid, the prosecution will fail.¹³¹ He should not be obliged to violate a statute carrying a criminal penalty in order to find out what it means and whether it is constitutional as applied.

Constitutionality. The courts have shown little hesitation in passing by declaratory action on the constitutionality and validity of criminal statutes, ordinances and regulations, adopted under the police power. The operators of pool rooms,¹³² of taxi-cabs,¹³³ of railroads,¹³⁴ of motor car finance companies,¹³⁵ dentists, optometrists and similar professional men,¹³⁶ have been sustained in their effort to challenge the validity of a statutory or administrative regulation of their business. Business men and manufacturers have challenged by declaration the constitutionality of statutes purporting under penalty to prevent them from manufacturing or vending

131. See *Shredded Wheat Co. v. City of Elgin*, 284 Ill. 389, 120 N. E. 248 (1918), criticized in BORCHARD, *op. cit. supra* note 3, at 967. See also *Dreiser v. John Lane Co.*, 183 App. Div. 773, 171 N. Y. Supp. 605 (1st Dep't 1918). The Supreme Court did not come far from approving (a) the necessity for criminal trial to test the constitutionality and construction of the Nebraska Full Train Crew Law, denying a federal injunction against the enforcement of a state law, and (b) the unimaginative policy of the *Shredded Wheat* case, by remarking, in *Beal v. Missouri Pacific Railroad Corp.*, 312 U. S. 45, 51 (1941): "If its decision [a state criminal prosecution] should be favorable to respondent no reason is shown for anticipating further prosecutions. If it were adverse, penalties in large amount, it is true, might be incurred, but they may well be the consequence of violations of state law." A similar idea is expressed in *Douglas v. City of Jeannette*, 63 Sup. Ct. 877, 881 (U. S. 1943).

132. See *Craig v. Mayor of Town of Gallatin*, 168 Tenn. 413, 79 S. W. (2d) 553 (1935); *Erwin Billiard Parlor v. Buckner*, 156 Tenn. 278, 300 S. W. 565 (1927).

133. See *City of Wichita v. Home Cab Co.*, 141 Kan. 697, 42 P. (2d) 972 (1935); *Johanson v. Winnipeg*, 43 Manit. 201, 2 W. W. R. 329 (1935) (that by-law requiring age of 21 as condition of taxi-driver's license was invalid; court remarked that plaintiff need not submit to prosecution to determine if law is valid. And even though police chief still had discretion to refuse license on grounds of character, this judgment removed one obstacle).

134. See *City of Harrodsburg v. Southern Ry.*, 278 Ky. 10, 128 S. W. (2d) 233 (1939) (declaration plus injunction against prosecution for violation of ordinance governing safety devices at intersections, on ground that the ordinance had been repealed).

135. See *Nelsen v. Tilley*, 137 Neb. 327, 289 N. W. 388 (1939) (regulations claimed invalid and inapplicable).

136. See *Board of Cosmetological Examiners v. Gibbons*, 238 Ala. 612, 193 So. 116 (1940) (whether Act applies to petitioner who vends cosmetics at retail); *State v. Borah*, 51 Ariz. 318, 76 P. (2d) 757 (1938) (course of conduct by dentist claimed privileged); *Stewart v. Robertson*, 45 Ariz. 143, 40 P. (2d) 979 (1935) (application of Pharmacy Act); *Sage-Allen Co. v. Wheeler*, 119 Conn. 667, 179 Atl. 195 (1935) (rule prohibiting optometrists from advertising the prices of optical goods under the name of opticians).

certain articles or conducting their business in certain ways¹³⁷ or restricting in certain particulars their liberty in carrying on their business.¹³⁸

Taxing and Zoning Statutes. Tax statutes generally carry a penalty. Those who, after threat of prosecution, contest their subjection to the statute or claim some immunity from its incidence by reason of a disputed method of computation, classification or deduction, have had no difficulty in having a court pass upon the issue by declaration without exposure to the obloquy of a criminal trial.¹³⁹ In the well-known case of *Socony-*

137. See *Little v. Smith*, 124 Kan. 237, 257 Pac. 959 (1927) (privileged to carry cigarette advertisements); *Calcutt v. McGeachy, Sheriff*, 213 N. C. 1, 195 S. E. 49 (1938) (prohibiting slot machines; 11 types of machines held within the Act, one type excluded); *League for Preservation of Civil Liberties v. Cincinnati*, 29 Ohio Abs. 204 (1939), *appeal dismissed*, 136 Ohio St. 561, 27 N. E. (2d) 235 (1940) (ordinance authorizing police to seize and destroy alleged gambling devices held invalid); *Lagoon Jockey Club v. Davis County*, 72 Utah 405, 270 Pac. 543 (1928) (privileged to conduct races, because second law repealed and first alleged not revived); *Utah State Fair Ass'n v. Green*, 68 Utah 251, 249 Pac. 1016 (1926) (privileged to conduct horse racing without danger of prosecution); *Harcourt v. Attorney General*, [1923] N. Z. 686 (that plaintiff's scheme for conducting horse races was privileged under the Gaming Act). See also *Smith v. Kairanga County*, [1917] N. Z. 567, and *Australian Mut. Provident Society v. Attorney General*, [1916] N. Z. 179, discussed in BORCHARD, *op. cit. supra* note 3, at 972.

138. See *Currin v. Wallace*, 306 U. S. 1 (1939) (regulation of tobacco auctions under Tobacco Inspection Act); *Sandelin v. Collins*, 1 Cal. (2d) 147, 33 P. (2d) 1009 (1934) (manner of conducting liquor business claimed privileged); *McCulley v. City of Wichita*, 151 Kan. 214, 98 P. (2d) 192 (1940) (restriction on grocery sales to certain hours); *Woolf v. Fuller*, 87 N. H. 64, 174 Atl. 193 (1934) (plaintiff's business claimed exempt from license; injunction denied, but declaration recommended by court; "present legal right" not to be prosecuted); *Chung Mee Restaurant Co. v. Healy*, 86 N. H. 483, 171 Atl. 263 (1934) (privileged to conduct restaurant in certain way without a license); *Pathé Exchange v. Cobb*, 202 App. Div. 450, 195 N. Y. Supp. 661 (3rd Dep't 1922), *aff'd*, 236 N. Y. 539, 143 N. E. 274 (1923) (that plaintiff not subject to censorship law); *American Trust Co. v. McCallister*, 136 Ore. 338, 299 Pac. 319 (1931) (plaintiff claimed exemption from the Blue Sky laws and not required to obtain a permit); *Stetzer v. Chippewa County*, 225 Wis. 126, 273 N. W. 525 (1937) (applicability of order to plaintiff's business). See also Ellingwood, *Declaratory Judgments in Public Law* (1934) 29 ILL. L. REV. 1, 174, 208 *et seq.*

Mr. Justice Jackson, in his recent book, *THE STRUGGLE FOR JUDICIAL SUPREMACY* (1941) 302 *et seq.*, makes a strong argument for the necessity of declaratory judgments in constitutional cases.

139. See *Curry v. Feld*, 238 Ala. 255, 190 So. 88 (1939) (seller of cigarettes arrested; claimed by declaration and injunction immunity from prosecution because engaged in interstate commerce); *City of Mayfield v. Reed*, 278 Ky. 5, 127 S. W. (2d) 847 (1939) (exemption from prosecution claimed because accountant not "carrying on business" in the city); *Maloney Davidson Co. v. Martin*, 274 Ky. 449, 118 S. W. (2d) 708 (1938) (held, plaintiff's type of wholesale selling was not within purview of stamp tax statute); *Detroit Edison Co. v. Secretary of State*, 281 Mich. 428, 275 N. W. 196 (1937) (that plaintiff's offices and branches were not chain stores, within tax statute); *Tirrell v. Johnston, Atty. Gen.*, 86 N. H. 530, 171 Atl. 641 (1934), *aff'd*, 293 U. S. 533 (1934)

Vacuum Oil Company v. City of New York,¹⁴⁰ sellers of gasoline successfully sought a declaration of the city's disability to demand that they exact the sales tax from their customers upon the entire selling price of the gasoline, which included federal and state taxes, and of their privilege, contrary to the city local law, to levy the tax on the net price only. While denying a requested injunction but granting a declaration, Justice Dore, for a unanimous Appellate Division, remarked:

"For these reasons, and because of the position of peril in which plaintiffs are placed, in view of the civil and criminal penalties imposed if they fail in their designated duties, and to avoid a multiplicity of suits and circuitry of action, and because of the invalidity of the regulation so far as it is attacked, we consider that a declaratory judgment is the appropriate remedy to settle these controversies before they lead to the repudiation of obligations, the invasion of rights, or the commission of wrongs."¹⁴¹

In a recent Arizona case, the taxpayer had made a settlement with the state of a disputed claim for taxes and was then met by an additional demand for penalties because of delay in payment. The taxpayer was sustained in its action for a declaration that it was not subject to penalties.¹⁴²

Persons desiring to erect buildings alleged to violate zoning ordinances have sought declarations that the zoning ordinance was arbitrary and invalid or that their proposed building was not a violation.¹⁴³

Gambling. The New York Court of Appeals in *Reed v. Littleton*¹⁴⁴ seems to have found no difficulty in concluding that the issue of constitutionality, or even the claim of the privilege to act free from a governmental requirement like a license, was properly justiciable by declaratory judgment. Possibly they might even have permitted the legality of a fixed

(injunction, for which court substituted a declaratory judgment, that plaintiff as federal mail carrier exempt from state gasoline road toll). But in *New York Rapid Transit Corp. v. City of New York*, 253 App. Div. 923, 2 N. Y. S. (2d) 659 (2d Dep't 1938), a declaration of the legality of penalties imposed for failure to pay certain taxes was refused. In *Stockman v. Wilson Distilling Co.*, 175 Misc. 314, 23 N. Y. S. (2d) 510 (Sup. Ct. 1940), the court declined to declare the invalidity of certain price-maintenance trade agreements. That plaintiff thereby sought to avoid prosecution was no ground for refusal; that the issue would not have been settled, because competing retailers might still sue, may have been a better ground.

140. 247 App. Div. 163, 287 N. Y. Supp. 288 (1st Dep't 1936), *aff'd*, 272 N. Y. 668, 5 N. E. (2d) 385 (1936).

141. *Id.* at 167, 287 N. Y. S. at 293.

142. See *Peterson v. Central Arizona L. & P. Co.*, 56 Ariz. 231, 107 P. (2d) 205 (1940).

143. See *Moore v. City of Pratt*, 148 Kan. 53, 79 P. (2d) 871 (1938); *C. K. Eddy & Sons v. Tierney*, 276 Mich. 333, 267 N. W. 852 (1936).

144. 275 N. Y. 150, 9 N. E. (2d) 814 (1937).

business practice within the meaning of a statute, requiring both the determination of the facts of the practice and the construction and interpretation of the law, to be adjudicated.¹⁴⁵ But they drew the line at authorizing the Appellate Division to determine whether a certain manner of running dog races constituted "gambling" within the meaning of the anti-gambling law, although the District Attorney was as anxious as the operator to obtain the judgment of a court of record, since a criminal prosecution, though advised by the court, was actually impractical.¹⁴⁶ The effort to devise schemes to circumvent or avoid the anti-gambling law, while meeting a public demand, has induced injunctive and declaratory challenges to the enforcement of the laws concerning horse racing, dog racing, slot machines, pin ball games and other devices. Courts in general have not been especially hesitant about assuming equitable jurisdiction, granting the injunction where the device or machine was considered as not to constitute gambling, while denying the injunction when they thought that it did.¹⁴⁷

Since these businesses come closer to the border line of *mala in se*, several courts have taken the position that they would not by injunction or declaration of the validity or legality of the device interfere with the enforcement of the criminal law, even though the court was competent

145. See *New York Foreign Trade Zone Operators v. State Liquor Authority*, 285 N. Y. 272, 34 N. E. (2d) 316 (1941); *Rockland Power & Light Co. v. City of New York*, 289 N. Y. 45, 43 N. E. (2d) 803 (1942).

146. The court did not state fully the historical facts concerning this litigation, which had resulted in an acquittal for a misdemeanor. This could not be appealed to a court of record. Commentators on the case also failed to note the peculiar judicial history of the *Reed* case, because the appellate division and the court of appeals failed to point it out. Cf. (1937) 6 BROOKLYN L. REV. 472; (1938) 23 CORN. L. Q. 314; (1937) 22 MINN. L. REV. 279; (1937) 14 N. Y. U. L. REV. 398; (1937) 11 ST. JOHNS L. REV. 320; (1939) 12 SO. CALIF. L. REV. 319. Several of these commentators conclude that the discretion of the New York courts should have been used in favor of issuing a declaration in the instant case. Subsequent to the court of appeals' refusal to make a declaration, a federal injunction was procured in the United States district court restraining the District Attorney from interfering in the operations of Reed; this was reversed by the circuit court of appeals, without any decision on the question whether the operations constituted gambling. Then a criminal indictment was found in the county court and on the evidence the county judge dismissed the indictment on motion, without passing on the question of gambling. The District Attorney appealed to the appellate division, which declined to entertain the appeal, and this was affirmed by the court of appeals, all without any definite adjudication whether the plan constituted gambling. *People v. Reed*, 276 N. Y. 5, 11 N. E. (2d) 330 (1937), *aff'g*, 252 App. Div. 214, 298 N. Y. Supp. 624 (2d Dep't 1937), *motion denied*, 276 N. Y. 556, 12 N. E. (2d) 572 (1937). See also *State ex rel. Egan v. Superior Court of Lake County*, 211 Ind. 303, 6 N. E. (2d) 945 (1937) (same view as in *Reed v. Littleton*, 275 N. Y. 150, 9 N. E. (2d) 814 (1937)). Cf. *Witschner v. City of Atchison*, 154 Kan. 212, 117 P. 570 (1941) (pinball game; dismissed for inadequacy of record, evidence and controversy—device not yet introduced in Atchison).

147. See cases cited in BORCHARD, *op. cit. supra* note 3, at 1031. Also Comment (1933) 27 ILL. L. REV. 560.

to pass upon the scheme and would have to do so later on possible appeal from a criminal conviction. To sustain their disinclination to rule on the issue of legality in a civil suit, these courts have adduced old generalizations, such as the refusal of equity to enjoin a criminal prosecution, which are neither accurate nor followed in many cases by the very courts which uncritically gave expression to the maxims. What they should say in such cases is that the facts are too complicated, or that the motive is too uncertain, to try the issue without a jury—although equity can impanel one—but not that the general rules of equity disable the court from passing on the issue of legality.

Business Practices Affected by Police Power. In ordinary cases of police power statutes carrying a penalty, the suggestion of the New York Court of Appeals in *Reed v. Littleton*¹⁴⁸ that equity cannot determine whether certain or uncertain facts constitute "crime"—making an analogy to larceny or bigamy—is inapplicable. The belief that the decision would not be binding as *res judicata* or even as *stare decisis* is not sustained by experience, since criminal prosecutions after a declaration of the legality or meaning of a police power statute are not known to the writer. The government as a rule is as desirous of having an authoritative construction of the law as the citizen. Of course the judgment would not be binding if the facts were varied. Actually the petitioner in these cases relieves the District Attorney of a burden he would ordinarily have to bear—petitioner must prove his claim of privilege or immunity by a preponderance of evidence, whereas had the District Attorney prosecuted, he would have had to prove guilt beyond a reasonable doubt.

Courts of equity have found no difficulty in issuing declarations on behalf of entitled petitioners against the District Attorney or prosecuting officer that numerous practices or forms of carrying on business were not illegal, as claimed, but rather were privileged under the law. Thus members of a spiritualist church successfully brought an action against the county prosecuting officer for a declaration that they were privileged to worship in the form of seances for which they charged a fee and were not guilty of violating the statute forbidding public exhibitions of "hypnotism, mesmerism, animal magnetism, or so-called psychical forces, for gain."¹⁴⁹

148. 275 N. Y. 150, at 157, 9 N. E. (2d) 814, at 817. There was no possibility, as the court remarked, of "interfering with administrative discretion in the enforcement of law," for the District Attorney joined in the request for a declaration on the very ground that no criminal prosecution was practical. Perhaps a better support for the *Reed* opinion than the reasons adduced might be the fact that the question whether the device of the plaintiff was "gambling" depended on his intent, and that could have been referred to a jury on interrogatories in the appellate division or should be left to the determination of a criminal jury, however impractical in the *Reed* case.

149. See *Dill v. Hamilton*, 137 Neb. 723, 291 N. W. 62 (1940). See also cases discussed and cited in *BORCHARD, op. cit. supra* note 3, at 779 *et seq.*, 788 *et seq.*, 966 *et seq.*

Business men have had occasion to place in issue by declaratory action their privilege to continue in the liquor business because a local option law had not properly come into force,¹⁵⁰ to sell used cars free from any penalty or fee arising out of the failure of former owners to pay license taxes,¹⁵¹ and their claims that a certain rider attached to an insurance policy was privileged, in spite of defendant's threatened prosecution,¹⁵² that a certain method of dental advertising was not a violation of the statute against the use of corporate or trade names,¹⁵³ that a dentist was privileged to substitute for the administration of anesthetics a duly registered nurse for a physician,¹⁵⁴ that the distribution of milk in cardboard containers was not a violation of an ordinance prescribing distribution in bottles only,¹⁵⁵ that the manner in which the petitioners conducted horse races was not unlawful as the District Attorney claimed.¹⁵⁶

Lotteries. On several occasions enterprising business men have sought to obtain a judicial declaration that their schemes for increasing business by distributing benefits to the successful winners of guessing or other contests based on chance were not lotteries which would expose them to criminal prosecution.¹⁵⁷ This required the court to examine the details of the schemes to determine whether they fell within the ban of the general term "lottery."

150. See *Rogers v. Commonwealth*, 266 Ky. 679, 99 S. W. (2d) 781 (1936). See also *Hemenway & Moser Co. v. Funk* (State Liquor Comm'n), 100 Utah 72, 106 P. (2d) 779 (1940) (power to seize personalty for violation of liquor law). Cf. *Ellingwood*, *supra* note 138, at 204 *et seq.*

151. See *Henry, Commissioner of Licenses v. Drennen Motor Car Co.*, 235 Ala. 559, 180 So. 563 (1938).

152. See *General Insurance Co. v. Ham*, State Ins. Comm'r, 49 Wyo. 525, 57 P. (2d) 671 (1936) (commissioner held to have discretion).

153. See *Gullings v. State Board of Dental Examiners*, 200 Minn. 115, 273 N. W. 703 (1937). Cf. *Speert v. Morgenthau*, 116 F. (2d) 301 (App. D. C. 1940) (privileged to label their whiskey either "corn" or "bourbon" against claim *contra* of Alcohol Administrator).

154. See *State v. Borah*, 51 Ariz. 318, 76 P. (2d) 757 (1938). Cf. *Board of Cosmetological Examiners v. Gibbons*, 238 Ala. 612, 193 So. 116 (1940) (that Act was not applicable to petitioners who vend cosmetics at retail).

155. See *Fieldcrest Dairies v. City of Chicago*, 35 F. Supp. 451 (N. D. Ill. 1940), *rev'd*, 122 F. (2d) 132 (C. C. A. 7th, 1941), *vacated and remanded*, 316 U. S. 168 (1942).

156. See *Multnomah County Fair Ass'n v. Langley*, Dist.-Atty., 140 Ore. 172, 13 P. (2d) 354 (1932). The District Attorney had claimed that the method of rewarding the owners of horses and the winners was a nuisance and a lottery, under statute. Cf. cases cited *supra* note 137.

157. See *Worden v. City of Louisville*, 279 Ky. 712, 131 S. W. (2d) 923 (1939) (proposed plan; held, for defendant, because prosecuting attorney not joined as defendant); *McFadden v. Bain*, Dist. Atty., 162 Ore. 250, 91 P. (2d) 292 (1939) (coupons with theater tickets, entitling holder to participate in raffle). See note 137 *supra*. In *Brown v. Bonnycastle*, [1936] 1 D. L. R. 295 (Man.) an informer unsuccessfully sued defendants, winners of lottery on car, for forfeiture of car, because lottery illegal.

Of equal interest is the attempt of an individual or a coöperative group to demonstrate against the prosecuting officials that their business is not "insurance" or other fiduciary business subject to strict regulation, for which reason they claim exemption from the restriction or penalties imposed.¹⁵⁸

Unlawful Practice of Law. When the Bar Association of Richmond accused the Credit Men's Association of that city of engaging unlawfully in the practice of law, the latter instituted an action for a declaration that their system of collecting accounts was legitimate and not a violation of the statute.¹⁵⁹ A similar practice was recently sustained by the Supreme Court of Missouri in a well-reasoned opinion on the demand of numerous casualty insurance companies which had been charged with the unlawful practice of law through their lay adjusters in the investigation and settlement of claims against the company.¹⁶⁰ The court remarked that the criminal features of the case were of less importance than the private and public interest in establishing the legitimacy of business conduct and practices, and that there was no reason why a civil equity court could not make that determination. The court made a classification of the numerous types of activity involved, holding some privileged and others unlawful.

158. See *Moresh v. O'Regan*, County Prosecutor, 120 N. J. Eq. 534, 187 Atl. 619 (1936), and the extraordinary subsequent miscarriage of justice in this case due to the New Jersey division between law and equity; BORCHARD, *op. cit. supra* note 3, at 1023. Cf. *Group Health Ass'n v. Moor*, 24 F. Supp. 445 (D. D. C. 1938), in which Justice Bailey declared that the Association was not engaged in the "business of insurance" and hence was not violating the criminal law. Judgment affirmed in *Jordan v. Group Health Ass'n*, 107 F. (2d) 239 (App. D. C. 1939).

159. See *Richmond Ass'n of Credit Men v. Bar Ass'n of City of Richmond*, 167 Va. 327, 189 S. E. 153 (1937). But the practice of the Association in selecting attorneys to make collections for customers and fixing fees, and sharing fees without the customer's knowledge of the identity of the attorneys, was considered the practice of law. Cf. (1939) 52 HARV. L. REV. 1185.

160. See *Liberty Mut. Ins. Co. v. Jones*, 344 Mo. 932, 130 S. W. (2d) 945 (1939). In *Birmingham Bar Ass'n v. Phillips & Marsh*, 239 Ala. 650, 196 So. 725 (1940), a case practically similar to the *Liberty Mutual* case in Missouri, Judge Bouldin for the Alabama court, which has been liberal in the use of the declaratory judgment, concluded that *quo warranto* was the "exclusive remedy" for such problems. This seems unconvincing and under the terms of the Uniform Act hardly justified. The court also thought the three classes of defendant's claims adjusters, their employees, and accessory defendants such as insurance companies, had nothing in common and therefore could not be joined, but this view also seems outmoded. See BORCHARD, *op. cit. supra* note 3, at 263. In *La Velle v. Hennepin County Bar Ass'n*, 206 Minn. 290, 288 N. W. 788 (1939), a private member challenged by declaration the defendant's right to poll the members of the association to elicit their preference for judicial candidates, on the ground that this violated the corrupt practices act. Demurrer on the merits was sustained.

In *Gonzales v. Ito*, 12 Cal. App. (2d) 124, 55 P. (2d) 262 (1936), a landowner challenged defendant's (Japanese) power to purchase at foreclosure on alleged ground that this violated the alien land law. Held, for defendant.

We have already observed that the New York Court of Appeals thought it sound policy to determine by declaration that the New York Foreign Trade Zone Operators by adding water to certain imported liquor were not engaged in the practice of "rectification" and were therefore exempt from the claimed obligation of taking out a state distiller's license.¹⁰¹ By contrast, the refusal of an Indiana court to determine by declaration whether the Kroger Grocery in selling certain vitamin tablets was engaged in selling "food" or "drugs" was most unfortunate, since this was not a case for criminal prosecution, as the court seemed to think.¹⁰²

CONCLUSION

It is hoped that this article will have demonstrated:

(1) That the declaration is superior to the injunction as a vehicle of adjudicating the construction and constitutionality of police power statutes, ordinances and regulations;

(2) That the injunction has become an awkward tool and has been abused, having been granted in many cases in the absence of the justifying conditions and refused in many cases where it should have been granted, a refusal due to considerations adverse to federal interference with state proceedings and to considerations involved in the cloudy maxim of not interfering with "criminal" prosecutions;

(3) That by progressively advancing restrictions on the grant of injunction, the courts are driving litigants into the position of either abandoning their challenge and obeying an unconstitutional statute, or else becoming, by choice or necessity, defendants in criminal trials; if courts must restrict the injunction, the alternative is not a criminal trial but a declaratory judgment;

(4) That the judicial demand for a "personal" threat of prosecution by an enforcing officer is an improper condition of justiciability, since *jeopardy* creates the privilege of initiating an action for relief, declaratory or equitable, and *jeopardy* is usually created by the statute itself, not by the Attorney-General or District Attorney;

(5) That the rationalization of *Ex parte Young*, which led the courts into their present bog, should be officially repudiated as unnecessary and confusing and without justification;

(6) That the perpetuation of the misconception in *Ex parte La Prade* and Federal Rule 25 (d) based upon it should also be officially repudiated;

161. It is regrettable that three judges dissented, since this is an admirable example of the declaratory judgment procedure. To compel the operators to become defendants in a criminal trial is no "adequate remedy," as Judge Desmond pointed out, even if that contention had any relevancy to the issue. It has not. See note 61 *supra*.

162. See *Dep't of State v. Kroger Grocery & Baking Co.*, 46 N. E. (2d) 237 (Ind. 1943).

(7) That the broad conception of "crimes" and "criminal" law should be analyzed and broken down, and police power measures carrying a penalty should no longer be classified as "crimes" or exposed to the same methods of adjudication as crimes;

(8) That on the contrary, the victim, target or subject of these police power measures should be enabled to challenge their constitutionality, applicability and construction by the simple method of declaratory adjudication, and thus dissipate the mass of judicial detritus which has accumulated around the adjudication of legislative prescriptions and so largely frustrated an efficient administration of justice.