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# DISPOSITION OF A FEDERAL CRIMINAL CASE WHEN DEFENDANT DIES PENDING APPEAL

Uncertainty has arisen in the last few years as to the proper disposition of a federal criminal case when the defendant dies during the appeal of his conviction.<sup>1</sup> The bases of appellate jurisdiction and the level of the appeal<sup>2</sup> bear significantly on the problem. The consequences of this disposition are important to the interests of the deceased defendant, his estate and survivors, and the society for whose protection the criminal justice system exists.

This article discusses the way in which courts historically have disposed of such cases and the apparent change recently introduced by the United States Supreme Court. After an examination of the ramifications of the new and old rules, certain changes in current practice are recommended which will better serve the interests of the deceased, his survivors, and society as a whole.

## I. THE TRADITIONAL RULE

Until 1976, it was well settled that when a defendant in a federal criminal case died pending appellate review of his conviction, all proceedings against him, including the indictment, abated,<sup>3</sup> and the conviction was dismissed on remand to the trial court.<sup>4</sup> This policy applied to both prison sentences and fines.

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<sup>1</sup> Although it is impossible to ascertain precisely how frequently this situation arises, the best estimate based on the number of cases uncovered in the course of writing this article is not more than ten annually. More likely, it is only two or three.

<sup>2</sup> See notes 26-32 and accompanying text *infra*.

<sup>3</sup> Discussion with local, state, and federal authorities revealed that while abatement terminates the proceedings and erases the conviction from the deceased's record, the arrest record and attendant reports and investigative data remain on file. Telephone interviews with Ben Brewer, Agent, Federal Bureau of Investigation, Detroit, Michigan (January, 1979); unnamed records officers, Michigan State Police, Ypsilanti, Michigan, and Ann Arbor Police, Ann Arbor, Michigan (January, 1979).

<sup>4</sup> Widespread acceptance of this rule is indicated by the number of cases which merely state that the cause abates, with little or no discussion of the question. See, e.g., *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385 (1972); *Menken v. Atlanta*, 131 U.S. 405 (1889); *List v. Pennsylvania*, 131 U.S. 396 (1888); *United States v. Jones*, 498 F.2d 673 (5th Cir. 1974); *United States v. Hudson*, 460 F.2d 321 (5th Cir. 1972); *United States v. Sikes*, 456 F.2d 1290 (5th Cir. 1972); *Daniel v. United States*, 268 F.2d 849 (5th Cir. 1959); *Baldwin v. United States*, 72 F.2d 810 (9th Cir. 1934); *Rossi v. United States*, 21 F.2d 747 (8th Cir. 1927); *McGovern v. United States*, 280 F. 73 (7th Cir. 1922); *Pino v.*

The rationale for the rule derived from the belief that the goals of the criminal law—incapacitation, rehabilitation, retribution, and deterrence<sup>5</sup>—would not be furthered by upholding the deceased's conviction.<sup>6</sup> When the defendant dies, the goals of incapacitation, rehabilitation, and retribution are no longer attainable, and punishing the deceased's family would be unjust in society's view.<sup>7</sup> Moreover, the deterrent value of criminal sanctions is unaffected by the disposition of the appeal after death.<sup>8</sup>

Courts have elaborated on this rationale when disposing of a criminal fine assessed against the deceased's estate.<sup>9</sup> Unlike civil damages, which attach to and are enforceable against the estate,<sup>10</sup> fines are considered penalties rather than compensation for injury to the state.<sup>11</sup> Because of the impossibility of punishing the deceased and the perceived injustice in punishing the family, the fine, like a prison sentence, abates together with the conviction.<sup>12</sup>

These principles were most recently discussed in *Durham v. United States*,<sup>13</sup> in which the appellant died while his petition for certiorari was pending. In a per curiam opinion, the United States Supreme Court, relying on *Crooker v. United States*,<sup>14</sup> granted the petition, vacated the conviction below, and remanded the

United States, 278 F. 479 (7th Cir. 1921); *Dyar v. United States*, 186 F. 614 (5th Cir. 1911); *United States v. Dunne*, 173 F. 254 (9th Cir. 1909).

<sup>5</sup> See P. TAPPAN, *CRIME, JUSTICE AND CORRECTION* 241-61 (1960).

<sup>6</sup> *United States v. Pomeroy*, 152 F. 279 (C.C.S.D.N.Y. 1907), *rev'd on other grounds sub nom. United States v. New York Central & H.R.R. Co.*, 164 F. 324 (2d Cir. 1908).

<sup>7</sup> *Id.* at 282.

<sup>8</sup> Formerly, English law imposed an attainder on the convicted felon's property; his entire estate, including real and personal property, was forfeited. This practice stemmed from the belief that deprivation of the estate would have significant deterrent value. This practice was not adopted in the American colonies. S. RUBIN, *LAW OF CRIMINAL CORRECTION* 706-07 (2d ed. 1973). For a study of the deterrent effects of various criminal sanctions, see *DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES* (1978).

<sup>9</sup> See, e.g., *United States v. Pomeroy*, 152 F. 279 (C.C.S.D.N.Y. 1907), *rev'd on other grounds sub nom. United States v. New York Central & H.R.R. Co.*, 164 F. 324 (2d Cir. 1908).

<sup>10</sup> *Id.* at 280.

<sup>11</sup> The fine as penalty is distinguished from state assessment against the offender in a jurisdiction with a Victim Compensation statute which provides for restitution by the offender. See generally H. EDELHERTZ & G. GEIS, *PUBLIC COMPENSATION TO VICTIMS OF CRIME* (1974), and Part III C *infra*.

<sup>12</sup> *United States v. Pomeroy*, 152 F. 279 (C.C.S.D.N.Y. 1907), *rev'd on other grounds sub nom. United States v. New York Central & H.R.R. Co.*, 164 F. 324 (2d Cir. 1908). Fines have not traditionally been viewed as retributive, so that they do not carry over to the estate to satisfy the vengeful needs of the victim or the state. See also the discussion of the retributive function of offender contribution to victims, Part III C *infra*.

<sup>13</sup> 401 U.S. 481 (1971) (per curiam).

<sup>14</sup> 325 F.2d 318 (8th Cir. 1963). In *Crooker*, the defendant died while his appeal was pending before the circuit court. The decision provides an excellent synthesis of the cases applying the rule of abatement when the defendant dies.

case to the district court for dismissal. Two minority opinions in *Durham*, however, presaged a change in the traditional rule. Justice Marshall, joined by Chief Justice Burger and Justice Stewart, would have dismissed the petition as moot and "direct[ed] the Court of Appeals to note this action on its records."<sup>15</sup> Thus, the conviction would have remained on record rather than have abated. No explanation was proffered for this abrupt departure from established practice.

A dissent by Justice Blackmun advanced two reasons for dismissing the petition. First, he stated that the petition was untimely and therefore should not have been entertained by the Court.<sup>16</sup> Second, to dismiss the petition as moot, and thereby retain the conviction, would be more in accord with previous decisions that had remanded the deceased's case to the lower court for disposition "as the interests of law would require."<sup>17</sup> Justice Blackmun took issue with the principle that a conviction should disappear from the record because of the petitioner's death and despite his failure to overturn it on appeal to the circuit court. He offered no reason why the conviction should stand even though no one would serve the sentence.<sup>18</sup> Justice Blackmun, however, did not advocate abandoning the rule at both levels of appeal. Rather, he supported *Crooker* and distinguished *Durham* on the ground that *Crooker* was an appeal of right before the circuit court, whereas *Durham* involved a second-level appeal on writ of certiorari.<sup>19</sup> This was the first appearance of the distinction

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<sup>15</sup> 401 U.S. at 483.

<sup>16</sup> *Id.* at 484. The majority dealt with this problem by pointing out that the delay was caused by a clerical error, not by the appellant. *Id.* at 481-82.

<sup>17</sup> *Id.* at 484. The cases cited were *American Tobacco Co. v. United States*, 328 U.S. 781 (1946); *Singer v. United States*, 323 U.S. 338 (1945); and *United States v. Johnson*, 319 U.S. 503 (1943). The "interests of law" referred to by Justice Blackmun were not defined, but he seems to have misconstrued the three cited cases. He cited them in support of dismissing the writ but maintaining the conviction, whereas in each case the petition was dismissed and the cause remanded to the lower court for disposition. See also *Crooker v. United States*, 325 F.2d 318 (8th Cir. 1963), in which the court noted that in *United States v. Johnson* there was "no indication . . . that [disposition of the fine] was done by any published opinion or order. Presumably, disposition was made by routine order [vacating and abating the fine]." 325 F.2d at 321.

The *Durham* majority also cited *American Tobacco*, *Singer*, and *Johnson* in support of the remand of the case to the lower court for dismissal.

<sup>18</sup> Justice Blackmun's position is most likely unrelated to the certainty of affirmance on appeal. Statistics show that most certiorari appeals heard by the Court are reversed or vacated. For the most recent available figures, see *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 1, 332 (1978); *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 1, 298 (1977); *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 1, 279 (1975); *The Supreme Court, 1974 Term*, 89 HARV. L. REV. 1, 278 (1975); *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 1, 277 (1974).

<sup>19</sup> See *Durham v. United States*, 401 U.S. 481, 484 (1971) (per curiam) (Blackmun, J., dissenting). The majority addressed this point in a footnote, pointing out that petition-

between an appeal of right and a discretionary appeal. Five years later this distinction apparently justified the overruling of *Durham*.<sup>20</sup>

## II. THE NEW RULE

In 1976 the Supreme Court, in *Dove v. United States*,<sup>21</sup> explicitly overruled *Durham* in a brief per curiam opinion denying certiorari in a case where the defendant died while the petition was pending.<sup>22</sup> The denial of certiorari caused the conviction to remain on the deceased petitioner's record. The Court gave no rationale for breaking the precedent of *Durham* and previous cases, thus leaving unclear whether the ruling should be limited to cases before the Court on petitions for certiorari, or should be applied to all cases, at whatever level of appeal, in which the defendant died while the appeal was pending.<sup>23</sup>

Two circuit courts have subsequently grappled with this question. In *United States v. Moehlenkamp*,<sup>24</sup> the Seventh Circuit abated the deceased appellant's conviction, expressly limiting *Dove* to Supreme Court appeals on certiorari.<sup>25</sup> The court

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ing for certiorari is as much a right as is an appeal of right. The Court concluded that "[s]ince death will prevent any review on the merits, whether the situation is an appeal or certiorari, the distinction between the two would not seem to be important for present purposes." 401 U.S. at 483.

This argument misses the point of the appeal of right/discretionary appeal distinction, which is that the defendant be given the benefit of the doubt until he has exhausted his right to be heard on the merits, that is, his right to appeal. While all criminal defendants have the right to petition for certiorari, none have the right to be heard by the Supreme Court on the merits unless Congress has so provided. Therefore, those who do not fall under the appeal of right provision, 28 U.S.C. § 1257 (1976), have exhausted their right to appeal after being heard in the federal circuit courts of appeal. See notes 27 and accompanying text *infra*.

<sup>20</sup> See *Dove v. United States*, 423 U.S. 325 (1976) (per curiam), and text accompanying notes 21-22 *infra*. The distinction has also arisen in other contexts. See, e.g., *Ross v. Moffitt*, 417 U.S. 600 (1974), in which the Court held that indigent defendants need not be given free transcripts and assistance of counsel in discretionary appeals.

<sup>21</sup> 423 U.S. 325 (1976) (per curiam).

<sup>22</sup> The decision reads in its entirety: "The Court is advised that the petitioner died at New Bern, N.C., on November 14, 1975. The petition for certiorari is therefore dismissed. To the extent that *Durham v. United States*, 401 U.S. 481 (1971) (per curiam), may be inconsistent with this ruling, *Durham* is overruled." *Dove v. United States*, 423 U.S. 325, 325 (1976) (per curiam).

<sup>23</sup> The only case that has come down from the Court since *Dove* in which a criminal appellant died is *Warden, Green Haven State Prison v. Palermo*, 431 U.S. 911 (1977). It reads: "The Court is advised that respondent was found dead at John F. Kennedy Airport, N.Y., on March 25, 1977. The petition for certiorari is therefore dismissed. *Dove v. United States*, 423 U.S. 325 (1976)." This casts no light on the effect which *Dove* has on cases other than those which are before the Court on certiorari.

<sup>24</sup> 557 F.2d 126 (7th Cir. 1977). Defendant died while his appeal was pending before the circuit court.

<sup>25</sup> "The Court's recent decision in *Dove v. United States*, 423 U.S. 325 (1976), . . .

invoked the appeal of right/discretionary appeal distinction expounded in Justice Blackmun's *Durham* dissent.<sup>26</sup> Without discussing the different types of appeals, the Ninth Circuit similarly limited *Dove* in *United States v. Bechtel*,<sup>27</sup> in which the defendant died while review of his conviction was pending.

*Moehlenkamp's* limitation of *Dove* to Supreme Court certiorari petitions is supported by Justice Blackmun's advocacy of the *Crooker* rule in his *Durham* dissent.<sup>28</sup> The reasoning of that dissent apparently persuaded the *Dove* Court to overrule *Durham*.<sup>29</sup> Further, there is no indication that the distinction between the two levels of appeal was rejected by the *Dove* Court.

The policies underlying Supreme Court appeals lend validity to the *Moehlenkamp* distinction. The discretionary appeal via writ of certiorari was not intended as an appeal to which all are entitled,<sup>30</sup> nor was it meant to provide a court of last resort, since that would overload the Court's docket.<sup>31</sup> Rather, the discretionary appeal was created to give the Court the opportunity to decide those important cases not coming before it by original juris-

has raised some doubts as to the propriety of our following the *Durham* disposition. . . . [W]e are of the view that *Dove* overrules *Durham* only with respect to the appropriate disposition of moot petitions for certiorari." 557 F.2d at 127.

<sup>26</sup> The court stated:

The mootness of an appeal of right taken from a criminal conviction brings into play different considerations than does the mootness of a petition for certiorari committed to the Supreme Court's discretion. . . . The Supreme Court may dismiss the petition without prejudicing the rights of a deceased petitioner, for he has already had the benefit of the appellate review of his conviction to which he was entitled of right. In contrast, when an appeal has been taken from a criminal conviction to the court of appeals and death has deprived the accused of his right to our decision, the interests of justice ordinarily require that he not stand convicted without resolution of the merits of his appeal.

*Id.* at 128.

<sup>27</sup> 547 F.2d 1379 (9th Cir. 1977) (per curiam).

<sup>28</sup> 401 U.S. at 484 (Blackmun, J., dissenting). For a discussion of *Crooker*, see note 14 and accompanying text *supra*.

<sup>29</sup> Only two members of the *Dove* majority actually changed their positions between *Durham* and *Dove*. Justices Douglas and Brennan voted in the majority in *Durham* and subsequently overruled themselves by voting in the *Dove* majority. Justice White, who was in the *Durham* majority, dissented without opinion in *Dove*. Justices Black and Harlan had retired before *Dove* was decided.

<sup>30</sup> F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 260-62 (1927).

<sup>31</sup> Frankfurter and Landis state:

[T]he conservation of the Supreme Court as the arbiter of legal issues of national significance . . . could hardly be attained so long as there persisted the obstinate conception that the Court was to be the vindicator of all federal rights. . . . Litigation which did not represent a wide public interest was left to the state courts of last resort and to the circuit courts of appeals, always reserving to the Supreme Court power to determine that some national interest justified invoking its jurisdiction.

*Id.* at 260-61.

diction or appeal of right, and to regulate and maintain control over its caseload.<sup>32</sup>

Policy and history, then, support the *Moehlenkamp* interpretation of *Dove*. Until the Supreme Court elaborates the intended scope of *Dove*, *Moehlenkamp* probably will stand as the prevailing interpretation.<sup>33</sup>

### III. THE CONSEQUENCES OF THE DISPOSITION OF THE CASE

The importance of *Durham* and *Dove* can only be understood in light of their effects on survivors and third-party beneficiaries, since most ramifications of a conviction or abatement extend beyond the deceased appellant. The results of sustaining a deceased appellant's conviction may include survival of criminal fines, denial of social welfare benefits, carry-over of victim compensation liabilities, and perpetuation of social stigma.<sup>34</sup> The discussion below examines these consequences in the wake of *Dove*.

#### A. Fines

The status of fines apparently is the only post-conviction issue unchanged by the mode of disposition pursuant to *Dove*. As noted previously,<sup>35</sup> under the procedure prior to *Dove* a fine abated along with all other sanctions against the deceased defendant on the theory that it would be unjust to punish the family for the deceased's crime.<sup>36</sup> *Dove* is silent on the question of the disposition of fines. Justice Blackmun's dissent in *Durham*, however, indicates that even if the conviction were retained, an affected third party could seek court relief from burdens imposed

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<sup>32</sup> *Id.*

<sup>33</sup> See note 23 *supra* regarding *Warden, Green Haven State Prison v. Palermo*, 431 U.S. 911 (1977), the only Supreme Court case to cite *Dove*.

<sup>34</sup> This is not an exhaustive list of the repercussions of a defendant's death. There are others which come to mind, but which have not been adjudicated and are so rare as to be virtually hypothetical. Consider, for example, the convicted smuggler whose airplane has been confiscated for carrying contraband across the border. If he dies, it would be unclear whether his estate could reclaim the airplane in spite of the decedent's conviction.

<sup>35</sup> See text accompanying notes 9-12 *supra*.

<sup>36</sup> *United States v. Pomeroy*, 152 F. 279 (C.C.S.D.N.Y. 1907), *rev'd on other grounds sub nom. United States v. New York Central & H.R.R. Co.*, 164 F. 324 (2d Cir. 1908), deals briefly with the distinction between depleting the estate after the death of the appellant and the depletion that occurs when a fine is paid while the defendant is alive:

It may be said, of course, that there is very little difference between the loss which his family would have sustained if the money had been collected before his death, and the loss which it will now sustain if it is collected from his estate. But if the money had been collected before his death, he would have been punished. If it is collected now, his family will be punished, and he will not be punished.

152 F. at 282.

by the conviction.<sup>37</sup> Assuming, then, that *Dove* is based on Justice Blackmun's *Durham* dissent,<sup>38</sup> *Dove* does not alter the policy of abating fines under *Durham* and its antecedents.

This result is consistent with the policy underlying the abatement of fines upon the defendant's death. There is no indication that the "interests of justice" which mandate the abatement of fines are different in the case of discretionary appeals, which *Dove* removes from the *Durham* rule of abatement. The concern with sparing the family of the deceased the burden of the fine is entirely distinct from the appeal of right/discretionary appeal dichotomy which apparently justified *Dove*. Thus, even under *Dove*, a fine should abate upon the death of the defendant.

### B. Survivor and Third-Party Social Welfare Benefits

The greatest tangible effect of affirmance of a deceased's conviction is on his estate and survivors. Certain social welfare programs such as retirement pay for government employees<sup>39</sup> and veterans' benefits<sup>40</sup> are not available to the surviving spouse or children of one convicted of certain crimes, primarily those against national security.<sup>41</sup> Under *Durham*, these benefits sur-

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<sup>37</sup> Justice Blackmun notes, "If, by chance, the suggestion of death has some consequence upon the survivor rights of a third party (a fact not apparent to this Court), the third party so affected is free to make his own timely suggestion of death to the court of appeals." 401 U.S. at 485.

This statement implies that affected third parties may still have fines cancelled after the defendant's death. Presumably, Justice Blackmun found no fault with the long-established tradition of abating fines. The statement may not, however, apply to other collateral effects, perhaps because they are non-punitive, or because Justice Blackmun simply did not consider them. If he did intend that collateral effects other than fines should be negated by the appellate courts, and if the *Dove* Court did in fact adopt the reasoning of his *Durham* dissent, then *Dove* changes only the technical, not the practical, effect of the conviction, except for stigma resulting from it. If the third party consequences of the conviction are removed, the conviction is pro forma only and has no practical tangible effect. The remainder of this article assumes that *Dove* is not so limited in effect, and that Justice Blackmun in *Durham* did indeed distinguish between abatement of punitive sanctions, such as fines, and abatement of such non-punitive collateral consequences as deprivation of social welfare benefits and victim compensation liability. This assumption is justified by the absence of well-articulated or accepted theories supporting the latter in comparison with the clear acceptance of the policy behind the former.

The trial court report of *Durham* does not mention the kind of sentence imposed. This fact perhaps explains why the Court did not know if a fine had been assessed. *Durham* had been convicted under 18 U.S.C. § 474 (1976), a counterfeiting statute providing for a \$5000 fine or up to fifteen years imprisonment or both.

<sup>38</sup> This is impossible to ascertain, since the *Dove* Court gave no reason for its decision. For the full text of that decision, see note 22 *supra*.

<sup>39</sup> 5 U.S.C. § 8312 (1976).

<sup>40</sup> 38 U.S.C. §§ 3404-3405 (1976).

<sup>41</sup> The due process argument challenging rescission of these benefits is beyond the scope of this article. No cases have been found in which survivors of a deceased appellant



vived because the conviction was to be vacated and treated as if it had never existed. *Dove*, however, seemingly requires deprivation of those benefits, because the conviction is retained on the record.<sup>42</sup> Competing policy questions compel discussion of the validity and justice of this result.

Deprivation of survivors' benefits is analogous to imposing a fine on the estate in that it penalizes the estate for the wrongs of the accused. While under prevailing theory it is unjust to fine the family for the deceased's crime,<sup>43</sup> social welfare statutes render certain benefits unavailable to such families. The legislative history of the various benefit statutes is silent as to the policies behind the forfeiture provisions.<sup>44</sup> Therefore, one can only hypothesize the reasons for treating deprivation of such benefits differently from criminal fines.

First, there is an apparent difference between cancelling a fine and giving money to the survivors of a convicted criminal. Ideals of justice and fairness aside, it is understandable that the public would not want its tax dollars to go to a felon's family. Fines, however, are judicially imposed and their abatement does not directly affect the taxpayer.

Moreover, there is something in the nature of the association with the government, from which the deceased derived benefits, which suggests special treatment. The statutes considered here, concerning government pensions and veterans' benefits, create an almost contractual relationship between the employee and the government. Such a contract requires faithful execution and support of the laws and the government itself. The crimes for which benefits are forfeited—subversive activities and treason—are the most serious breach of that contract. It is this serious breach which causes the government to react so strongly as to cut off all benefits, to the employee and his dependents alike. In contract terms, since the employee has not performed, the government need not perform, and all benefits are forfeited.

An alternative rationale for requiring forfeiture is that violators of national security laws are so reprehensible that they deserve sanctions which punish not only them but also their dependents. This argument characterizes the deprivation to survivors

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contested such a loss. For a general discussion of the due process considerations involved in the deprivation of social welfare benefits, see *Flemming v. Nestor*, 363 U.S. 603 (1950).

<sup>42</sup> *But see* note 37 *supra*.

<sup>43</sup> *See* text accompanying notes 9-12 *supra*.

<sup>44</sup> *See* S. REP. NO. 862, 87th Cong., 1st Sess., reprinted in [1961] U.S. CODE CONG. & AD. NEWS 2928 (government pensions); S. REP. NO. 664, 86th Cong., 1st Sess., reprinted in [1959] U.S. CODE CONG. & AD. NEWS 2216; and H. REP. NO. 279, 85th Cong., 1st Sess., reprinted in [1957] U.S. CODE CONG. & AD. NEWS 1214 (veterans benefits).

as part of the punishment for the criminal's acts. The flaw in such reasoning is that similar sanctions are not imposed on veterans or government employees who commit other heinous crimes, such as murder. It is difficult to believe that the legislature would react so strongly to such a narrow group of criminals, but continue to bestow its largess on others guilty of equally shocking crimes. While it is arguable that treason affects the entire nation while murder affects primarily the victim and those close to him, there is little logic in depriving the traitor and his survivors of benefits but not similarly sanctioning the murderer.

The contractual nature of government service seems therefore the more persuasive of the arguments justifying deprivation of survivors' benefits. Under that theory, forfeiture is not punitive. The survivors have a statutory entitlement subject to the employee's fulfillment of certain conditions. When those conditions are not met, the benefits are no longer due them. Like the policies supporting abatement of fines, the reasons for requiring forfeiture of social welfare benefits are independent of the policies behind the appeal of right/discretionary appeal distinction. Since deprivation of benefits is arguably non-punitive, however, it is different from a fine imposed on the family for the acts of the deceased. Therefore, abatement of the deprivation is not mandated by the same considerations that require abatement of the fine.<sup>45</sup> If a suit ever arises in which the survivors request the court to abate the deprivation, it will probably be unsuccessful.

### C. Victim Compensation

Although less than one-quarter of the states have enacted victim compensation statutes,<sup>46</sup> the trend is toward adoption of this type of legislation.<sup>47</sup> While most compensation comes from state funds, at least two states have statutory provisions for direct contribution by the offender.<sup>48</sup> Such statutes are of special interest in the context of this article.<sup>49</sup> Under the statutory schemes,

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<sup>45</sup> See note 37 *supra*.

<sup>46</sup> See ALASKA STAT. § 18.67.010-180 (Supp. 1978); CAL. GOV'T CODE § 13959-13974 (West Supp. 1979); GA. CODE ANN. § 47-518-526 (1974); HAW. REV. STAT. § 351 (1976); MD. ANN. CODE art. 26A (1968); MASS. ANN. LAWS ch. 258A, §§ 1-8 (1968); NEV. REV. STAT. ch. 217 (1973); N.J. STAT. §§ 52:4B-1-52:4B-21 (West 1978); N.Y. EXEC. LAW §§ 622-634 (1978); WASH. REV. CODE ANN. ch. 7.68 (West 1978).

<sup>47</sup> See generally H. EDELHERTZ & G. GEIS, *supra* note 11.

<sup>48</sup> See CAL. GOV'T CODE § 13967 (West Supp. 1979); MD. ANN. CODE art. 26A, § 17 (1976).

<sup>49</sup> Statutory contribution is distinguished from informal restitution, such as returning shoplifted goods or replacing a broken window, under the supervision and prompting of police, the court or the parties themselves. See, e.g., Jacob, *Reparation or Restitution by*

compensation out of state funds is independent of the conviction or even the identification of the offender.<sup>50</sup> In states where the offender is required to contribute, it is only after full adjudication of his guilt. The question is, therefore, whether the family of a deceased defendant must contribute to the state compensation fund in his stead.

Under the *Durham* rule, liability to the victim would abate along with the conviction.<sup>51</sup> The underlying theory is that liability should not attach until the defendant has received full appellate review and has been finally adjudged guilty. The analysis under *Dove*, however, is more complex. If, as in the words of the California statute,<sup>52</sup> such payment is a fine, it should not be assessed against the estate of the deceased offender.<sup>53</sup> The term "fine," however, may not literally mean a penalty which should abate under *Durham*.<sup>54</sup> Such a construction is supported by examination of the various theories behind the statutes.

One of the grounds for offender contribution is the mitigation of the victim's desire for vengeance.<sup>55</sup> A victim's vengeful motives will likely carry over to the deceased's family. Under this rationale, the estate should remain liable for contribution after the convicted offender's death in order to mollify the victim. An additional reason for contribution is to afford the victim an alternative to a tort suit<sup>56</sup> in which most offenders would be judgment-proof because of their generally low incomes. The offender's con-

*the Criminal Offender to his Victim: Applicability of an Ancient Concept in the Modern Correctional Process*, 61 J. CRIM. L.C. & P.S. 152 (1970).

<sup>50</sup> See generally Laster, *Criminal Restitution: A Survey of Its Past History and an Analysis of its Present Usefulness*, 5 RICH. L. REV. 71 (1970); H. EDELHERTZ & G. GEIS, *supra* note 11.

<sup>51</sup> This, however, does not affect civil liability.

<sup>52</sup> CAL. GOV'T CODE § 13967 (West Supp. 1979). The statute reads:

Upon a person being convicted of a crime of violence committed in the State of California resulting in the injury or death of another person, if the court finds that the defendant has the present ability to pay a fine and finds that the economic impact of the fine upon the defendant's dependents will not cause such dependents to be dependent on public welfare the court shall, in addition to any other penalty, order the defendant to pay a fine commensurate with the offense committed. The fine or penalty assessment imposed pursuant to this section shall be deposited in the Indemnity Fund in the State Treasury. . . and the proceeds of which shall be available for appropriation by the Legislature to indemnify persons filing claims pursuant to this article.

<sup>53</sup> See text accompanying notes 9-12 *supra*. But see note 37 *supra*.

<sup>54</sup> The fine assessed for compensatory purposes is not subject to the so-called penalty assessment provisions of the California Penal Code, which provide that "there shall be levied a penalty assessment in an amount equal to five dollars (\$5) for every twenty dollars (\$20), or fraction thereof, of every fine, penalty, and forfeiture imposed and collected by the courts for criminal offenses." CAL. PENAL CODE § 13521 (West Supp. 1979).

<sup>55</sup> S. SCHAFER, *COMPENSATION AND RESTITUTION TO VICTIMS OF CRIME* 4-5 (1970).

<sup>56</sup> Laster, *supra* note 50, at 81.

tribution, however, is typically much less than a civil damage award.<sup>57</sup> If, instead of a tort suit, the offender contributes to the state fund, the victim is fully recompensed with available state monies.<sup>58</sup>

Under the above theories, the effect of *Dove* would be to preserve liability. Since these theories are victim-oriented rather than punitive, the death of the offender should not affect the victim's compensation.<sup>59</sup>

Another theory for requiring victim compensation is rehabilitation.<sup>60</sup> This theory is manifested in those non-statutory systems in which the offender makes full restitution, as opposed to a mere contribution to a state fund. The rationale is that putting the offender in touch with his victim personalizes the criminal justice system "so as to impress upon the mind of the criminal that he has injured a human being, not some impersonal entity known as the state. . . . One benefit of a meaningful system of restitution is that it would keep the criminal within the normal society. . . ." <sup>62</sup> Under this rationale, contribution becomes meaningless once the defendant dies.

Because of the undeveloped state of the law in this area, it is unclear which is the dominant theory behind victim compensation involving offender contribution. Until one or the other prevails, it is impossible to ascertain *Dove's* effect on those cases. As this area of legislation expands victim compensation statutes must be considered in deciding the ideal disposition of *Dove*-type cases, although the degree of the estate's liability to the victim is not related to the appeal of right/discretionary appeal distinction which apparently justified *Dove*.

#### D. Stigma

Although some stigma attaches irrevocably when one is accused, and acquittal or reversal on appeal will not change the way in which many view the accused and his family, vacating the conviction is one way to relieve innocent survivors of that burden. Even the possibility of Supreme Court affirmance<sup>63</sup> should not preclude the survivors from pursuing their interest in a good fam-

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<sup>57</sup> See, e.g., CAL. GOV'T CODE § 13967 (West Supp. 1979), which puts a maximum of \$10,000 on the offender's contribution.

<sup>58</sup> See H. EDELHERTZ & G. GEIS, *supra* note 11, at 282-84, for a discussion of allowable benefits.

<sup>59</sup> See note 35 *supra*.

<sup>60</sup> Laster, *supra* note 50, at 81.

<sup>61</sup> See note 49 *supra*.

<sup>62</sup> Laster, *supra* note 50, at 80-81.

<sup>63</sup> But see statistics on Supreme Court reversals cited at note 18 *supra*.

ily name. While stigma may appear insignificant in comparison with economic and legal ramifications, it is probably the most common consequence for the survivors when a convicted defendant dies pending appeal. In addition to day-to-day embarrassment, there may be more tangible manifestations of stigma. For example, employment opportunities may be denied when a criminal family background is disclosed. *Durham*, perhaps out of generosity as well as considerations of utility and justice, ameliorated the effects of the conviction as much as possible. Even if vacating the conviction because of death does not fully remove stigma, it may have some effect because it admits the possibility that the conviction was erroneous and would have been overturned had the appeal been completed. Under *Dove*, however, all stigma remains, since convictions do not abate.

#### IV. RECOMMENDATION FOR REFORM

The Supreme Court overruled *Durham* apparently because the appeal of right satisfies the defendant's right to appellate review. However valid this line between appeals as of right and discretionary appeals may be, the recorded conviction of the deceased appellant does little to further the goals of criminal justice.<sup>64</sup> It may in fact result in injustice to the surviving family members, especially in light of the likelihood of reversal by the Supreme Court if the Court grants certiorari.<sup>65</sup>

Provision should be made for representatives of the deceased to continue prosecution of the appeal if they so desire. This idea is not new—at least one state has followed such a procedure.<sup>66</sup> The Court already has a rule providing for this practice but has apparently limited it to civil suits.<sup>67</sup> The proposed procedure would allow survivors to settle the issue of the conviction's validity and would therefore have several advantages over current federal practice.

First, survivors would have the opportunity to qualify for social welfare benefits if the conviction were overturned. This would not conflict with society's interest in withholding those benefits, since that interest applies only to survivors of those whose convictions are ultimately upheld.

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<sup>64</sup> See text accompanying notes 5-19 *supra*.

<sup>65</sup> See note 18 *supra*.

<sup>66</sup> See *Wetzel v. Ohio*, 371 U.S. 62 (1962) (per curiam), in which the administratrix of deceased's estate was substituted as the appellant pursuant to Ohio practice at that time.

<sup>67</sup> "Whenever either party shall die after filing notice of appeal to this court or filing of petition for writ of certiorari in this court, the proper representative of the deceased may . . . be substituted as a party to the proceeding. . . ." U.S. SUP. CT. R. 48(1).

Second, this procedure would determine the issue of the estate's liability for contribution to the deceased's victim. On the one hand, the victim loses nothing in a state with a compensation fund, since he or she will be compensated from the fund regardless of the guilt or innocence of the particular defendant or indeed whether or not there is any identification of a suspect in the case. On the other hand, the defendant's estate has an opportunity to finalize the matter and to avoid liability should the conviction be in error.

A third benefit of this procedure would be the possible avoidance of the family stigma that attaches to conviction, and the reinforcement of survivors' belief that justice has been done.

Questions as to standing<sup>68</sup> may be answered by analogy to those instances in which a living defendant appeals after his sentence has been satisfied. The trend is to allow standing to appeal when there is a possibility that the defendant will suffer collateral legal consequences, including loss of social benefits.<sup>69</sup> Even in situations where the only consequence is stigma, standing has been found when it is shown that stigma may, for example, affect job or educational opportunities.<sup>70</sup> An innocent survivor suffering such effects of a conviction can demonstrate at least as great a stake as the ex-convict, so that standing is no less reasonable for the family of the deceased than for the living defendant.<sup>71</sup>

Allowing appeals by representatives would add a negligible number of cases to the Supreme Court docket. In addition, it

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<sup>68</sup> Art. 3 § 2 of the U.S. Constitution requires that the Court hear only cases or controversies. In the context of criminal appeals, it is arguable whether such a controversy exists if the defendant has died and can no longer be sanctioned by the criminal process. As the text illustrates, however, a controversy is demonstrable when third parties have a justiciable stake in the outcome of such an appeal. See C. WRIGHT, *LAW OF FEDERAL COURTS* 39 (3d ed. 1976).

<sup>69</sup> See Note, *Criminal Law—Standing Based on Collateral Civil Consequences*, 14 WAKE FOREST L. REV. 231 (1978); Note, *Postrelease Remedies for Wrongful Conviction*, 74 HARV. L. REV. 1615 (1961).

<sup>70</sup> *Id.*

<sup>71</sup> In extraordinary circumstances a survivor, through a bill in Congress, may attack collaterally a conviction that works harm to him or her. Consider, for example, the attempts of Antonette Slovik to regain the veteran's pension and insurance benefits she lost when her husband Edward was convicted and executed for desertion in World War II. The Senate bill which would have awarded those benefits was "indefinitely postponed" (and thus effectively killed) at an executive session of the Judiciary Committee on September 11, 1979, following Mrs. Slovik's death September 7th. The bill was not worded to award benefits posthumously. Telephone interview with a staff member of the Senate Judiciary Committee (September 24, 1979). For a chronicle of Mrs. Slovik's previous attempts to have her husband pardoned and to be awarded the benefits, see N.Y. Times, Feb. 8, 1978, at 8, col. 6; Feb. 7, 1978, at 6, col. 1; Aug. 17, 1977, § 4, at 15, col. 3; Aug. 13, 1977, at 1, col. 5; July 27, 1977, § 3, at 2, col. 4; June 16, 1977, at 18, col. 4; Apr. 28, 1977, § 3, at 2, col. 4; Apr. 6, 1977, at 16, col. 4; Dec. 25, 1976, at 22, col. 1; Nov. 13, 1976, at 24, col. 2.

would give the Court the opportunity to hear a case it felt was of central importance, even though the defendant had died.<sup>72</sup>

In those cases the Court would not want to hear, the petition for certiorari should be denied, as it would be if the defendant were still alive; this is contrary to the disposition in *Durham*, which granted the petition in order to vacate the conviction. The mere fortuity of a petitioner's death should not result in overturning a conviction which would have stood but for the defendant's death. In this respect, the suggested reform is consistent with *Dove*, in that the Court may still reject a petition for certiorari when the appellant has died. In effect, the proposed rule represents a compromise between the interest of the survivors in overturning the deceased's conviction and the interest of the Court in controlling its docket. Even if the Court refused certiorari, the survivors might still be able to avoid the consequences of the conviction, per Justice Blackmun's language in his *Durham* dissent.<sup>73</sup>

Many benefits and few costs would accrue in allowing the deceased appellant's personal representatives to prosecute the appeal in the Supreme Court. Since such an appeal would be by writ of certiorari, the Court would continue to exercise its discretion as to the acceptance of a particular case. The Court would have no greater burdens and there would be further opportunity for justice in individual cases.

### CONCLUSION

As the law now stands, a federal defendant who dies pending his appeal of right before the circuit court will automatically be cleared; the conviction and all proceedings will abate. At the second level of appeal, however, if the proceeding is by certiorari rather than by right, the defendant's death will result in the

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<sup>72</sup> The Court has on at least one occasion decided a case mooted by the death of the appellant. See *Robinson v. California*, 370 U.S. 660 (1961). After reversing the appellant's conviction for drug addiction, the Court was notified that the defendant had died prior to oral argument. The Court denied California's petition for rehearing and upheld the reversal without discussion. 371 U.S. 905 (1961). Justices Black, Harlan, and Stewart dissented, arguing that the judgment should have been vacated and remanded to the state court for disposition under state law. The dissenters cited *Stewart v. Southern R. Co.*, 315 U.S. 784 (1942), in which a remand by the Court for a new trial was vacated as moot when the parties settled. 371 U.S. 905, 905-06 (1961).

If a case such as *Robinson* arose today, disposition would not be affected by *Dove*, because *Robinson* was an appeal of right under 28 U.S.C. § 1257(2) (1976). Applying the appeal of right/discretionary appeal distinction, the case would properly be dismissed and the conviction abated, because the defendant had not received his full statutory right to review. See note 26 *supra*.

<sup>73</sup> See note 37 *supra*.

automatic dismissal of certiorari and the finalization of the conviction on the record. Because of the effect of the conviction, survivors may suffer consequences which would not have resulted had the defendant lived and successfully contested his conviction. Survivors should be given the right to continue to prosecute appeals before both the circuit courts of appeal and the Supreme Court in an effort to vindicate the deceased, and to retain the social and legal rights they might otherwise lose.

—*Lori R. Dickerman*