BEHIND *BARTKUS*: A FLAMBOYANT LAWYER, A VINDICTIVE JUDGE, AND THE UNTOLD STORY OF DOUBLE JEOPARDY'S DUAL SOVEREIGNTY

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A young defense attorney earns his client, charged in federal court with bank robbery, a jury acquittal. (It's the attorney's first.) One would expect the impartial judge to thank the jury for its service. Instead, this one harangues both jury and defense attorney ("entailing changes in his complexion from red to purple to dead white"), publicly rails against the verdict, attempts to bar the jurors from future service, refuses to release the defendant, and successfully prods prosecutors to bring a duplicative state prosecution that would end in conviction for the same crime.

To anyone who respects the rule of law—or at the very least to anyone who respects the American jury—this should be deeply troubling. Yet when it took place in a Chicago federal courtroom in December 1953, state prosecutors leapt at the federal judge's call. And when the appeal of the duplicative state prosecution reached the United States Supreme Court, the defendant lost 5-4. Criminal practitioners know that result as Bartkus v. Illinois, *359 U.S. 121 (1959), a rule of double-jeopardy "dual sovereignty" that the Court reaffirmed in 2019. But next to nobody appreciates how it began in that Chicago federal courtroom. That history comes to life in the unpublished notes of the remarkable defense lawyer. It is a story that underscores just*

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how wrongheaded is the legal rule, and that makes vivid the abuse of judicial power.

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WHAT WE KNEW–

A "Routine" Bank Robbery Case

On July 27, 1953, Joseph Cosentino and James Brindis robbed the General Savings & Loan Association in Cicero, Illinois, at gunpoint.[1] Each confessed and pleaded guilty.[2] And each testified in the prosecution of Alfonse Bartkus, allegedly their wheelman and the mastermind of the $3,675 heist.[3] Based upon that testimony, the confirmatory testimony of a jailhouse informant, a partial eyewitness identification, a license plate match, and a criminal history (Bartkus had three felony convictions, two for armed robbery), it was an easy prosecution win.[4] Bartkus was convicted by a unanimous Illinois jury and sentenced to life in prison.[5]

Yet things often are not as they first seem. That synopsis describes Bartkus's *second* trial, meaning prosecutors and the police had enjoyed a test run.[6] Bartkus had an alibi defense supported by at least five other persons.[7] And the first jury to hear and consider the allegations believed Bartkus, at least enough to conclude there was a reasonable doubt, and returned an acquittal after three hours of deliberation.[8] Yet the second jury was left

1. Illinois v. Bartkus, 130 N.E.2d 187, 188 (Ill. 1955).

2. *Id.*

3. *Id.*; *Report Naming of Bartkus in New True Bill*, CHICAGO TRIB., Jan. 7, 1954, at 3.

4. *See Bartkus*, 130 N.E.2d at 188–89.

5. *Id.* at 187.

6. *See id.* at 188; Bartkus v. Illinois, 359 U.S. 121, 122–22 (1959). In the later words of the United States Supreme Court, "[c]oncededly, some of that [second trial] evidence had been gathered after acquittal in the federal court." *Bartkus*, 359 U.S. at 122. That included the testimony of the jailhouse informant. *See id.* at 166–67 (Brennan, J., dissenting).

7. *See Bartkus*, 130 N.E.2d at 189. In his ultimate dissent, Justice Brennan seems to indicate there might have been even more alibi witnesses. *Compare id.* (noting five alibi witnesses exclusive of the defendant, only two barbers of whom testified to the haircut alibi); *Bartkus*, 359 U.S. 121, 165 (Brennan, J., dissenting) ("The owner of the barber shop, his son and other witnesses placed Bartkus in the shop at the time.").

8. *See Bartkus*, 130 N.E.2d at 187; *Judge Orders Probe of Jurors in Robbery Case*, ALBUQUERQUE J., Dec. 20, 1953, at 41.

entirely ignorant of this play's first act, the Illinois judge refusing to permit Bartkus to inform his jury that he had already been acquitted of this very crime.[9]

So, tried and acquitted once for this bank robbery, Bartkus received a life sentence only when prosecuted again for the same crime. That's rather strange justice when the Fifth Amendment commands that "no person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb."[10] At the American Founding, this meant that "when a man [was] once fairly found not guilty upon any indictment or other prosecution, before any court having competent jurisdiction of the offence, he may plead such acquittal in bar of any subsequent accusation for the same crime."[11] In the words of the United States Supreme Court, the Double Jeopardy Clause thus "protects against a second prosecution for the same offense after acquittal."[12] So, although some double jeopardy problems might be hard ones, the duplicative prosecution of Alfonse Bartkus would seem easy: he could not be re-prosecuted following his federal jury acquittal, and, at the *very* least, he ought to have been able to bring that acquittal to the attention of his second, Illinois state jury.

When Bartkus' appeal reached the United States Supreme Court, his case divided an eight-member Court 4-4.[13] Given that Justice William J. Brennan Jr. was the one sitting out,[14] the Bartkus defense must have been quite pleased when the Court granted a motion for rehearing and reargument.[15] Yet when the dust settled, only four members of the Court (Justices Earl Warren, Hugo Black, William O. Douglas, and William J. Brennan Jr.) would have held for Bartkus.[16] For them, like for the two of us, "double prosecutions for the same offense are . . . contrary to the spirit

9. *See Bartkus*, 130 N.E.2d at 188. In the words of the Illinois Supreme Court, that first acquittal was "irrelevant." *Id.*

10. U.S. CONST. amend. V.

11. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 335 (1773).

12. North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

13. Bartkus v. Illinois, 355 U.S. 281 (1958); *see also Bartkus*, 359 U.S. at 122 (noting this prior per curiam resolution).

14. *Bartkus*, 355 U.S. at 281.

15. *See* Bartkus v. Illinois, 356 U.S. 969 (1958); *see also Bartkus*, 359 U.S. at 122 (noting this change of course).

16. *See* Bartkus v. Illinois, 359 U.S. 121, 150 (1959) (Black, J., dissenting); *id.* at 165 (Brennan, J., dissenting).

of our free country."[17] But for five other Justices—Felix Frankfurter, Tom Campbell Clark, John Marshall Harlan, Charles Evans Whittaker, and Potter Stewart—formalism seemingly (but not really) entrenched in long precedent would win the day: the state of Illinois was a different government than the United States, and so each could prosecute regardless of the actions of the other.[18] Indeed, each could prosecute, as here, in coordination with the other.[19]

Six decades later, in 2019, a contemporary majority nodded again to prosecutorial second helpings in *Gamble v. United States*:

> [A] crime under one sovereign's laws is not "the same offence" as a crime under the laws of another sovereign. Under this "dual-sovereignty" doctrine, a State may prosecute a defendant under state law even if the Federal Government has prosecuted him for the same conduct under a[n identical] federal statute.[20]

A FEW HINTS–

A Strangely Continued Federal Investigation

Despite that double jeopardy dodge, not every acquittal results in a second prosecution. Neither does every conviction. Both typically could, given the rule that Bartkus's case produced and that the Supreme Court ratified in *Gamble*.[21] But in practice they typically don't. So *why* was Bartkus—at worst, a garden-variety bank robber (we append some details of his life for

17. *Id.* at 150 (Black, J., dissenting). Justice Brennan's dissent more particularly complained of the federal government's continued involvement in Bartkus's state prosecution. *See id.* at 164–70. For more on our views of the dual sovereignty matter, see Stephen E. Henderson & Dean A. Strang, *Double Jeopardy's Dual Sovereignty: A Tragic (and Implausible) Lack of Humility*, 18 OHIO ST. J. CRIM. L. 365 (2020); see also George C. Thomas III, *The Double Jeopardy Clause and the Failure of the Common Law*, 53 TEX. TECH. L. REV. 7 (2020) (providing a delightful and insightful critique).

18. *See Bartkus*, 359 U.S. at 128–36 (Frankfurter, J., for the Court); Henderson & Strang, *supra* note 17, at 371–75, 383–86.

19. *See* text and notes 22–29, 50–52, *infra*.

20. Gamble v. United States, 139 S. Ct. 1960, 1964 (2019). Our disagreement with this decision is explained in Henderson & Strang, *supra* note 17.

21. Even under the Court's notion of dual sovereignty, there will of course be some instances in which only a single sovereign has jurisdiction, as when Congress has not opted to exercise its broad Commerce Clause authority and neither conduct nor actors implicate multiple states.

the interested reader below)—tried again after a jury decided he had nothing to do with the crime? Although we've uncovered details that suggest a more personal, more unscrupulous and vindictive answer, we first briefly recount what was already known: merely the hint of an answer, and a dry, judicial hint at that.

According to the Supreme Court's eventual opinion, the FBI agent who had led the federal investigation "turned over to the Illinois prosecuting officials all the evidence he had gathered."[22] So, following the federal jury acquittal, the FBI handed its file to the state of Illinois, permitting a state indictment "less than three weeks later."[23]

Was this because Illinois had come asking? No. In the words of the Illinois prosecutor, this was "a case where the federal authorities came to [us]."[24]

Very cooperative of them. But it gets stranger. In the words of the Supreme Court, "[c]oncededly, some of that evidence had been gathered after acquittal,"[25] including discovery of a jailhouse informant to whom Bartkus allegedly confessed.[26] Think about that for a minute. The federal government investigates and prosecutes Bartkus for bank robbery. A jury acquits. And so . . . the federal government *continues to investigate*. Someone must have disliked that acquittal very much indeed. But who? The FBI agent? The federal prosecutor?

There are two leads buried in the Supreme Court's opinions. For most readers these have gone largely unappreciated. But they become stark and startling once the whole story is put together as it will be below. First, from the Court majority, there is this: "The only other connection between the two trials is to be found in a suggestion that the federal sentencing of the accomplices who testified against petitioner in both trials was purposely continued by the federal court until after they testified in the state trial."[27] Indeed, both Cosentino and Brindis—convicted bank robbers—were released upon bail during this time.[28] Second, from Justice Brennan's dissent, there is this: "The federal authorities were highly displeased with

22. *Bartkus*, 359 U.S. at 122.
23. *Id.* at 164 (Brennan, J., dissenting).
24. *Id.* at 123 n.1. *See also id.* at 165 (Brennan, J., dissenting) (quoting the same language).
25. *Id.* at 122.
26. *See id.* at 166–67 (Brennan, J., dissenting).
27. *Id.* at 122–23.
28. *See id.* at 166 (Brennan, J., dissenting).

the jury's resolution of the conflicting testimony, and the trial judge sharply upbraided the jury for its verdict."[29]

Despite these hints, and despite our years of litigating, teaching, and writing about *Bartkus*'s dual sovereignty, we never quite "got it," and we suspect it has been the same for everyone else. But all that changed when we fortuitously learned the content of some unpublished, incomplete notes of a late Chicago defense lawyer.

A MORE COMPLETE STORY–

The Young Defense Lawyer and the Angry Judge

Frank Williams Oliver was not a common criminal defense lawyer, to dally with understatement.[30] For starters, he had an atypical pedigree. The boy

29. *Id.* at 165 (Brennan, J., dissenting) (citing United States v. Vasen, 222 F.2d 3, 9–10 (7th Cir. 1955) (Finnegan, C.J., dissenting)). Justice Brennan points to an appellate record of the trial judge's displeasure, recorded when the judge—in another case—took it upon himself to explain it to the jury! Those remarks to the *Vasen* jury included these:

> Now, Ladies and Gentlemen, we will have the opening statement by the Government. . . .
> I think in fairness to this defendant I should say something to you Ladies and Gentlemen before this case starts. I do not want you people to get the impression that I as a judge have any notion about what you should do as members of the jury, and I am going to try to give this defendant a fair trial and give the Government a fair trial.
> I have been practicing law and been a judge altogether over a period of upwards of twenty-seven years; about twenty-five of that was as a lawyer. I have disagreed with a few juries, and not too much. I never criticized but one jury in my life, as a practicing lawyer or as a judge. . . . I did criticize one, and some of you may know about it, and I do not regret that I did. If I had it to do over I would again. . . .
> It sounded to me like [defendant Bartkus] would have had to have Aladdin's magic carpet to have moved around over the city of Chicago [like he claimed] . . . It was so impossible and improbable.

Vasen, 222 F.2d at 9–10 (Finnegan, C.J., dissenting).

30. Because some of the information in this section is based upon personal knowledge, it will help to note at the outset that one of us, Dean Strang, was personally acquainted with Frank Oliver. Strang's principal mentor as a trial lawyer is James M. Shellow of Milwaukee, and Shellow was one of Oliver's several star pupils. Dean met Oliver in 1986 and had rare and casual social meetings with him until the early 2000s. Beginning then and continuing until shortly before Oliver's death in 2006, there was more frequent contact in person and by email in an effort to explore Oliver's personal history with greater care. Oliver was a consummate raconteur and, at least in later years, projected a bit of the rake (often dressing in a black turtleneck sweater with slacks and sport coat in shades of grey, offset by conspicuous gold jewelry and a sly grin).

was born in March 1920 in Sioux City, Iowa, near the South Dakota border.[31] If there is or was a fashionable part of Iowa, that's not it. But Frank was the son of a lawyer, Ralph Addison Oliver (1886–1968), who later would serve as a justice of the Iowa Supreme Court.[32] Indeed, Ralph was in the third generation of Olivers to serve as judges in Iowa: both his father and grandfather had been trial court judges.[33] So Frank stood in a long genetic line that led straight to law school and, his parents might have hoped, eventually to the bench.

For a time, young Frank did not disappoint. He attended the University of Chicago as an undergraduate, beginning a lifelong affair with that city.[34] Inducted into the Army in March 1942, he served almost exactly four years in an Airborne Division, becoming a lieutenant.[35] After the war, he went to law school at the University of Iowa.[36] Upon graduation, he returned to Chicago to begin a career as a criminal defense lawyer.[37]

As a young lawyer, Frank Oliver had at least some acquaintance with, and probably mentoring by, the flamboyant Chicago lawyer Wm. Scott Stewart (1886–1964),[38] who was one-half of the composite model for Billy Flynn, the defense lawyer in the 1926 play, 1975 musical, and 1927 and 2002 movies, *Chicago*.[39] Much later in life, Oliver certainly credited Stewart as a mentor.

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31. Frank W. Oliver, Draft Registration Card, July 1, 1941 (viewed on Ancestry.com); Maurice Possley, *Frank W. Oliver: 1920–2006*, CHICAGO TRIB., Oct. 5, 2006, https://www.chicagotribune.com/news/ct-xpm-2006-10-05-0610050249-story.html.

32. Possley, *supra* note 31; *Former Iowa Jurist Dies*, SIOUX FALLS (S.D.) ARGUS-LEADER, Oct. 14, 1968, at 7.

33. *Former Iowa Jurist Dies*, *supra* note 32.

34. *See* Possley, *supra* note 31.

35. *WWII Bonus Case Files, 1947–54*, State Historical Society of Iowa (viewed on Ancestry.com); "Ganter-Oliver" wedding notice, SIOUX CITY (IOWA) JOURNAL, Dec. 21, 1944, at 8.

36. Possley, *supra* note 31.

37. *Id.*

38. This and similar details are the personal recollection of an author, as confirmed by others who knew Frank Oliver (see note 30, *supra*).

39. *See, e.g.*, *The Fascinating Full Story Of 2002's Chicago*, Musicoholics, https://www.musicoholics.com/backstage-stories/the-fascinating-full-story-of-2002s-chicago/2.html (last visited Oct. 2021). Stewart was as outsized as Frank Oliver, or more. As a young Assistant State's Attorney in Cook County, Stewart acquired a lasting nickname: "the hanging prosecutor." *Mouthpiece is Quiet in Pauper's Death*, MIAMI HERALD, Mar. 21, 1964, at 12. Joining the defense bar, he soon represented second-tier mobsters and molls of Al Capone's Chicago. He went on to become the most notable, which is not to say appreciated or

In those early years after school, Frank Oliver practiced mostly in the famed Criminal Courts building at 26th Street and California Avenue. But he also aspired to break into federal court in the Northern District of Illinois.

That's exactly what the young lawyer was doing in 1953 when he undertook the defense of Alfonse Bartkus. By his own account, still not four years out of law school, Oliver had not yet won a jury trial.[40] That changed on December 18, 1953, when a federal jury acquitted his 25-year-old client.

Now, many federal judges might allow a young lawyer to enjoy his first acquittal, whatever their personal views on the accused's guilt. No criminal defense lawyer ever forgets that first not-guilty verdict and the flush of seeing a client released from jail or bail conditions. At the very least, most judges would show respect to the jury.

But the Honorable Joseph Samuel Perry, who presided over the Bartkus trial, was not that kind of judge. Oliver offered this about Judge Perry:

> Sam Perry's vocalization had the slightly nasal quality of those certain southern crackers whose intonation carries the awful burden of poverty of education. Accompanied by its faithful attendant, poverty of thought. He conducted his court as though fearful everyone sought to outsmart him. Thinking he "had" you in some triviality, he was spiteful in the style of a meanly intentioned 11 year old girl. My original opinion of him never changed.[41]

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admired, Chicago defense lawyer in the years immediately after Clarence Darrow. His massive 1940 book, ON TRIAL STRATEGY (The Flood Co.), closes its 1442 pages with a sixty-page, seething diatribe against the office of the Cook County Public Defender. "The Public Defender System," opined Stewart, "is wrong in principle and often operates as a fraud upon the defendant in violation of the constitution." Stewart, ON TRIAL STRATEGY at 1382. The gloating over Stewart's death in the Miami Herald obituary—not even his hometown, but rather merely his part-time winter haven—is striking: "There was no funeral. There were no flowers. There were no mourners." *See Mouthpiece is Quiet*, *supra* this note.

40. *See* Frank W. Oliver, *Some Judges of the Northern District of Illinois*, at 1 (unpublished; on file with authors).

41. *Id. at* 1. We leave Oliver's idiosyncratic grammar and punctuation unchanged. According to the Federal Judicial Center, Perry indeed was born and educated in Alabama, so Oliver's geography was right even as his slur was wrong. *See Perry, Joseph Samuel*, FEDERAL JUDICIAL CENTER, https://www.fjc.gov/history/judges/perry-joseph-samuel (last visited Oct. 2021). For what it is worth, Jim Shellow—again, Frank Oliver's devoted pupil—also knew Judge Perry slightly and recalls him as "just another federal judge." (By which Shellow means an ordinary hack, as he tends to view most judges, but not one worthy of special denunciation.)

To be fair, based upon what follows, Oliver was no disinterested observer when it came to Judge Perry. Still, while he generally thought dimly of federal judges in his later years, few received anything like that treatment. To the contrary, although he peppered most of his comments with gibes, Judge Richard Austin "was that ideal judge who let the lawyers try the case,"[42] Judge Bernard Decker "[b]y and large . . . must be considered to have been a credit to the bench,"[43] and as for Judge Michael Igoe, "[w]e are lucky to have had him."[44] Oliver "admir[ed] Judge [Frank] McGarr"[45] and thought Judge Walter LaBuy "a warm and kindly gentleman."[46] Perhaps most tellingly, many contemporary observers will think extremely little of Judge Julius Hoffman given his depiction in Netflix's *The Trial of the Chicago Seven*.[47] Yet while far from generally complimentary of the man, Oliver believed "Judge Hoffman had the misfortune to preside" in that matter and "was damned beyond any reasonable measure for his conduct of that trial," treatment that was "grossly unfair."[48]

42. Oliver, *Some Judges*, *supra* note 40, at 4. *See also Austin, Richard Bevan*, FEDERAL JUDICIAL CENTER, https://www.fjc.gov/history/judges/austin-richard-bevan (providing biographical detail) (last visited Oct. 2021).

43. Oliver, *Some Judges*, *supra* note 40, *at* 6. *See also Decker, Bernard Martin*, FEDERAL JUDICIAL CENTER, https://www.fjc.gov/history/judges/decker-bernard-martin (providing biographical detail) (last visited Oct. 2021).

44. Oliver, *Some Judges*, *supra* note 40, at 8. *See also Igoe, Michael Lambert*, FEDERAL JUDICIAL CENTER, https://www.fjc.gov/history/judges/igoe-michael-lambert (providing biographical detail) (last visited Oct. 2021).

45. Oliver, *Some Judges*, *supra* note 40, at 9. *See also McGarr, Frank James*, FEDERAL JUDICIAL CENTER, https://www.fjc.gov/history/judges/mcgarr-frank-james (providing biographical detail) (last visited Oct. 2021).

46. Oliver, *Some Judges*, *supra* note 40, at 10. *See also LaBuy, Walter J.*, FEDERAL JUDICIAL CENTER, https://www.fjc.gov/history/judges/labuy-walter-j (providing biographical detail) (last visited Oct. 2021).

47. Netflix (2020), https://www.netflix.com/title/81043755. We do not ignore the well-documented historical inaccuracies of that (still wonderful) film. *See, e.g.*, Matthew Dessem, *What's Fact and What's Fiction in The Trial of the Chicago 7*, SLATE (Oct 15, 2020, 1:20 PM), https://slate.com/culture/2020/10/trial-chicago-seven-aaron-sorkin-accuracy-netflix.html; Jeanne Dorin McDowell, *The True Story of 'The Trial of the Chicago 7'*, SMITHSONIAN MAG. , Oct. 15, 2020, https://www.smithsonianmag.com/history/true-story-trial-chicago-7-180976063/.

48. Oliver, *Some Judges*, *supra* note 40, at 7. *See also Hoffman, Julius Jennings*, FEDERAL JUDICIAL CENTER, https://www.fjc.gov/history/judges/hoffman-julius-jennings (providing biographical detail) (last visited Oct. 2021).

So, Oliver's excoriation of Perry stands out, and—assuming it is about right—Oliver's description of the closing minutes of the Bartkus trial fits the Perry mold:

> His disagreement with the jury verdict . . . took the form of a 15 or 20 minute rage entailing changes in his complexion from red to purple to dead white, and vocal changes from nasty jabs at the horrified jury to screams, in the course of all of which he made it plain that he felt the jury had been bribed. By me, the principal target of his livid anger.[49]

Oliver's recollection has ample corroboration. The *Chicago Tribune* described it consistently, if less colorfully; the *Tribune* noted specifically that the judge called on jurors to "hang your heads in shame" over their verdict.[50] Justice Brennan's dissent in the later Supreme Court opinion also refers to Perry "sharply upbraid[ing] the jury."[51]

But Judge Perry did not stop there. "He ordered the jurors' names stricken from the roster of talesmen," and ordered Bartkus held "until he could be charged with the same offense (bank robbery) by the State of Illinois."[52]

As Oliver recounted it, Perry's suspicions that the young defense lawyer had bribed the jury remained. Oliver inferred that Perry also made the accusation about him to other judges. "That he blackened me for a time with other judges of the court was evident in their treatment of me—pre-*Bartkus* as a somewhat inept young lawyer—post-Bartkus as one upon whom one must keep a suspicious eye."[53]

Again, Oliver's recollection has corroboration. According to a contemporary article in *The Albuquerque Journal*—indicative of the national attention this judicial outburst and crusade received—Judge Perry personally

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49. Oliver, *Some Judges*, *supra* note 40, *at* 1.

50. *Report Naming, supra* note 3; *see also Ex-Convict Slugs Deputy, but Another Foils Escape*, CHICAGO TRIB., Feb. 18, 1954, at 14.

51. Bartkus v. Illinois, 359 U.S. 121, 165 (1958); *see also supra* note 29.

52. Oliver, *Some Judges*, *supra* note 40, at 1. Here, Oliver's recollection might be wrong at the edges. A contemporary newspaper account had Bartkus due to serve the remainder of a short state sentence after he was discharged from his federal pretrial detention by the acquittal. *See Report Naming, supra* note 3. But that same article confirms Judge Perry's active effort to procure the subsequent state prosecution and adds that Perry "ordered" the United States Attorney, Otto Kerner, Jr., to seek perjury indictments against Bartkus and two defense witnesses.

53. Oliver, *Some Judges, supra* note 40, at 1.

investigated the jury's secret deliberations and then publicly called for an investigation of two of the jurors.[54] That led at least one juror to demand a probe to clear their now-besmirched names, and caused others to wonder whether they ought to directly confront Judge Perry.[55] But Perry would have none of that. As he went about glibly relating alleged content from the jury's deliberations, he simultaneously waved off, or even hid from, the jurors' concerns. As the Albuquerque Journal put it,

> [Judge] Perry made it clear his court would be closed to them. . . . "I'm not going to waste any time talking to them," [Perry] said. "No one is going to come into my court and put on a show. Let them go to the FBI and submit to an investigation."[56]

In short, Judge Perry was content trying the jurors in the press. In his words, "I unhesitatingly say that the background of these two members should be investigated to see if they had any interest in voting for an acquittal or if they were just sympathetic to criminals."[57] Indeed, Perry's only regret was that his swift vengeance (recall his rebuke of the jury after verdict) had not been more severe. To reporters, he "express[ed] regret he had not cited all 12 jurors for contempt of court after they returned their verdict."[58] That echoed unsubtly the late Middle Ages, when jurors—perceived as "witnesses rather than judges"—could be prosecuted for perjury or contempt when a judge did not like their decision.[59] Throughout, Perry made clear and public his suspicions that at least some jurors had taken bribes.

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54. *Judge Orders Probe, supra* note 8. This article was a wire service offering that newspapers nationwide ran in some form.

55. *Judge Perry Asks State to Try Bartkus*, CHICAGO TRIB., Dec. 21, 1953, at 1.

56. *Id.*

57. *Judge Orders Probe, supra* note 8.

58. *Judge Perry Asks, supra* note 55, at 8.

59. SIR PATRICK DEVLIN, TRIAL BY JURY 67 (1956). That came to an end in *Bushel's Case*, 124 E.R. 1006 (1670), in which London jurors—after withstanding a judge-ordered confinement and fast—bravely entered a not guilty verdict for William Penn, only to be held in contempt and imprisoned. *Id.* at 1006–07. Chief Justice Vaughan granted the jurors habeas relief and put an end to such punishments going forward. *Id.* at 1009; *see also* DEVLIN, *supra* this note, at 69; *see generally* John A. Phillips & Thomas C. Thompson, *Jurors v. Judges in Later Stuart England: The Penn/Mead Trial and* Bushell's Case, 4 LAW & INEQ. 189 (1986). (This footnote illustrates, incidentally, the alternate spellings that persist as to this famous case: for some, the rebellious juror was Edward Bushel; for others, Bushell.)

Now, there have been eras in Chicago criminal practice in which bribing jurors (or, in the 1970s and into the 1980s, bribing judges) was a lively possibility.[60] But for at least three reasons, Perry's suspicions in *Bartkus* almost surely were spurious.

First, not even the prosecutor seemed to believe them. In the words of the assistant U.S. attorney two days after the acquittal, "as of today there is no reason to suspect the jury was influenced."[61] *No reason* . . . and yet a federal judge had publicly upbraided the jury and requested that each and every juror be forever barred from that civic participation.[62]

Second, as another matter of specifics, a 25-year-old ex-con like Bartkus, who settled for an inexperienced defense lawyer, only three years out of school and still searching for his first not-guilty verdict, almost surely would not have had a budget to bribe his way to acquittal. Seeking a mistrial—a hung jury—by bribery would have been a more plausible objective, as it would have required bribing only one juror. But an acquittal would have been a grand objective that could have required, quite conceivably, successfully bribing all twelve. A defendant with access to that kind of money and persuasive capacity likely would have hired a defense lawyer more experienced than the sapling Oliver.

Third, as a general and reputational matter, Frank Oliver was not someone whom even his (many) detractors suspected of bribing juries or judges. Rather, he consistently trusted juries and baited judges, eventually polishing both qualities into something like an art form. There was the time, decades later, that he himself was on trial for tax charges. When the government rested, the judge pronounced the prosecution's proof insufficient and said he would acquit Oliver.[63] But Frank Oliver wouldn't let

60. Recall the well-known Operation Greylord, conducted by the FBI, after which a number of Cook County judges, lawyers, and court officials became differently acquainted with federal penitentiaries. *See Operation Greylord*, FBI, https://www.fbi.gov/history/famous-cases/operation-greylord (last visited Oct. 2021); *Operation Greylord*, Wikipedia, https://en.wikipedia.org/wiki/Operation_Greylord (last visited Oct. 2021).

61. *Judge Orders Probe, supra*, note 8.

62. *See id.* ("After the verdict was returned, Judge Perry asked the U. S. attorney to bar all 12 members of the jury from ever again serving as jurors in a federal court."). Another reporter more plausibly attributed Perry's order or request to the federal jury commission. *See 'Shame!' Judge Cries As Jury Frees Suspect*, CHICAGO TRIB., Dec. 19, 1953, at 3. We found no record of a prosecutor ever leveling a criminal charge against any of the jurors or against Bartkus's alibi witnesses.

63. Possley, *supra* note 31.

him: he insisted that the jury acquit. So the trial continued and the jury did exactly that.[64] Oliver faced (and faced down, on appeal) contempt of court charges at least four times in federal court for goading judges, and lost a fifth in Illinois state courts for the same.[65] In one of those federal contempt proceedings—a prosecution of Vietnam war resisters for breaking into a local Selective Service office and burning draft cards—Oliver suggested on cross-examination that there might be a sign in the hallway of that office stating, "Abandon ye all hope who enter here," riffing on Dante.[66] The federal judge (not Perry) was unamused enough to cite Oliver for contempt on the spot.[67]

A frequent Oliver gambit was to refuse to participate in conferences with the judge and prosecutor in chambers during a trial, or to join sidebar conferences.[68] He would explain to the judge that his client believed that the judge and lawyers were fixing the case when such things occurred, and that Oliver could not persuade the poor, deluded client otherwise.[69] A student of the science of how animals establish dominance over territory ("ethology," as he called it, preferring the archaic term here as he often

64. *Id.*

65. *See* United States v. Sopher, 347 F.2d 415 (7th Cir. 1965) (reversing a judgment of contempt that was based upon statements made during closing argument); In re Oliver, 308 F. Supp. 1183 (N.D. Ill. 1970) (judicially reprimanding for conduct during a press conference), *rev'd*, 452 F.2d 111 (7th Cir. 1971) (holding the prohibition upon which the reprimand was based violative of the First Amendment); In re Oliver, 470 F.2d 10 (7th Cir. 1972) (reversing a judgment of contempt that was based upon unsupported cross-examination); In re Oliver, 470 F.2d 15 (7th Cir. 1972) (reversing a one-year disbarment that was based upon comments to the press); People ex rel. Woodward v. Oliver, 25 Ill. App.3d 66, 322 N.E.2d 240 (1975) (affirming a judgment of contempt for, *inter alia*, refusing to participate in *in camera* proceedings).

66. *Oliver*, 470 F.2d at 12.

67. *See id.*

68. *See, e.g., People ex rel. Woodward*, 322 N.E.2d at 242 (describing Oliver's refusal to participate in an *in camera* conference, leading to Oliver's only contempt citation that would be upheld on reported appeal); Oliver, *Some Judges*, *supra* note 40, at 3 ("I was fond of [Judge Hubert Will's] court despite his devotion to sidebar conferences which I regard as both constitutionally forbidden in criminal cases and [which] make lengthy cases interminable.").

69. *See People ex rel. Woodward*, 322 N.E.2d at 246 (rejecting Oliver's reliance upon the defendant's mistrust of sidebar, for "[i]t was the responsibility of Mr. Oliver to educate his client to the purposes of side-bar and in chambers discussions"); Oliver, *Some Judges, supra* note 40, at 3 ("Nor did I succeed by offering that many court onlookers believed sidebar to be an auction, the judge's ruling going to the highest money bidder.").

did[70]), Oliver would on occasion arrive in court early and claim the prosecution table, leaving the government to complain about being relegated to the table farther from the jury.[71] An oft-retold story is of Oliver addressing a Chicago federal judge during the middle of a long trial and asking for a day off mid-week; Tuesday, as the story goes. The judge, already grumpy about the slow pace of the trial, asked why. "Because, Your Honor," Oliver replied with a straight face and perfect courtroom decorum, "that's the day I promised to take my dog to the movies."[72] Finally, there is the probably apocryphal tale of a federal appeal that Oliver won. Rare as such a win is for criminal defendants, Oliver—as the story goes—petitioned for a rehearing. He wanted the court to reach the same conclusion, but on reasoning that was not so patently silly.

So baiting judges, yes; often and with relish.[73] But bribing them or juries? By reputation and style, no.

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70. Although Frank Oliver went on, over the decades, to become a dean of the federal criminal defense bar in Chicago (witness the tribute of Jim Shellow in Frank's obituary, available at https://www.legacy.com/us/obituaries/chicagotribune/name/frank-oliver-obituary? pid=19474612, and that of Tom Durkin in Thomas Anthony Durkin, *Binyon's, Plato, Jack Sprat & Frank, in* YOUR WITNESS: LESSONS ON CROSS-EXAMINATION AND LIFE FROM GREAT CHICAGO TRIAL LAWYERS 2 (Stephen F. Molo & James R. Figliulo eds., 2008)), his quirks were many. One was the conclusion that almost no published case decided after about 1650 was terribly worth citing. For himself, he loved to cite sources like the *Malleus Maleficarum* in his own legal arguments. (The *Malleus*, or "Hammer of Witches," was published in 1486 by a Dominican friar or two, and it became the notorious medieval text on methods of detecting and punishing witches; *see* Christopher S. Mackay, trans., THE HAMMER OF WITCHES (Cambridge U. Press 2009).) Another quirk was to wear a cape to court on occasion. *See* Possley, *supra* note 31; Durkin, *supra* this note, *at* 4. And yet another was to become a big fan of Wesley Newcomb Hohfeld of Stanford and Yale, whose few published works became influential in the philosophy of rights, but who was hardly the stuff of most in the practicing criminal defense bar. *See* Wesley Newcomb Hohfeld, https://en.wikipedia.org/wiki/Wesley_Newcomb_Hohfeld (last visited Oct. 2021); see also W.N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917) (considered Hohfeld's main article, published not long before his early death).

71. This recollection is based upon personal discussions between Oliver and author Strang (see *supra* note 30). *See also* Durkin, *supra* note 70, at 6 (recalling a particular instance of Oliver attempting to coopt the prosecution table in an effort to distance his client from other defendants).

72. As told by Jim Shellow (see *supra* note 30).

73. Any reader desiring yet further proof—or just desiring another classic Frank Oliver story—ought to read Tom Durkin's description of Oliver's defense in the *Ziperstein* prosecution. *See* Durkin, *supra* note 70, at 4–8.

In any event, the mutual enmity between Oliver and Judge Perry continued for decades. In 1969, Perry was one of a three-judge panel who not only denied a "most inartfully drafted" petition filed by Oliver and other defense attorneys (declaring it "frivolous and impertinent"),[74] but then reprimanded Oliver for "contemptuous and insolent conduct" because Oliver had held a press conference on the matter.[75] (This from the judge who had freely shared jury deliberations and unfounded accusations with the press after Bartkus's jury acquittal!) Oliver himself recounted this later conflict:

> Wh[en] I faced disciplinary proceedings about 25 years later [it was in fact closer to 15], Sam Perry, one of the three judges assigned to hear the matter, called me at my office. "Mr. Oliver," he said, "We charged you with speaking to the press. Jim Thompson (then U.S. Attorney prosecuting the proceedings against [Oliver]) has done the same, only worse. Why don't you file a complaint against him?" I replied that if the court brought the same charges against him as it had against me, I hoped Thompson would accept my offer of help, for I would do my utmost to secure his discharge. "Oh," quoth he, "It[']s a matter of principle, is it?" His use of "principle" made it sound as something one did not encounter in life, only in books. Which I knew in his case to have been impossible.
>
> A man of any integrity whatever would at least have withdrawn as a judge of proceedings against me. But a man of integrity would not have made that telephone call so I was unsurprised that he sat in judgment against me. (Reversed, as usual on appeal.)[76]

WHERE THIS LEAVES US–

One Worse for Dual Sovereignty

When a federal jury acquitted Alfonse Bartkus of robbing the General Savings & Loan, that should have ended the matter. As we have argued elsewhere, both our constitutional Framing and an understanding of the limited justifications of criminal justice demand such respect for a jury's acquittal.[77] The story we now have related highlights why this remains as

74. In re Trials of Pending & Future Criminal Cases, 306 F. Supp. 333, 334, 337 (N.D. Ill. 1969).

75. In re Oliver, 308 F. Supp. 1183, 1185 (N.D. Ill. 1970), *rev'd*, 452 F.2d 111 (7th Cir. 1971).

76. Oliver, *Some Judges, supra* note 40, at 2.

77. *See generally* Henderson & Strang, *supra* note 17. Recall, too, that the crime did not go altogether unpunished: two other men pleaded guilty. *See* Illinois v. Bartkus, 130 N.E.2d

true in modern times as it was when a revolutionary-era New York jury famously acquitted John Peter Zenger of seditious libel.[78] Yes, today we thankfully have a more independent judiciary and rights of appeal, but a vindictive judge ought never be able to trump the voice of the people; the jury was meant to "function as circuitbreaker in the State's machinery of justice,"[79] or, to switch metaphors, to be the very "'heart and lungs' . . . of our liberties."[80]

When Alfonse Bartkus's case came before the Supreme Court for the second, determinative time, Justice Black began his dissent with this:

> Petitioner, Bartkus, was indicted in a United States District Court for bank robbery. He was tried by a jury and acquitted. *So far as appears the trial was conducted fairly by an able and conscientious judge*.[81]

Black was of course teeing up the proposition that nothing was amiss in that first trial, and so it should have settled the matter. We cannot help but wonder what Justice Black—and fellow dissenters Warren, Brennan, and Douglas—would have thought had they known a fuller version of the real story: that it was a disgruntled (even vindictive and reckless) federal judge, furious over a jury acquittal, who lit the fire that would become the second, duplicative prosecution of Bartkus.[82] We cannot help but wonder, too, what the fuller story might have meant to Justice Harlan and others in the majority . . . perhaps especially to the one Justice who seems to have switched sides between the Court's initial 4-4 split and the Court's

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187, 188 (Ill. 1955); *Two Bank Robbers Get Right to Spend Holidays At Home*, CHICAGO TRIB., Dec. 24, 1953, at 13.

78. *See John Peter Zenger*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/biography/John-Peter-Zenger.

79. Blakely v. Washington, 542 U.S. 296, 307 (2004).

80. United States v. Haymond, 139 S. Ct. 2369, 2375 (2019) (plurality opinion) (quoting Letter from Clarendon to W. Pym (Jan. 27, 1766), in 1 PAPERS OF JOHN ADAMS 169 (R. Taylor ed., 1977)).

81. *Bartkus*, 359 U.S. at 150 (Black, J., dissenting) (emphasis added).

82. While we attempt nothing like an independent assessment of Judge Perry's work, perhaps it is worth noting that his career might best be known for dismissing the wrongful death lawsuit brought against police by the families of two members of the Black Panthers, which dismissal was reversed upon appeal. *See Joseph Sam Perry*, Wikipedia, https://en.wikipedia.org/wiki/Joseph_Sam_Perry (highlighting the case) (last visited Oct. 2021); *Hampton v. Hanrahan*, 600 F.2d 600 (7th Cir. 1979) (reversing dismissals), *cert. granted in part, judgment rev'd in part*, 446 U.S. 754 (1980) (refusing attorney's fees).

ultimate 5-4 decision.[83] What we do know is how the richer story struck *us* upon its discovery: yet more concrete proof of how misguided is the Court's dual sovereignty exception to the Constitution's double jeopardy right.

We appreciate that not everyone will find endearing the ethos, antics, and career of Bartkus's initial defense counsel, Frank Oliver, who "terrorized witnesses with a devastating cross-examination, locked horns continually with judges, and, in later years, came to court with a cape across his shoulders and amulet hanging from his neck."[84] Not everyone will trust in the American jury quite as Oliver did.[85] But we all ought to respect a jury's unanimous acquittal. Judge Joseph Samuel Perry did not. The dual sovereignty exception does not. Indeed, it makes disrespect doctrinal. And that is reason enough to reject it—reason now made all the more poignant by knowing more of the human story behind *Bartkus v. Illinois*.

A BRIEF APPENDIX–

Just Who Was Alfonse Bartkus?

It ought to come as no surprise that the life intersection of a defense lawyer and judge might provide insight into a legal rule. The law is, and should forever be, the story of human beings, both individually and collectively.[86] And thus we might also—especially the teachers of the law among us[87]—ask just who was the accused, Alfonse Bartkus. Although much of his story probably is lost forever, as with almost all of the broken human beings who typically are the defendants and victims in the millions of criminal cases

83. Remember, Justice Brennan—an ultimate dissenter—was the one not taking part in that initial consideration. *See* note 14, *supra*. So, had the four Justices in the original "this is unconstitutional" camp all remained, it would have meant a win for defendant Bartkus and a better Constitution for us all.

84. Possley, *supra* note 31.

85. *See supra* text accompanying notes 62–63.

86. For a magnificent exposition of this truth, see John T. Noonan Jr., PERSONS AND MASKS OF THE LAW (1976; revised ed. 2002), which grew out of his 1972 Holmes lectures at Harvard.

87. *See* Thomas D. Eisele, *Book Review*, 24 VILL. L. REV. 184, 185 (1979) (reviewing John T. Noonan Jr., PERSONS AND MASKS OF THE LAW (1976)) ("Professor Noonan ascribes primary responsibility for the neglect of persons in the law to law teachers who . . . exalt the study of the rules of the law to the exclusion of any consideration of the importance of persons to the legal process.").

that flow through this nation's courthouses, there are a few things we learned.

Bartkus was born on February 18, 1928, in the working-class suburb of Cicero on Chicago's west side.[88] His father was a Lithuanian immigrant employed as a paper-hauler and was thirteen years older than the boy's mother, also a Lithuanian immigrant.[89] Alfonse was the second of two children, with a sister two years older.[90]

The month after Alfonse turned four, his father died, leaving his mother to raise both children alone.[91] Alfonse attended high school at least through his freshman year, but perhaps not after.[92] He did, however, register dutifully for the draft—right on his eighteenth birthday, a scrawny lad standing six feet tall but weighing just 165 pounds, with blonde hair and blue eyes.[93] That was 1946 and the second world war was over, but Bartkus served in the U.S. Merchant Marines all the same.[94]

Back home, he married a 16-year-old girl on June 25, 1953,[95] hardly one month before the bank robbery that eventually took him to the United States Supreme Court.[96] So far as historical records show, she dropped from sight after a newspaper photograph of Bartkus bidding her farewell when the Cook County chief judge, Richard B. Austin, sentenced him to

88. Alfonse Bartkus, Draft Registration Card (Feb. 18, 1946), viewed on ancestry.com (last visited Dec. 31, 2020).

89. *Id.*

90. 1930 U.S. Census Records, ancestry.com (last visited Dec. 31, 2020).

91. *See* Peter Bartkus, Cook County (Illinois) Genealogy Records (Deaths), Record No. 6009078, March 26, 1932, on ancestry.com (last visited Dec. 31, 2020).

92. Ancestry.com has at least three linked yearbooks from Kelly High School in Chicago, describing and depicting Bartkus as a freshman in 1943 and 1944. *See, e.g.*, (membership required) https://www.ancestry.com/imageviewer/collections/1265/images/43134_b197657-00052?treeid=&personid=&rc=&usePUB=true&_phsrc=wJJ289&_phstart=successSource&pId=374777100; https://www.ancestry.com/imageviewer/collections/1265/images/43134_b184948-00092?treeid=&personid=&rc=&usePUB=true&_phsrc=wJJ291&_phstart=successSource&pId=968126305; https://www.ancestry.com/imageviewer/collections/1265/images/43134_b184948-00031?treeid=&personid=&rc=&usePUB=true&_phsrc=wJJ292&_phstart=successSource&pId=968123780 (last visited January 1, 2021).

93. *See supra* note 88.

94. *See Death Notices*, CHICAGO TRIB., Jan. 10, 2012, Section 2, at 9.

95. Cook County (Illinois) Genealogy Records (Marriage), on ancestry.com (last visited Dec. 31, 2020).

96. *See* Illinois v. Bartkus, 130 N.E.2d 187, 188 (Ill. 1955); *supra* notes 13–19.

25 years to life following his conviction.[97] That was April 1954, and Bartkus, at age 26, qualified as an habitual criminal under Illinois law.[98]

That same judge ran for governor as the Democratic candidate in 1956, but lost to the Republican incumbent, William G. Stratton.[99] Just over four years later, as Stratton was about to leave office in January 1961, fate smiled briefly on Alfonse Bartkus. The distinguished Chicago silk-stocking litigator who had argued Bartkus's case *pro bono* in the United States Supreme Court, Walter T. Fisher, intervened with his acquaintance, Governor Stratton.[100] The outgoing governor commuted Bartkus's sentence to time served.[101] Bartkus was out after less than seven years. The police and Judge Austin pronounced themselves mystified.[102] But there would be consolation for Austin. He became a federal district judge.[103] And among those who assessed him kindly was Frank Oliver.[104]

Unfortunately, the commutation was not to be Bartkus's last encounter with the law. In April 1968, he beat a Cook County case for theft of 15 refrigerators.[105] That judge granted a dismissal motion, holding that the police did not have probable cause that the refrigerators were stolen at the time of arrest—this being a time when many courts treated an unconstitutional arrest as a defect in personal jurisdiction.[106]

Bartkus was not so lucky the next time. On August 16, 1970, he was among three Illinois men for whom Michigan warrants were issued, alleging that they were reselling about $32,000 in stolen television sets.[107] That case eventually went to Detroit federal court as an interstate theft charge. While awaiting trial, Bartkus escaped briefly from jail with three unrelated

97. *See, e.g., Farewell Embrace*, FORT LAUDERDALE DAILY NEWS, Apr. 13, 1954, at 1 (many newspapers across the country ran the AP wire photo); *see also Stratton's Parole of 3 Draws Lots of Squawks*, THE DISPATCH (Moline, Ill.), Jan. 10, 1961, at 8 (providing the identity of the judge and details of the sentence).

98. *See* Bartkus v. Illinois, 359 U.S. 121, 122 (1959).

99. *Gov. Stratton Confident of Final Victory*, CHICAGO TRIB., Nov. 7, 1956, at 4.

100. *See Walter T. Fisher, 99, lawyer, ex-chief of ICC*, CHICAGO TRIB., Aug. 29, 1991, at 94.

101. *See Stratton's Parole of 3, supra* note 97.

102. *Id.*

103. *See supra* note 42.

104. *See id.*; Oliver, *Some Judges, supra* note 40, at 4–5.

105. *Ciceronian is Freed in Theft Case*, BERWYN (Ill.) LIFE, Apr. 5, 1968, at 3.

106. *See id.*

107. *Warrants Issued*, LANSING STATE JOURNAL, Aug. 16, 1970, at A 2.

inmates, jumping out of a second-story window in the St. Clair County (Michigan) Jail.[108] The caper resulted in immediate recapture.[109]

Still, by May 1980, a legal notice established that Bartkus was living back on the west side of Chicago and operating a business called, or at least using the trade name, "Armor Lock"[110]—an ironic detail, considering his past record. Even then, his legal troubles weren't over. On September 6, 1984, he and a pharmacist were arrested in possession of 50 gallons of codeine cough syrup.[111] The pharmacist had sold more than 600 gallons of the syrup over the preceding year, with codeine a drug then widely abused.[112] And that's where the newspaper trail on the life of Alfonse Bartkus in America's jails, courts, and prisons ends.

Bartkus lived on, though. He died on January 2, 2012, childless and in a VA hospital, aged 83.[113]

108. *Jailbreak Foiled; 4 Caught*, THE TIMES HERALD (Port Huron, Mich.), Sept. 15, 1972, at 1.

109. *Id.* This was not Bartkus's only escape attempt, and another hints at the desperation of an angry young man, fatherless since age four, and with few prospects. While he was awaiting his state trial after the federal acquittal, the county jail took Bartkus to a hospital for dental work in February 1954. On the way back to jail, he asked the two deputies escorting him if he could use the washroom. One accompanied him in; the other stood guard outside the door. In the washroom, Bartkus punched the first deputy and tried to escape. The other rushed in and put his gun to Bartkus's head. Bartkus urged that deputy to kill him. The deputy handcuffed him instead. *Ex-Convict Slugs Deputy, But Another Foils Escape*, CHICAGO TRIB., Feb. 18, 1954, at 14.

110. *Legal Notices*, CICERO (Ill.) LIFE, May 25, 1980, at 15.

111. '*Most-Abused' Drug Bust Nets Two*, CHICAGO TRIB., Sept. 6, 1984, at 37.

112. *Id.*

113. *See Death Notices, supra* note 94.