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rough formula the Court posed a reasonable answer to the religious aid issue. Lunches, health care and transportation can be upheld under the pupil benefit theory as not being part of the actual educational function that the Court has found to be "inextricably intertwined"⁶⁸ with religion. Textbooks, however, are an inseparable part of the primary educational function of schools and should have been invalidated. Though this approach would require the bolder actions of overruling *Board of Education v. Allen*⁶⁹ and striking the textbook program in *Meek*, it would more clearly establish the lines of state neutrality without requiring the sacrifice of consistency.

ERIC NEWMAN

Criminal Procedure—Prison Escapee's Pending Appeal Dismissed Despite Early Recapture

Escape from prison or other official custody is not only a common-law¹ or statutory² offense but it can also be a ground for major procedural disabilities. Summary dismissal of the pending appeal of a prison escapee or other fugitive from justice, at least while the appellant is still at large, is accepted practice in many appellate courts.³ The result of this procedure is a total preclusion of review of an escaping prisoner's original conviction. In *Estelle v. Dorough*⁴ the United States Supreme Court extended its approval of this practice twofold by holding that a Texas statute⁵ that allowed the automatic dismissal of an escaping

68. *Id.* at 1764, quoting *Lemon v. Kurtzman*, 403 U.S. 602, 657 (1971). See text accompanying note 21 *supra*.

69. 392 U.S. 236 (1968).

1. United States *ex rel.* *Manzella v. Zimmerman*, 71 F. Supp. 534 (E.D. Pa. 1947); *Smith v. State*, 145 Me. 313, 75 A.2d 538 (1950); *State v. Pace*, 192 N.C. 780, 136 S.E. 11 (1926).

2. *E.g.*, N.C. GEN. STAT. § 148-45 (1973); TEX. PENAL CODE art. 38.07 (1974).

3. See text accompanying notes 32-41 *infra*.

4. 420 U.S. 534 (1975) (per curiam).

5. TEX. CODE CRIM. PRO. ANN. art. 44.09 (1966). This statute provides:

If the defendant, pending an appeal in the felony case, makes his escape from custody, the jurisdiction of the Court of Criminal Appeals shall no longer attach in the case. Upon the fact of such escape being made to appear, the court shall, on motion of the State's attorney, dismiss the appeal; but the order dismissing the appeal shall be set aside if it is made to appear that the defendant has voluntarily returned within ten days to the custody of the officer from whom he escaped; and in cases where the punishment inflicted by the jury is death or confinement in an institution operated by the Department of Correc-

felon's pending appeal, not only when the felon is recaptured soon after his escape but also when his appeal is not delayed, did not violate the equal protection clause of the fourteenth amendment.⁶

The history of the case began in 1963 when Jerry Mack Dorrough was convicted in a Texas court of felonious bank robbery and given a twenty-five year sentence. Direct appeal was taken to the Texas Court of Criminal Appeals. While his appeal was still pending, Dorrough escaped from jail by stealing a United States mail truck. Two days later he was recaptured. Thereafter the appellate court, upon motion by the State, dismissed Dorrough's appeal pursuant to article 44.09 of the Texas Code of Criminal Procedure. The statute in effect required automatic dismissal since "jurisdiction . . . shall no longer attach" if the appellant escapes.⁷ There are, however, two express exceptions. The order dismissing the appeal must be set aside if the escapee is a term felon who voluntarily surrenders within ten days, and the order may be set aside if the escapee is a felon under a life or death sentence who surrenders or is recaptured within thirty days.⁸ Since Dorrough was only serving a term of years and since his recapture prevented his voluntary surrender, the appellate court did not (and could not) reinstate his appeal.⁹

Dorrough was then charged under federal law for theft of the mail truck, to which he pleaded guilty and was given a twenty-five year federal prison term. He is now serving this sentence and is also being held under a Texas detainer warrant for his original state sentence.¹⁰

After numerous unsuccessful challenges to his federal guilty plea and to the state detainer warrant,¹¹ Dorrough sought federal habeas

tions for life, the court may in its discretion reinstate the appeal if the defendant is recaptured or voluntarily surrenders within thirty days after such escape.

6. 420 U.S. at 539.

7. See note 5 *supra*.

8. See note 5 *supra*.

9. See note 5 *supra*. See also *Maugia v. State*, 90 Tex. Crim. 539, 236 S.W. 740 (1922).

10. 420 U.S. at 535.

11. There were four attacks on his guilty plea under 28 U.S.C. § 2255 (1970) and one challenge to the detainer warrant prior to the present case, all in the federal courts. The merits of the state case were not considered. The full case history is as follows: *Dorrough v. United States*, 327 F.2d 667 (5th Cir. 1964) (per curiam); *Dorrough v. United States*, 344 F.2d 125 (5th Cir. 1965) (per curiam); *Dorrough v. United States*, 385 F.2d 887 (5th Cir. 1967), *aff'd en banc*, 397 F.2d 811 (5th Cir. 1968) (per curiam), *cert. denied*, 394 U.S. 1019 (1969); *Dorrough v. Texas*, 440 F.2d 1063 (5th Cir.) (per curiam), *cert. denied*, 404 U.S. 840, *rehearing denied*, 404 U.S. 959 (1971); *Dorrough v. United States*, 440 F.2d 1336 (5th Cir.) (per curiam), *cert. denied*, 404 U.S. 915, *rehearing denied*, 404 U.S. 979 (1971); *Dorrough v. Estelle*, 497 F.2d 1007 (5th Cir. 1974), *rev'd*, *Estelle v. Dorrough*, 420 U.S. 534 (per curiam), *rehearing denied*, 421 U.S. 921 (1975).

corpus relief on the ground that the earlier dismissal of his state appeal denied him equal protection. The district court denied relief but the Fifth Circuit reversed and ordered the state detainer warrant voided unless Dorrough was given a direct appeal or a new trial for his state offense.¹²

The Supreme Court reversed the Fifth Circuit in a five to four per curiam opinion.¹³ After stating that "there is no federal constitutional right to state appellate review of state criminal convictions,"¹⁴ the Court held that the classifications¹⁵ created by the exceptions in the Texas mandatory dismissal law did not violate the equal protection clause of the fourteenth amendment.¹⁶ Relying upon traditional equal protection analysis, the Court applied the rational basis test¹⁷ to the statute since no fundamental interests or suspect criteria were involved.¹⁸ Under this standard, the Court reasoned that the classifications were rationally related to the legitimate state interests of discouraging escapes, encouraging surrenders and promoting the "efficient, dignified operation of the Texas Court of Criminal Appeals."¹⁹ In dissent, Justices Stewart, Brennan and Marshall stressed both the irrationality of dismissing an appeal *after* the appellant-escapee is back in the custody and control of the court, and the disparity of punishments resulting from application of the Texas law.²⁰

A few other states have statutes similar to the one upheld in *Estelle*.²¹ Yet, in the absence of a statute, decisional law uniformly has

12. *Dorrough v. Estelle*, 497 F.2d 1007, 1014 (5th Cir. 1974) (Wisdom, J., for the court in an excellent opinion).

13. 420 U.S. at 534. Texas sought review under 28 U.S.C. § 1254(1) (1970). Certiorari was granted in the present case, 420 U.S. at 536.

14. 420 U.S. at 536.

15. Article 44.09 of the Texas Code creates at least four classifications: (1) escaping felons v. escaping misdemeanants, (2) escape pending appeal v. escape before appeal, (3) felons serving a life or death sentence v. felons serving a term of years, and (4) term felons surrendering within ten days v. term felons surrendering after ten days. See note 5 *supra*.

16. 420 U.S. at 539.

17. *Id.* at 538-40. See also notes 71-76 and accompanying text *infra*.

18. These phrases were not specifically mentioned in the opinion but it seems clear that the majority did not consider the defendant's interest in appellate review to be "fundamental." See 420 U.S. at 536.

19. *Id.* at 537.

20. *Id.* at 542-45. Justice Douglas filed a short separate dissent. *Id.* at 542.

21. *E.g.*, GA. CODE ANN. § 6-809(b) (1972) (dismissal of appeal for mootness); OKLA. STAT. ANN. tit. 22, § 1058 (1951) (appeal bond subject to condition that defendant not depart without leave of court). The Texas law (article 44.09), however, appears to be unusually harsh in expressly requiring dismissal for a recaptured escapee, since this statute deprives the court of *jurisdiction* when the appellant has escaped. The Oklahoma statute gives the court discretion to dismiss. *Trotter v. State*, 334 P.2d 452 (Okla. Crim. App. 1959). The Georgia statute has been construed to require mandatory

sustained the appellate dismissal practice as it applies to the non-returning appellant-escapee²² and sometimes as to the returning escapee.²³ In the relatively few escape-pending-appeal cases to reach the Supreme Court, the first question faced was whether there is a constitutional right of appeal. Answering this in the negative,²⁴ the Court on several occasions has then proceeded to approve of the practice of dismissal for escape.²⁵ In fact, the Supreme Court itself has either "removed the appeal from its docket" or dismissed certiorari when the appellant escaped after the granting of certiorari.

*Smith v. United States*²⁶ was an important early case in which the appeal was conditionally ordered off the Supreme Court docket unless the appellant returned before the next term of Court. Although *Smith* involved an appeal from a state conviction, the case established the Supreme Court's own early dismissal practice;²⁷ it did not establish the validity of state court dismissal practice. Nevertheless, the rationale of *Smith*, the inability of a court to enforce its judgment against a fugitive, is potentially applicable at all levels of appeal: "If we affirm the judgment, [the escapee] is not likely to appear to submit to his sentence. If we reverse it and order a new trial, he will appear or not, as he may consider most for his interest."²⁸ The Court's present method of disposition of an escapee's appeal is unconditional dismissal of certiorari.²⁹

Not long after *Smith* the Supreme Court had occasion to review a state appellate dismissal rule in *Allen v. Georgia*.³⁰ In this case, a state court's semi-discretionary practice of dismissal subject to reinstatement

dismissal for escape, *Pope v. State*, 126 Ga. App. 488, 191 S.E.2d 115 (1972), but the case involved a non-returning escapee. It is not clear how Georgia would treat a recaptured escapee. His appeal ought not to be moot once he returns to custody.

22. See note 39 *infra*.

23. See note 41 *infra*.

24. See note 78 *infra*.

25. *Molinaro v. New Jersey*, 396 U.S. 365 (1970) (per curiam); *Eisler v. United States*, 338 U.S. 189 (per curiam), cert. dismissed, 338 U.S. 883 (1949), noted in 18 GEO. WASH. L. REV. 427 (1950), 48 MICH. L. REV. 112 (1949), and 7 WASH. & LEB L. REV. 214 (1950); *Allen v. Georgia*, 166 U.S. 138 (1897); *Bonahan v. Nebraska*, 125 U.S. 692 (1887); *Smith v. United States*, 94 U.S. 97 (1876). See also *United States v. Campos-Serrano*, 404 U.S. 293, 294 n.2 (1971) (dictum); *National Union of Marine Cooks v. Arnold*, 348 U.S. 37, 43 (1954) (dictum).

26. 94 U.S. 97 (1876).

27. *Smith* was followed in two later cases, *Eisler v. United States*, 338 U.S. 189 (per curiam), cert. dismissed, 338 U.S. 883 (1949), and *Bonahan v. Nebraska*, 125 U.S. 692 (1887).

28. 94 U.S. at 97.

29. *Molinaro v. New Jersey*, 396 U.S. 365 (1970) (per curiam). Certiorari was not dismissed in *Estelle* because the Court was reviewing a state court's dismissal. In *Molinaro* the appellant escaped after certiorari was granted.

30. 166 U.S. 138 (1897).

was upheld over a due process challenge. Reasoning that a fugitive should not dictate the terms of his surrender, the Supreme Court permitted the Georgia courts to set a sixty-day limit for return to custody. In *Allen*, recapture of the escapee one year later was found not sufficient for reinstatement of the appeal, despite the fact that the escapee faced a death sentence.³¹

Practice in the state courts has generally been in accord with *Smith* and *Allen*, but these courts often differ about the manner in which the appeal is dismissed, the legal theories employed, and the policy reasons considered. The methods of disposing of escapees' appeals are in large part classifiable as either unconditional dismissal³² or conditional dismissal.³³ Unconditional dismissal is usually tantamount to dismissal with prejudice but some courts allow eventual reinstatement.³⁴ Conditional dismissal means that the escapee's appeal will be dismissed unless he returns to custody within a certain period of time, usually thirty days³⁵ but sometimes longer.³⁶ The return to custody may be either by recap-

31. *Id.* at 139.

32. *Molinaro v. New Jersey*, 396 U.S. 365 (1970) (per curiam); *Lofton v. State*, 149 Miss. 514, 115 So. 592, cert. denied, 278 U.S. 568 (1928); *State v. Page*, 23 N.C. App. 539, 209 S.E.2d 379 (1974); *Forder v. State*, 456 S.W.2d 378 (Tex. Crim. App. 1970); see *Eisler v. United States*, 338 U.S. 189 (per curiam), cert. dismissed, 338 U.S. 883 (1949).

33. *Bonahan v. Nebraska*, 125 U.S. 692 (1887); *Smith v. United States*, 94 U.S. 97 (1876); *United States v. Sperling*, 506 F.2d 1323 (2d Cir. 1974); *Johnson v. Laird*, 432 F.2d 77 (9th Cir.), merits considered, 435 F.2d 493 (9th Cir. 1970); *People v. Estep*, 413 Ill. 437, 109 N.E.2d 762 (1952), cert. denied, 345 U.S. 970 (1953); *State v. Spry*, 126 W. Va. 781, 30 S.E.2d 88 (1944). Some early cases spoke of "leaving the appeal off the docket," until a certain date or until directions to the contrary, but this was similar to conditional dismissal. See *Bonahan* and *Smith supra*. But see *Eisler v. United States*, 338 U.S. 189 (per curiam), cert. dismissed, 338 U.S. 883 (1949). See generally 18 GEO. WASH. L. REV. 427 (1950). One court in a recent case granted a general continuance even though the appellant-escapee had escaped once before and was still at large. *Commonwealth v. Galloway*, 333 A.2d 741 (Pa. 1975). But indefinite postponement is rare. See *Jones v. State*, 218 So. 2d 705 (Miss. 1969), overruling *Harrelson v. State*, 222 Miss. 514, 76 So. 2d 516 (1954). On a few occasions the court has heard the appeal in the appellant's absence. *Irvin v. State*, 236 Ind. 384, 139 N.E.2d 898 (1957), *rev'd on other grounds*, 359 U.S. 394 (1959); *Stevens v. State*, 26 Ohio App. 53, 159 N.E. 834 (1927); *State v. Broom*, 121 Ore. 202, 253 P. 1042 (1927). In North Carolina, several approaches have been taken including affirmance, dismissal, continuance, and leaving off the docket. See *State v. Williams*, 263 N.C. 800, 140 S.E.2d 529 (1965). For a general discussion of dismissal for escape pending appeal see 39 COLUM. L. REV. 1244 (1939); 5 U. DET. L.J. 77 (1941); 18 GEO. WASH. L. REV. 427 (1950); Annot., 26 L.R.A.(N.S.) 921 (1910).

34. *Miller v. State*, 311 So. 2d 348 (Miss. 1975) (reinstatement for good cause). Mere recapture may not be good cause, *Mitchell v. State*, 294 So. 2d 395 (Fla. 1974), but meritorious appeal may be, if the state's case has not been prejudiced by the escape. *White v. State*, 514 P.2d 814 (Alas. 1973).

35. *United States v. Eberhardt*, 467 F.2d 578 (5th Cir. 1972) (per curiam); *People v. Clark*, 201 Cal. 474, 259 P. 47 (1927).

36. *United States v. Shelton*, 508 F.2d 797 (5th Cir. 1975) (reasonable time);

ture or by surrender; results seldom turn on this distinction.³⁷ Another fact of apparently little significance to either conditional or unconditional dismissal is the type of appeal involved. Courts tend not to distinguish between statutory appeals of right and discretionary appeals, and hold that both types are subject to some form of dismissal.³⁸ Of vital importance, however, is the procedural juncture at which the escape occurs. When the appellant escapes after he has been convicted and sentenced and has filed his appeal, and is still a fugitive at the date set for the appeal hearing, dismissal in some form is almost always granted.³⁹ When, however, the appellant escapes pending appeal but returns to custody before the hearing date, the appeal is *not* usually dismissed.⁴⁰ In the few cases that allowed post-return dismissal, it appears that the escapee delayed the appellate process by his long absence.⁴¹

A second way in which courts differ is the legal theory employed as the ground for dismissal. The four major theories are lack of jurisdiction,⁴² mootness,⁴³ waiver⁴⁴ and abandonment,⁴⁵ but there is a cornuco-

State v. Mosley, 84 Wash. 2d 608, 528 P.2d 986 (1974) (until date of filing of court's opinion).

37. 39 COLUM. L. REV. 1244, 1246 n.11 (1939) (collecting cases); see Brinlee v. United States, 483 F.2d 925 (8th Cir. 1973) (per curiam). *But cf.* Johnson v. Laird, 432 F.2d 77 (9th Cir. 1970).

38. United States v. Swigart, 490 F.2d 914 (10th Cir. 1973).

39. Shelton v. State, 131 Ga. App. 786, 206 S.E.2d 654 (1974); State v. Page, 23 N.C. App. 539, 209 S.E.2d 379 (1974); see 18 GEO. WASH. L. REV. 427, 428 (1950); 5 U. DET. L.J. 77 (1941).

40. Ruetz v. Lash, 500 F.2d 1225 (7th Cir. 1974) (collecting federal cases); People v. Mutch, 4 Cal. 3d 389, 482 P.2d 633, 93 Cal. Rptr. 721 (1971); Stevens v. State, 26 Ohio App. 53, 159 N.E. 834 (1927); Commonwealth v. Galloway, 333 A.2d 741 (Pa. 1975). A clear statement of the rationale appears in the *Galloway* case, *supra*: "Since Galloway [the escapee] is no longer a fugitive from justice and is now subject to the jurisdiction of this Court, he will be responsive to any judgment this Court renders. Therefore, this Court has no basis upon which to grant a motion to dismiss the appeal at this juncture." *Id.* at 743.

41. See Allen v. Georgia, 166 U.S. 138 (1897) (absence of one year); *cf.* State v. Dalton, 185 N.C. 606, 115 S.E. 881 (1923) (per curiam) (appeal docketed three years late).

42. Bonahan v. Nebraska, 125 U.S. 692 (1887); Smith v. United States, 94 U.S. 97 (1876); Gentry v. State, 371 S.W.2d 566 (Tex. Crim. App. 1963); Vega v. State, 103 Tex. Crim. 308, 280 S.W. 824 (1926).

43. Eisler v. United States, 338 U.S. 189 (per curiam), *cert. dismissed*, 338 U.S. 883 (1949); Allen v. Georgia, 166 U.S. 138 (1897); United States v. Dawson, 350 F.2d 396 (6th Cir. 1965) (per curiam); Mitchell v. State, 294 So. 2d 395 (Fla. 1974); State v. John, 60 Wis. 2d 730, 211 N.W.2d 463 (1973). *But see* Molinaro v. New Jersey, 396 U.S. 365 (1970) (per curiam). For a discussion of mootness see 41 HARV. L. REV. 534 (1927); 34 HARV. L. REV. 416 (1920). For a discussion of the related "case and controversy" question of escape as raised by the *Eisler* case, *supra*, see 48 MICH. L. REV. 111 (1949).

44. Mitchell v. State, 294 So. 2d 395 (Fla. 1974); State v. Jacobs, 107 N.C. 772, 11 S.E. 962 (1890); Hurt v. State, 72 Okla. Crim. 318, 115 P.2d 919 (1941), *noted in* 5 U. DET. L.J. 77 (1941); Kilpatrick v. State, 71 Okla. Crim. 125, 109 P.2d 514 (1941),

pia of others including forfeiture,⁴⁶ lack of standing,⁴⁷ implied dismissal,⁴⁸ loss of an indispensable party,⁴⁹ lack of mutuality,⁵⁰ breach of condition,⁵¹ "disentitlement",⁵² and even contempt of court⁵³ and obstruction of justice.⁵⁴ The ground of no jurisdiction, sometimes phrased in terms of the *Smith* rationale of nonenforceability of judgment, is the most common, and is the nominal basis for dismissal in Texas.⁵⁵ These distinctions between legal theories are often academic⁵⁶ but they are sometimes decisive.⁵⁷

Finally, courts support their dismissal decisions with various policy considerations. Most of these fall into two categories: concern for orderly appellate procedure and concern for the proper methods of dealing with criminal escapes. Included in the first are the policies favoring prompt appeals,⁵⁸ the policies against deciding moot cases,⁵⁹ and related

noted in 12 OKLA. B.A.J. 439 (1941); *State v. Mosley*, 84 Wash. 2d 608, 528 P.2d 986 (1974); *State v. John*, 60 Wis. 2d 730, 211 N.W.2d 463 (1973). *But see* *Ruetz v. Lash*, 500 F.2d 1225 (7th Cir. 1974) (collecting cases); *White v. State*, 514 P.2d 814 (Alas. 1973). *See generally* 39 COLUM. L. REV. 1244 (1939).

45. *Allen v. Georgia*, 166 U.S. 138 (1897); *Mitchell v. State*, 294 So. 2d 395 (Fla. 1974); *Kirkman v. State*, 232 Ind. 563, 114 N.E.2d 878 (1953); *State v. DeVane*, 166 N.C. 281, 81 S.E. 293 (1914); *State v. John*, 60 Wis. 2d 730, 211 N.W.2d 463 (1973). *But see* *McKinney v. United States*, 403 F.2d 57 (5th Cir. 1968).

46. *Shelton v. State*, 131 Ga. App. 786, 206 S.E.2d 654 (1974).

47. *Lambert v. State*, 21 Ala. App. 373, 108 So. 631 (1926); *State ex rel. Ruetz v. La Grange Cir. Ct.*, 258 Ind. 354, 281 N.E.2d 106 (1972).

48. *Cf. Eisler v. United States*, 338 U.S. 189 (per curiam), *cert. dismissed*, 338 U.S. 883 (1949).

49. *Cf. State v. Carter*, 299 A.2d 891 (Me. 1973).

50. *Johnson v. Laird*, 432 F.2d 77 (9th Cir. 1970); *United States v. Shapiro*, 391 F. Supp. 689 (S.D.N.Y. 1975). This ground means that a court is unwilling to allow a defendant to gain the benefit of a favorable result when he is unwilling to risk the burden of an adverse decision.

51. *Stevens v. State*, 26 Ohio App. 53, 159 N.E. 834 (1927); *Trotter v. State*, 334 P.2d 452 (Okla. Crim. App. 1959).

52. *Molinaro v. New Jersey*, 396 U.S. 365 (1970) (per curiam).

53. *Crum v. Commonwealth*, 232 Ky. 331, 23 S.W.2d 550 (1930); *State v. Carter*, 98 Mo. 431, 11 S.W. 979 (1889); *State v. Jacobs*, 107 N.C. 772, 11 S.E. 962 (1890); *see Allen v. Georgia*, 166 U.S. 138, 141 (1897).

54. *State v. John*, 60 Wis. 2d 730, 211 N.W.2d 463 (1973).

55. TEX. CODE CRIM. PRO. ANN. art. 44.09 (1966); *Gentry v. State*, 371 S.W.2d 566 (Tex. Crim. App. 1963).

56. For example, *Allen v. Georgia*, 166 U.S. 138 (1897), seems to be based on four or five separate theories.

57. *See, e.g., White v. State*, 514 P.2d 814 (Alas. 1973) (escape by itself held not to constitute waiver). Most escapees probably do not voluntarily and knowingly give up their statutory rights of appeal. *Cf. Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Furthermore the escapee's return to custody would seem to render most of the grounds inapplicable.

58. Such as the court's interest in judicial economy, *Loyd v. State*, 19 Tex. Ct. App. R. 137, 155 (1885), and similar interests of other appellants. *See* 39 COLUM. L. REV. 1244, 1246 n.15 (1939).

59. Such as judicial economy and assuring vigorous adversary presentation. *See* note 43 *supra*.

arguments.⁶⁰ In the second category, some courts stress the impropriety of allowing escapees to "blackmail" the state or dictate the terms of their surrender.⁶¹ But what occasionally stands out most sharply is an element of punishment or retribution.⁶² In some cases, dismissal of appeal is viewed as an appropriate way of punishing either the escape itself⁶³ or the contempt of court or authority which the escape may represent.⁶⁴ Even if not directed to do so by statute, many courts seem compelled to mete out procedural punishments for fugitives even before they are tried for the crime of escape.⁶⁵

This judicial condemnation of escape has been given a major boost in *Estelle v. Dorrough*.⁶⁶ By upholding a statute which allows the dismissal of an appeal despite the early recapture of the escapee, the Supreme Court has signalled a significant extension of an accepted but heretofore limited practice.⁶⁷ First, the Texas statute does not limit the applicability of the dismissal rule to appellant-escapees who are beyond the court's jurisdiction at the hearing date, as was the situation in most prior cases such as *Smith*.⁶⁸ The fact that the escapee is back in the custody and control of the court and therefore subject to its decrees is no longer of any consequence. Secondly, and likewise irrelevant to the Court, is the fact that the escape may have no dilatory effect on the appellate process, which in effect removes the limitation implicit in *Allen* for dismissal only after a long absence by the escapee.⁶⁹ Thirdly, an escapee's intent to remain a permanent fugitive is not required. Although not at issue in *Estelle*, the dismissal rule apparently would apply with equal force to an escapee on the verge of surrender at the time of recapture.⁷⁰

60. *E.g.*, the fact that appeals are different from trials, *State v. Jacobs*, 107 N.C. 772, 11 S.E. 962 (1890), and the asserted analogy between civil and criminal dismissals. *Allen v. Georgia*, 166 U.S. 138 (1897); *State v. DeVane*, 166 N.C. 281, 81 S.E. 293 (1914).

61. *See, e.g.*, *Allen v. Georgia*, 166 U.S. 138 (1897).

62. *See, e.g., id.* at 141; *cf. Molinaro v. New Jersey*, 396 U.S. 365, 366 (1970) (*per curiam*).

63. *Cf. Molinaro v. New Jersey*, 396 U.S. at 366.

64. *Allen v. Georgia*, 166 U.S. at 141; *see note 53 supra*.

65. The escapee need not be tried for escape under the Texas statute. A sheriff's affidavit is the only proof required that an escape has occurred, and it is sufficient to authorize dismissal of the appeal. *TEX. CODE CRIM. PRO. ANN.* art. 44.10 (1966); *Cuevas v. State*, 467 S.W.2d 421 (Tex. Crim. App. 1971); *Powell v. State*, 99 Tex. Crim. 276, 269 S.W. 443 (1925). This issue, however, is almost never raised. *See, e.g., Allen v. Georgia*, 166 U.S. 138 (1897).

66. 420 U.S. at 534.

67. *See text accompanying notes 40-41 supra*.

68. *See text accompanying notes 26-28 supra*.

69. *See text accompanying notes 30-31 supra*.

70. The Texas statute makes no provision for an inquiry into the escapee's state of

From the standpoint of constitutional theory, *Estelle* is neither inconsistent with nor an extension of prior law. No definitive new tests or principles were enunciated or novel approaches taken. Rather, the Court continued to employ the traditional two-tier equal protection analysis⁷¹ often used in challenges to state legislative classifications. Applying this approach to the Texas statute, the *Estelle* majority rejected the "strict scrutiny" standard of review by apparently reasoning that since a criminal defendant's interest in appellate review is not constitutionally guaranteed,⁷² a fortiori it is not "fundamental." This is consistent with the Court's recent hesitation to expand the list of fundamental interests.⁷³ Rejection of strict scrutiny, of course, generally means acceptance of the "rational basis" standard of review.⁷⁴ In accepting this standard, the majority's holding that the Texas classifications were rationally related to state interests⁷⁵ seems to be consistent with the Court's usual allowance of wide latitude to state legislative choices under this branch of the test.⁷⁶

mind. Such an inquiry would seem to be forbidden in light of the fact that escape deprives the court of jurisdiction at the outset. TEX. CODE CRIM. PRO. ANN. art. 44.09 (1966). One case, *Leonard v. State*, 53 Tex. Crim. 187, 109 S.W. 149 (1908), suggested that intent to surrender might prevent dismissal, but this is contrary to the terms of the statute, and the case was criticized in *Gibson v. State*, 83 Tex. Crim. 345, 203 S.W. 893 (1918). At any rate, the escapee in *Estelle* apparently did not allege that he was ready to surrender.

71. 420 U.S. at 539. This approach to equal protection can be phrased as an inquiry in the following form:

Does the statutory classification affect a "fundamental interest" or is it based on "suspect criteria"?

- (1) If so, then the "strict scrutiny" standard of review applies, meaning that the classification is permissible (in equal protection terms) only if justified by a "compelling state interest."
- (2) If not, then the looser "rational basis" standard of review applies, meaning that the classification is permissible if rationally related to legitimate state purposes.

See *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528, 533 (1973); *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972); *Shapiro v. Thompson*, 394 U.S. 618, 658 (1969) (Harlan, J., dissenting). For a discussion of two-tier equal protection see *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969). For a broad discussion of equal protection in general see Tussman and tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

72. 420 U.S. at 536; see cases cited note 78 *infra*.

73. See, e.g., *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Dandridge v. Williams*, 397 U.S. 471 (1970). But see *Roe v. Wade*, 410 U.S. 113 (1973).

74. See note 71 *supra*.

75. 420 U.S. at 537. The state interests mentioned were deterring escapes, encouraging surrenders, and expediting appeals. *Id.* The classifications created by the statute are listed in note 15 *supra*.

76. 420 U.S. at 538 n.7; see *McGowan v. Maryland*, 366 U.S. 420 (1961); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Railway Express Agency v. New York*, 336 U.S. 106 (1949).

Although not momentous in constitutional terms, the potentially great impact of *Estelle* to criminal appellate procedure demands close examination of the Court's application of the equal protection analysis in the case. Beginning with the rejection of strict scrutiny review, the majority's declaration that there is no constitutional right of appeal⁷⁷ has indeed been echoed through the years,⁷⁸ but it has rarely appeared as more than a bald assertion devoid of reasoning. Federal appeal is a matter of statutory⁷⁹ and decisional⁸⁰ right and all states provide for appeal by statute.⁸¹ The Supreme Court itself has greatly expanded appellate access in recent years by requiring states to furnish free transcripts⁸² and counsel⁸³ to indigents on their first appeal of right.⁸⁴ Also, the Court now recognizes a generalized "right of access" to the courts⁸⁵ that is grounded in the equal protection clause: "[A]venues [of appellate review] must be kept free of unreasoned distinctions that can only impede the open and equal access to the courts."⁸⁶

77. More precisely, "no federal constitutional right to state appellate review of state criminal convictions." 420 U.S. at 536.

78. See, e.g., *Ortwein v. Schwab*, 410 U.S. 656, 660 (1973) (per curiam); *Griffin v. Illinois*, 351 U.S. 12, 18-19 (1956); *National Union of Maritime Cooks v. Arnold*, 348 U.S. 37, 43 (1954); *McKane v. Durston*, 153 U.S. 684, 687 (1894).

79. 28 U.S.C. §§ 1291, 1294, 2106 (1970); FED. R. APP. P. 4(b).

80. *Coppedge v. United States*, 369 U.S. 438 (1962); *McKinney v. United States*, 403 F.2d 57 (5th Cir. 1968). *But cf.* *United States v. Swigart*, 490 F.2d 914 (10th Cir. 1973).

81. E.g., N.C. GEN. STAT. § 7A-27 (Cum. Supp. 1974); TEX. CODE CRIM. PRO. ANN. art. 44.02 (1966). See generally A.B.A. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE—STANDARDS RELATING TO CRIMINAL APPEALS (Approved Draft 1970).

82. *Griffin v. Illinois*, 351 U.S. 12 (1956). See also *Mayer v. Chicago*, 404 U.S. 189 (1971) (collecting cases).

83. *Douglas v. California*, 372 U.S. 353 (1963). See also *Anders v. California*, 386 U.S. 738 (1967).

84. But not on discretionary appeal. *Ross v. Moffitt*, 417 U.S. 600 (1974), noted in 53 N.C.L. REV. 560 (1975).

85. See *Abram*, *Access to the Judicial Process*, 6 GA. L. REV. 247 (1972); *Wedlock*, *The Emerging Rights of the Confined: Access to the Courts and Counsel*, 25 S.C.L. REV. 605 (1973); Note, *The Expansion of a Prisoner's Right of Access to the Courts*, 1 CAPITAL U.L. REV. 192 (1972).

86. *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966), quoted in *Blackledge v. Perry*, 417 U.S. 21, 25 n.4 (1974); *Mayer v. Chicago*, 404 U.S. 189, 193 (1971); *North Carolina v. Pearce*, 395 U.S. 711, 724 (1969), and *Williams v. Oklahoma City*, 395 U.S. 458, 459 (1969) (per curiam). In addition to indigents, the "right of access" rule has been applied to prisoners in various contexts. *Johnson v. Avery*, 393 U.S. 483 (1969); *Dowd v. United States ex rel. Cook*, 340 U.S. 206 (1951); *Gilmore v. Lynch*, 319 F. Supp. 105 (N.D. Cal. 1970) (per curiam), *aff'd sub nom. Younger v. Gilmore*, 404 U.S. 15 (1971) (per curiam). Other cases have acknowledged the importance of appeal in general: "Justice demands an independent and objective assessment of a district judge's appraisal of his own conduct of a criminal trial." *Coppedge v. United States*, 369 U.S. 438, 455-56 (Stewart, J., concurring). Also, some authorities have expressed the view that the right of appeal is a fundamental aspect of due process. See, e.g., *State ex rel.*

In sum, the Court in *Estelle* failed to take note of the constellation of recent developments concerning appellate access and the de facto right of appeal in current practice. Although a full inquiry into whether appellate review should be a "fundamental" interest is beyond the scope of this note, a first look suggests that an appeal from a criminal conviction is at least as fundamental as certain other interests so recognized in recent years, such as travel⁸⁷ and privacy.⁸⁸ When a defendant faces years in prison, denial of review of his possibly erroneous conviction seems just as serious as denial of these other rights.

Also questionable is the *Estelle* Court's application of the "rational basis" standard of equal protection review. Although a large portion of the opinion dealt with this issue, the Court's conclusion that state interests were rationally served⁸⁹ by a statute allowing dismissal for escape despite recapture is unconvincing. In the first place, deterrence of prison escape may be a proper state interest, but there is little support for any rational relation between dismissal of a pending appeal and deterrence of escape. Not only is there virtually no case law to support this proposition⁹⁰ but there is also a dearth of empirical data. A statistical showing by the Court of some kind, such as one indicating that dismissal practice reduced the number of escapes, would have been most persuasive. The omission of such data is an unfortunate departure from some recent cases in which the Court looked at the practical effect of a statute as well as its theoretical effect.⁹¹ At least one "statistic," the large amount of litigation under the Texas statute, belies the contention that the threat of dismissal deters escapes. The escapee in *Estelle* certainly was not deterred.

Statistics and precedent aside, common sense would seem to suggest that no real deterrence results from the Texas statute. If the potential escapee is even aware of the existence of a statute on the subject, dismissal of his appeal is probably the least of his concerns. Of

Ruetz v. La Grange Cir. Ct., 258 Ind. 354, 357, 281 N.E.2d 106, 109 (1972) (DeBruler, J., dissenting).

87. Shapiro v. Thompson, 394 U.S. 618 (1969).

88. Roe v. Wade, 410 U.S. 113 (1973).

89. 420 U.S. at 537.

90. The majority cited only one case for its deterrence argument, namely Rodriguez v. State, 457 S.W.2d 555 (Tex. Crim. App. 1970). See 420 U.S. at 537 n.5. Rodriguez, however, is totally unresponsive. Not only does the case fail even to mention deterrence, but it does not even involve the same statute as *Estelle*. No case could be found which suggests that the threat of dismissal deters escapes. One case suggests the opposite. See White v. State, 514 P.2d 814, 815 (Alas. 1973).

91. See, e.g., United States Dep't of Agriculture v. Moreno, 413 U.S. 528, 537 (1973); cf. Schlesinger v. Ballard, 419 U.S. 498, 510 (1974).

doubtful validity is the majority's statement in *Estelle* that escapes are "reasonably calculated to disrupt" the appellate process.⁹² Why would a convict deliberately sabotage his only chance of obtaining legal freedom? The fact that such sabotage in fact occurs is evidence only of the escapee's confused state of mind, perhaps brought on by his motives for escape—desire for freedom, family troubles, denial of parole hearing, threats on his life or others.⁹³ One commentator has pointed out that "to the extent that psychological pressure affects the convict, the rational basis of behavior which a deterrent theory presupposes is lacking."⁹⁴

In addition to deterrence, the Court in *Estelle* mentioned orderly appellate procedure as a state interest that was furthered by the Texas dismissal statute.⁹⁵ But again accepting this as a legitimate purpose, the allegedly rational relationship between dismissal of appeal and orderly procedure is questionable on two grounds. The first, which the Court did not address, is the needlessness of punishing a defendant whose escape has not been shown to prejudice the State's case.⁹⁶ Although prejudice to the State could indeed result from a long absence by the escapee,⁹⁷ prejudice after two days would be rare. The second reason, also omitted from the Court's discussion and perhaps the Court's most flagrant omission, is the reality that two days of an appellant's absence during his escape is hardly likely to even delay his appeal, much less disrupt the judicial process. Texas, like most states, allows a ten-day period for the filing of all appeals.⁹⁸ Furthermore it has been estimated that even under ideal conditions the Texas Court of Criminal Appeals does not hear a case until 165 days after conviction.⁹⁹ This suggests a crucial distinction between the one year interval between escape and recapture in *Allen v. Georgia*¹⁰⁰ (relied upon by the majority), which

92. 420 U.S. at 541.

93. For a discussion of some psychological and social factors behind escapes see Renteria and Holt, *The Anatomy of an Escape*, 33 AM. J. CORRECTIONS 10 (Jan./Feb. 1971). See also Loving, Stockwell and Dobbins, *Factors Associated with Escape Behavior of Prison Inmates*, 23 FED. PROBATION 49 (Sept. 1959).

94. 39 COLUM. L. REV. 1244, 1245 n.9 (1939).

95. 420 U.S. at 537.

96. See *White v. State*, 514 P.2d 814 (Alas. 1973).

97. Such as loss of evidence. See 39 COLUM. L. REV. 1244, 1246 n.15 (1939).

98. TEX. CODE CRIM. PRO. ANN. art. 44.08(c) (1966).

99. Reid, *The Texas Code of Criminal Procedure*, 44 TEXAS L. REV. 983, 1016 (1966). It is true that article 44.23 of the Texas Code authorizes the advancing of cases out of their normal docket slots but this is almost never done. See, e.g., *Gaines v. State*, 58 Tex. Crim. 631, 127 S.W. 181 (1910), in which the court refused to advance an appeal even though it was a homicide case and the accused was a member of the Texas state legislature.

100. 166 U.S. 138 (1897); see text accompanying notes 30-31 *supra*.

could very well have delayed the appeal, and the two day interval in *Estelle*.

It should also be stressed that there is no relation between a dismissal rule and the purposes of deterrence or orderly judicial procedure when a felon can escape after conviction but before sentencing or before filing the record on appeal and yet still be heard by the appellate court. As the Texas statute has been construed, escaping felons can be heard on appeal after their recapture if the *record* on appeal has not been filed, even if *notice* of appeal was given before the escape.¹⁰¹ The irrationality of these distinctions is obvious.

Finally, it is unfortunate that the Court failed to discuss alternative measures available to states for dealing with prison escapes. Reduction of the number of escapes, for example, would probably be better achieved by increasing prison security, improving prison conditions, and decreasing prison sentences. Not only would these methods have a far more direct relation to escape than dismissal of appeal, but they would also be much less severe to the prisoner.¹⁰² Furthermore, if escapes continued to occur despite these efforts, they could be punished by the substantive penalties of fine or imprisonment or increased sentence already allowed by common law¹⁰³ and many state statutes.¹⁰⁴

As a result of *Estelle*, Texas appellate calendars may be less crowded and non-escaping appellants may not have their appeals delayed by escapees still at large. But the felon who escapes, for whatever reason, will find his statutory right of review of one offense entirely cut off by his subsequent commission of a wholly unrelated offense. This is true even if the felon is never convicted or even prosecuted for the second offense of escape,¹⁰⁵ and it may be true even if the escape is justified.¹⁰⁶ This is not to condone escape. It is a serious offense which

101. *McGee v. State*, 445 S.W.2d 187 (Tex. Crim. App. 1969) (appeal was dismissed on other grounds); *Walters v. State*, 18 Tex. Crim. 8 (1885). *See also Cushman v. State*, 493 S.W.2d 159 (Tex. Crim. App. 1973).

102. It is true that, in equal protection litigation, the availability of less restrictive alternatives has traditionally been a concern of the Court only in "strict scrutiny" cases such as those involving first amendment rights. *Sherbert v. Verner*, 374 U.S. 398, 407-08 (1963) (collecting cases). But it should also be a factor in "rational basis" cases. When the alternative chosen by the legislature is of minimal rationality to start with, and use of the alternative greatly affects individual interests which, although may not be "fundamental," are nevertheless important, and there are several eminently feasible, superior, and much less severe alternatives available to the state, then such alternatives should at least be considered by the Court in an equal protection challenge.

103. *See note 1 supra*.

104. *See note 2 supra*.

105. *See note 65 supra*.

106. Justification for escape, though rare, has been found in some instances, such as

should be punished, but the penalty should be substantive, and only after a due process conviction at a separate trial for the escape. Some procedural sanctions such as conditional dismissal of appeal may be justifiable when the escapee is still at large, but never after recapture when personal jurisdiction has reattached, especially if the appeal has not been delayed.

The preclusion of review allowed by *Estelle* means that a prison term must be served by the escapee regardless of errors in his original conviction which, had an appeal been allowed, might have resulted in a new trial or outright reversal. Apart from this borderline due process consideration, there is a serious equal protection issue not fully faced by the majority. As Justice Stewart indicates in his dissent,¹⁰⁷ a real possibility exists of two prisoners escaping at the same time and in the same manner and yet suffering completely disparate sentences dependent upon the fortuity of errors at trial, and wholly unrelated to the gravity of the offense of escape. Although the majority in *Estelle v. Dorrough* considered the interests of appellate courts in judicial economy, the interests of other appellants in expeditious appeals, and the interests of the state and the public in deterring escape, the most important interest—that of an inmate under a quarter-century prison term in having justice done—has been sadly neglected.

OTHO B. ROSS, III

Federal Income Taxation—Transfers to and Leasebacks from a Short-Term Trust

For almost thirty years¹ tax planners have been frustrated by the judicial confusion surrounding the deductibility of rental payments made by a settlor for property used in his trade or business which he has transferred to and leased back from a short-term trust.² To date, two

for duress due to homosexual threats. *People v. Harmon*, 53 Mich. App. 482, 220 N.W.2d 212 (1974), noted in 43 U. CIN. L. REV. 956 (1974). The escapee in *Estelle* apparently did not seek to justify his escape.

107. 420 U.S. at 542.

1. The first case to deal directly with this problem was *Skemp v. Commissioner*, 168 F.2d 598 (7th Cir. 1948).

2. Deductions of rental payments for property used in the taxpayer's trade or business are generally allowed under section 162(a) of the Internal Revenue Code of 1954. That section provides in part: