REFORM OF THE FEDERAL CRIMINAL LAWS

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIMINAL LAWS AND PROCEDURES

OF THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

NINETY-THIRD CONGRESS

FIRST SESSION

ON

S. 1 and S. 1400

[General codification and provisions relating to abortion, business law, civil rights, death penalty, elections, Indian law, insanity defense, and sentencing]

JULY 25, 26, AND SEPTEMBER 27, 1973

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Part IX—S. 1 and S. 1400

(General codification and provisions relating to abortion, business law, civil rights, death penalty, elections, Indian law, insanity defense, and sentencing)

REFORM OF FEDERAL CRIMINAL LAWS

WEDNESDAY, JULY 25, 1973

U.S. SENATE,
SUBCOMMITTEE ON CRIMINAL LAWS AND PROCEDURES
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:08 a.m. in room 2228, Dirksen Senate Office Building, Senator Roman Hruska presiding.

Present: Senator Hruska (presiding).

Also present: G. Robert Blakey, chief counsel; Paul C. Summitt, deputy chief counsel; Kenneth A. Lazarus, minority counsel; Dennis C. Thelen, assistant counsel; and Mable A. Downey, clerk.

Senator HRUSKA. The subcommittee will come to order.

We will resume hearings on the two bills for the reform of the Federal Criminal Code, S. 1 and S. 1400. In the absence of the chairman of this subcommittee, who is engaged in other official duties, the Senator from Nebraska will preside this morning.

Our first witness today is Mr. Richard A. Givens, former assistant U.S. attorney for New York.

STATEMENT OF RICHARD A. GIVENS, FORMER ASSISTANT U.S. ATTORNEY, NEW YORK, N.Y.

Mr. GIVENS. Thank you very much, Senator. It is a great pleasure to be here and a great honor to appear before you. I had the pleasure of testifying before you about a year ago in connection with the hearings on the Brown Commission report; and I am extremely pleased to see that the subcommittee draft, S. 1, and also the Administration proposal, the Justice Department proposal, S. 1400, has made many changes along the lines which I had recommended, and also which various bar groups had recommended.

So for my part, I would like to compliment both the subcommittee staff and the Justice Department team for doing an excellent job on very many points that I had mentioned.

Now, I would like to also mention, Senator, that although I am the regional director of the Federal Trade Commission for New York and New Jersey, that of course I am appearing here solely in my capacity as a former assistant U.S. attorney and in no way as a Commission staff member or on behalf of the Federal Trade Commission.

Senator HRUSKA. Thank you, Mr. Givens.

Let me suggest that compliments are due to you and other witnesses similarly situated, because you must have been very persuasive in order to get those changes rendered.

Mr. GIVENS. Thank you, Senator.

Now, I would like to mention one or two of those now briefly, because I think it is important that in the legislative phase of the code that these changes in S. 1 and 1400 be maintained.

The basic difference between S. 1 and S. 1400 on the one hand, and the National Commission report on the other, in my view, was that the National Commission report attempted to completely recodify all of the Federal criminal laws more or less from scratch; and that was a tremendous undertaking and in many respects they did a good job. But they had to have a model, and the basic model they used was State law as reflected in modern thinking about State criminal law in such documents as the Model Penal Code.

Now, that was a very forward-looking document, of course, the Model Penal Code, but it failed to include many very important laws passed by the Congress of the United States to deal with national problems of the last 100 years. And one example of that was the mail fraud statute, which makes it a crime for anyone to devise an artifice or a scheme to defraud and use the mails to carry out that scheme.

I am very happy to say that S. 1 and S. 1400 contain provisions dealing with the scheme to defraud which would protect a very important power of the Federal courts to prevent such schemes, instead of relying merely on a larceny concept, which is perhaps appropriate in State law and which was included in the Brown Commission report.

Senator HRUSKA. Mr. Givens, you have submitted to the committee a statement. It will appear in the record in its full text.

Mr. GIVENS. Thank you.

Senator HRUSKA. If you would continue to highlight it as you have in this first section, it would be appreciated. We do not like to impose time limitations on witnesses; so we will refrain from doing that until we have to.

We have a series of votes later this morning and afternoon in the Chamber.

[The prepared statement of Richard A. Givens follows:]

STATEMENT OF RICHARD A. GIVENS, FORMER ASSISTANT U.S. ATTORNEY

My name is Richard A. Givens. I am most pleased to appear before this Subcommittee in connection with its hearings on the proposed new Federal Criminal Code.

APPEARANCE IN INDIVIDUAL CAPACITY ONLY

I would like to emphasize at the outset that I am appearing solely in my capacity as a former Assistant United States Attorney at the request of your Committee, and not in my present capacity as Regional Director of the New York Regional Office of the Federal Trade Commission. The views which I will express are solely my own and not attributable to the Commission or any other government agency. It should be clear from this that I am in no sense appearing as a Commission staff member or on behalf of the Commission in any way.

I would like to comment on some selected issues relevant to the proposed new Federal Criminal Code and then answer any questions that you might like to ask. The areas touched on in this prepared statement are:

(a) The Code as it affects consumer protection, including (i) the Code's revisions of the mail fraud statute, (ii) injunctive relief for violation of anti-fraud provisions; (iii) criminal coercion provisions, and (iv) prohibition on improper use of insignia of government agencies in the collection of debts;

(b) The insanity defense;
(c) Plea bargaining, prosecutorial recommendations as to sentences and appellate review of sentences;
(d) Impact on use of secret foreign bank accounts; and
(e) The need for comprehensive examination of criminal procedures to supplement the revision of substantive law.

PRESERVATION OF THE PROTECTION OF THE PUBLIC BY THE MAIL FRAUD STATUTE

The principal weapon available for protection of the public against the many kinds of fraudulent conduct, especially consumer fraud, has long been the mail fraud statute.[1] The mail fraud section has been used with great success against numerous hard-core consumer frauds.[2] It has been far more effective than State larceny provisions, because the fraudulent scheme, rather than loss of individual victims is the essence of the crime. Success of the scheme need not be shown, which greatly simplifies the case even where the scheme has in fact been successful. Large numbers of witnesses need not be called to show any particular dollar amount of loss, nor need all victims be alleged in the indictment, subjecting them to possible threats of harsh collection action or to pay-off to get them not to testify.

The National Commission on Reform of Federal Criminal Laws, however, proposed dropping the mail fraud statute and replacing it with a mere larceny provision coupled with highly restrictive definitions[3] which in my judgment would have cut back substantially on the protection of the public under long-standing existing law.

Law enforcement authorities including New York State Attorney General Louis J. Lefkowitz and several Bar comments on the proposed Code[4] criticized the National Commission version as failing to preserve adequate consumer protection contained in existing law.[5] In part as a result of these criticisms of the National Commission formulation, both the version of the proposed Code prepared by the staff of this Subcommittee (S. 1), and the proposed Code as submitted by the Department of Justice (S. 1400) contain antifraud sections which preserve in full the thrust of the existing mail fraud section.[6]

Both bills also go further in providing jurisdiction over frauds where instrumentalities of interstate commerce are used, as well as where the mails are used. This constitutes a significant improvement over the existing mail fraud section and the wire fraud statute[7] which covers only transmission of sounds and signals "in" interstate commerce to carry out a scheme to defraud. S. 1 also provides jurisdiction where there is a scheme to defraud and substantial conduct to carry it out and where interstate commerce is affected.[8] Although most cases reached

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[1] 18 U.S.C. § 1341.
[2] E.g., United States v. Zovluck, 274 F. Supp. 385 (S.D.N.Y. 1967), aff'd after conviction without opinion, Dkt. No. 32652 (2d Cir. 4/7/69), denial of post-conviction motion aff'd, 448 F. 2d 339 (2d Cir. 1971); United States v. Armantrout, 411 F. 2d 60 (2d Cir. 1969); United States v. Andreadis, 366 F. 2d 423 (2d Cir. 1966), cert. denied, 385 U.S. 1001 (1967); Blachly v. United States, 380 U.S. 665 (5th Cir. 1967); Nickles v. United States, 381 F. 2d 258 (10th Cir. 1967); Fabian v. United States, 358 F. 2d 187 (8th Cir. 1966); Adams v. United States, 347 F. 2d 665 (8th Cir. 1965); Williams v. United States, 368 F. 2d 972 (10th Cir. 1966); Friedman v. United States, 347 F. 2d 697 (8th Cir. 1965).
[3] Final Report of the National Commission on Reform of Federal Criminal Laws §§ 1732(b), 1741(a) (1971).
[4] Special Committee on the Proposed New Federal Criminal Code, The Association of the Bar of the City of New York, "The New Criminal Code Proposed by the National Commission on Reform of Federal Criminal Laws" 74–75 (1972); Special Committee on Consumer Affairs, "The Proposed New Federal Criminal Code and Consumer Protection," 27 Record of The Association of the Bar of the City of New York 324 (1972), also in "Reform of the Federal Criminal Laws," Hearings Before the Subcommittee on Criminal Laws & Procedures, Senate Judiciary Committee, 92d Cong., 1st Sess., Part III, Subpart B (1972) (hereinafter 1972 "Hearings"), pp. 1827–28; Committee on Federal Legislation, New York County Lawyers Ass'n, "Report on the Proposed New Federal Criminal Code," 1972 Hearings at 1398, 1399–1400. See also Committees on Federal Legislation, Federal Courts, Consumer Affairs & Trade Regulation, "Proposed Federal Legislation to Protect Consumers," 26 Record of The Ass'n of the Bar of the City of New York 601, 614 n. 13 (Oct. 1971), also in 10 Reports of Committees of The Ass'n of the Bar Concerned With Federal Legislation, #1, p. 1, 14 n. 13 (Oct. 1971).
[5] See 1972 Hearings 1553, 1554–55, 1563–65; see also Givens, "Roadblocks to Remedy in Consumer Fraud Litigation," 23 Case Western Reserve L. Rev. 144 (1972).
[6] S. 1, 93d Cong., 1st Sess. (1973), p. 119, § 2–8D5; S. 1400, 93d Cong., 1st Sess. (1973), p. 114, § 1734.
[7] 18 U.S.C. § 1343.
[8] See Polish National Alliance v. NLRB, 322 U.S. 643 (1944); see also Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Ricciardi, 357 F. 2d 91 (2d Cir.), cert. denied, 385 U.S. 814 (1966).

by this provision would no doubt also be reached by the combination of jurisdiction based on use of the mails and jurisdiction based on use of interstate instrumentalities. "affecting commerce" jurisdiction could apply to serious fradulent schemes where concerted efforts were made to avoid the use of the mails or interstate instrumentalities in order to avoid jurisdiction under the statute. In my opinion, United States Attorneys would be able to decline jurisdiction over minor cases by referring them to local agencies if this jurisdiction were provided.

Both the Department of Justice proposal and the Subcommittee draft represent tremendous improvements over the National Commission version, and both would preserve the thrust of existing law with some highly significant improvements.

Under both versions, the essence of the violation continues to be the devising of a fraudulent scheme involving deliberate intent to use deceit, craft, trickery or like means as set forth in detail in numerous judicial interpretations of the language of the long-standing mail fraud provisions. A substantial step must also be taken toward carrying out a scheme under both versions; mere evil intent remaining within the head of the defendant is not enough. And some acts must be done or caused to bring the case within one or more of the judicial bases provided in the sections. Both sections appear to continue existing law unchanged for all intents and purposes except that the jurisdictional bases are broadened and the phraseology of the existing mail and wire fraud statutes is conformed to the structure of the Code which separates the judicial aspects from the definition of the conduct to be prohibited.

In my opinion, both the Department of Justice and your Subcommittee staff deserve high commendation for their drafting of these provisions, which if enacted will continue to help to protect both the public and legitimate business from fraud—including consumer fraud and other types of schemes to defraud as well.

Obviously, fraud injures both the public and legitimate business in whatever area it is practiced. In the consumer area, harm to honest business includes the creation of a climate of hostility inimical to all business, unfair competition to legitimate firms and the creation of the need for more drastic regulation than would otherwise be necessary.

INJUNCTIVE RELIEF AGAINST VIOLATION OF ANTI-FRAUD PROVISIONS

Both the Subcommittee bill and the Code as recommended by the Department of Justice permit injunctive relief against violations of the sections dealing with schemes to defraud [9] and certain other criminal conduct, and also permit private damage actions based on violations of the statutory criminal provisions listed.[10]

The need for authority for injunctive relief against violations of the laws dealing with schemes to defraud is based on the fact that many of the schemes involve continuing courses of conduct as should be obvious in the case of consumer fraud, and in some instances the conduct is even continued after indictment pending trial and indeed pending appeal.[11] The chief argument against such authority would appear to be that since the conduct in question is already prohibited by criminal statute, an injunction would serve no purpose. This is incorrect, since an injunction can be far more specific than the underlying statutes, and quicker sanctions might be imposed for violation, which could also include civil contempt aimed at compelling cessation of the practices as well as punishment for contempt. Congress has in the past authorized both criminal and injunctive relief against the same conduct in numerous instances, including for example the Fair Labor Standards Act and the Securities Laws.[12]

A number of objections to injunctive relief against criminal violations were raised in testimony by Mr. George Liebmann on June 12, 1973. Mr. Liebmann has raised points worthy of consideration in regard to certain types of cases.

1. Mr. Liebmann believes that authority for injunctions against election frauds and violations of laws against rioting under S. 1, and against violations of anti-obscenity laws under S. 1400 may pose special risks of abuse which could be harmful to constitutionally protected freedoms. This approach finds some support

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[9] S. 1, p. 224, § 3–13A1 ; S. 1400, p. 264, § 3641–3643.

[10] S. 1, p. 225–26, § 13A2.

[11] E.g. Zovluck v. United States, 448 F. 2d 339 (2d Cir. 1971). See Special Committee on the Proposed New Federal Criminal Code, The Association of the Bar of the City of New York, "The New Criminal Code Proposed by the National Commission on Reform of Federal Criminal Laws" (1972) ; Report of Committee on Federal Legislation, New York County Lawyers Ass'n, 1972 Hearings 1406 ; see also 1972 Hearings 1555–56, 1559–61.

[12] 29 U.S.C. § 217 ; 15 U.S.C. § 77t(b).

in the views of Bar groups [13] and in judicial reluctance to sanction prior restraint against publication in obscenity and related cases.[14] In addition, injunctive relief or damages at the suit of private parties, under Section 3643 on p. 265 of S. 1400 for alleged racketeering activity under Section 1861 of S. 1400 involving violation of some aspects of the "criminal coercion" section of S. 1400 [15] might be reconsidered because of the possibility of an undesirable "chilling" effect on legitimate activity. This section is discussed in greater detail below.

2. Mr. Liebmann points out that punishment for contempt of court could involve attaching a badge of guilt for extremely serious conduct to an individual if the junction is aimed at prohibiting serious crimes, without the safeguard of trial by jury in such cases. It could be made clear in the statute, however, that any contempt finding would not entail a conclusion that the defendant was guilty of violation of the underlying criminal provision. This would not logically follow in any event. The injunction could be far more specific than the underlying statute and not every violation of the injunction would necessarily entail commission of the crime defined by the statute. It could also be made clear that any contempt of an injunction be denominated simply as contempt and not as, for example, "contempt (extortion)".

To the extent that this would not entirely obviate the problem raised by Mr. Liebmann, the statute could further provide for jury trial in cases involving contempt of injunctions issued pursuant to the proposed provisions. This should not apply, of course, to the *issuance* of the injunction, which should be a matter for the court without a jury as in equity practice generally.

3. Mr. Liebmann has cited cases in his testimony holding that an injunction running into the indefinite future against any and all criminal conduct of the type involved is improper if based on merely a single isolated incident. This point would not appear to be an objection to the injunctive power, but rather a matter going to its proper exercise, which can be supervised by the court in any event as in the cases cited by Mr. Liebmann. The legislative history of any provisions granting new injunctive jurisdiction could, of course, make it clear that this principle is intended to apply, and that only a strictly limited injunction would be proper based on any isolated incident. A longer-lasting or broader injunction should be supported by a pattern of conduct establishing the need for such relief.

The remaining objections made by Mr. Liebmann are in my opinion lacking in merit. Specifically, it is incorrect to argue that availability of injunctive relief can paralyze the activities of a defendant with no opportunity for review of the merits of the injunction. In federal practice any injunctive order, preliminary or otherwise, can be made the subject of appeal and of a study pending appeal if justified. Likewise, Mr. Liebmann cites no authority in support of his contention that impropriety of the original injunction could never be raised as a defense to a contempt charge. Again, however, if concern exists on this score, it could be made clear in the statute that impropriety of the original injunctive order would be available as a defense to be made to the court (not the jury if jury trial is allowed) in connection with any contempt proceeding.

Mr. Liebmann further argues that the proposed sections would extend injunctive authority beyond that contained in various existing statutes. That, of course, is its purpose and can hardly be cited as a legitimate objection. In my view, the need for such authority is amply established.

If the damage action provisions of the Subcommittee bill are adopted, it might be important to provide if official misconduct were involved, the governmental agency in question would be liable rather than the individual officer as recom-

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[13] See Committee on Federal Legislation, Report on the "First Amendment Freedoms Act," 26 Record of The Association of the Bar of the City of New York 312 (1971), but compare Id. at 323 n. 12 (individual views) which states:

". . . Among safeguards and limitations on injunctions which might be considered in this connection are (a) a prohibition of ex parte orders without notice, (b) a prohibition on injunctions based on expected conduct which has not yet occurred nor been prepared for by overt acts, and (c) a prohibition on injunctions against meetings and the like merely because illegal conduct may be associated with them, limiting the injunction to the illegal conduct itself."

[14] Compare Near v. Minnesota, 283 U.S. 697 (1931) with Kingsley Books, Inc. v. Brown, 354 U.S. 436, 441–42 (1957). See Emerson, The Doctrine of Prior Restraints, 20 Law & Contemp. Prob. 648 (1955).

[15] S. 1400, pp. 106–07, § 1723.

mended by various authorities in the past.[16] This would have the advantage that the injured party would be assured that funds would be available to pay any resulting judgments. It would also avoid the probability that even legitimate law enforcement activity and other legitimate functions would be impaired by the threat of damage suits against individual officers whose repeated exposure to the possibility of such suits would be likely to be substantial. This problem would be especially severe to criminal investigators if defendants in criminal cases were given a statutory right of action against the investigator which could be used to deter prosecution of defendants with sufficient funds to hire counsel for such purposes, the effect in that case would be to redirect some of the enforcement activity of the agents toward small-time suspects.

CRIMINAL COERCION

The National Commission on Reform of Federal Criminal Laws proposed a new federal criminal statute not based on anything in existing federal law, dealing with "criminal coercion." [17] This section would have, among other things, made it a violation in substance for anyone, with the intent to cause another person to perform any act, to threaten to reveal any asserted fact "whether true or false" which would hold the person in question up to hatred, contempt or ridicule or impair such person's credit or business repute. It would also have been a violation to threaten to take or withhold official action or cause official action to be taken or withheld for such purpose. An affirmative defense was provided where in substance the conduct was performed in good faith for justified reasons. The burden of establishing and proving the defense would have been on the defendant.

This provision was strongly criticized by Bar groups [18] as likely to have a "chilling effect" on legitimate activity.[19] Among the types of activity which it was felt could have been covered by the National Commission's proposed section would have been:

> A call by a housewife to a landlord threatening to send pictures of roaches on her apartment floor to a newspaper of interstate circulation unless the exterminators were called.
>
> A letter from a businessman threatening to reveal the fact that the funds of one trying to buy a controlling share in his busines came from secret foreign bank accounts, unless the take-over attempt were called off.[20]
>
> A call by a consumer to the seller of an appliance to the effect that a complaint would have to be made to an enforcement agency unless alleged defects were repaired or the item replaced.[21]

S. 1 contains a criminal coercion section [22] which is an extension of the present extortion statute [23] and requires the use of inherently wrongful methods such as threats of illegal activity for a violation to be made out. This poses no problem from the point of view of the considerations raised by the Bar reports.

The Code as submitted by the Department of Justice contains a criminal coercion section [24] which goes further than that contained in S. 1, but which

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[16] Report of the Committee on Federal Legislation, New York County Lawyers Association, in "Measures Relating to Organized Crime," Hearings before the Subcommittee on Criminal Laws & Procedures, Senate Judiciary Committee, 91st Cong., 1st Sess., 225–27 (1969); Foote, "Tort Remedies for Police Violations of Individual Rights," 39 Minn. L. Rev. 493, 514–16 (1955); Gellhorn & Schenck, "Tort Actions Against the Federal Government," 47 Colum. L. Rev. 722 (1947).

[17] Final Report of the National Commission on Reform of Federal Criminal Laws § 1617 (1971).

[18] Special Committee on Consumer Affairs, "The Proposed New Federal Criminal Code and Consumer Protection," 27 Record of the Ass'n of the Bar of the City of New York, 324, in 1972 Hearings 1827–28; Report of Committee on Federal Legislation, New York County Lawyers Ass'n, 1972 Hearings 1404.

[19] See 1972 Hearings 1557–58. Concerning the beneficial effect of the possibility of publicity in certain confrontations, see Schelling, The Strategy of Conflict, ch. 1(2): p. 31 (1970).

[20] Compare "Legal and Economic Impact of Foreign Banking Procedures on the United States," Hearings before the House Committee on Banking and Currency, 90th Cong., 2d Sess. (1968).

[21] Compare facts in cases cited, note 2 supra.

[22] S. 1, pp. 136–37, § 2–9C4.

[23] 18 U.S.C. § 1951.

[24] S. 1400, pp. 106–07, § 1723.

appears to have been drafted with the purpose of avoiding the criticisms of the National Commission version. The statute is limited to obtaining property, and although property is broadly defined in the Department of Justice bill, it would apepar to be the intent that only conduct having the character of blackmail or extortion is intended to be covered. This intent is also reflected in the requirement that a threat to impair personal, professional or business reputation or credit be made "unjustifiably," and that any taking or withholding of official action or causing the taking or withholding of official action be done "unjustifiably" in order for the statute to apply. The term "unjustifiably" is similar to the term "wrongfully" contained in the present Hobbs Act[25] and recently construed by the Supreme Court[26] as applying only where inherently wrongful methods such as violence are used for illegitimate purposes or in some other cases where other means are used for clearly extortionate illegitimate purposes such as coercing payment for services not needed or not rendered.[27] The section also contains a requirement not present in the National Commission version that the coerced party be placed "in fear." This also carries a connotation of wrongfulness and would appear to exclude a case where the threat was to reveal a fact related to a *bona fide* dispute between the coerced party and the coercing party.

Furthermore, the distinction between damage to credit or business repute which must be treated "unjustifiable" and threats to reveal facts holding someone up to hatred, contempt or ridicule would appear to suggest that the latter category refers to threats to reveal personal facts about the coerced party relating to his or her personal life rather than to the facts surrounding any dispute relating to the property which the actor is seeking to obtain.

If the Department of Justice's provision on this subject is adopted, it might be desirable for the legislative history to confirm the intent that it not reach the kinds of legitimate conduct which critics of the National Commission formulation felt could be covered by the National Commission's language.

FALSE USE OF NAMES OR INSIGNIA OF GOVERNMENT AGENCIES IN COLLECTION AGENCIES

The United States Court of Appeals for the Second Circuit[28] recently held that the present federal law covering misuse of names or insignia of federal agencies in connection with collection of debts[29] would not apply to a situation where the names were being used in collection of the debts of the party involved rather than in collection of debts for others.[30] The Court stated that it reached this conclusion with "a heavy heart," and presumably in part for this reason both the Subcommittee bill and the bill proposed by the Department of Justice would eliminate this loophole.[31] Such action is highly desirable and important for the protection of the public and of the government against the erroneous impression created when the initials "U.S." or other indicia falsely implying that a government agency is involved in collection of private debts are permitted to be utilized.

INSANITY DEFENSE

My experience is that the insanity defense in criminal cases, rather than fulfilling a desirable purpose, tends to injure both individual rights and law enforcement. Individual rights suffer because commitment to a mental institution fails to provide the safeguards of a criminal trial, requires no proof of guilt, and can lead to indefinite confinement. Law enforcement suffers because some defendants escape either conviction or commitment. The Committee on Federal Legislation of the New York State Bar Association therefore questioned the desirability of the defense in a report filed without dissent in 1969.[32]

Developments indicate the extreme difficulty of applying an insanity defense in

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[25] 18 U.S.C. § 1951.
[26] United States v. Emmons, 41 U.S.L. Week 4301 (U.S. 2/22/73).
[27] Id. at 4302 n. 3; 4303.
[28] United States v. Boneparth, 456 F. 2d 497 (2d Cir. 1972).
[29] 18 U.S.C. § 712.
[30] See 1972 Hearings 1559.
[31] S. 1, p. 281, proposing new 4 U.S.C. § 153; S. 1400, p. 164 proposing new 4 U.S.C. § 173.
[32] Committee on Federal Legislation, "The Dilemma of Mental Issues in Criminal Trials," 41 N.Y. State Bar J. 394 (Aug. 1969).

a workable manner.[33] Consequently, other Bar groups[34] as well as the consultant to the National Commission on Reform of Federal Laws[35] have indicated that consideration should be given to eliminating insanity as a separate defense and permitting evidence as to the mental state of the defendant to be admitted on the issue of intent under the applicable statute. This would be accomplished by the Department of Justice's proposal on this question.[36] On the other hand, the Subcommittee bill on this point would retain a separate defense of insanity contrary to these recommendations.[37] Since I have testified separately on this issue I will not repeat comments on the matter here.

PLEA BARGAINING, RECOMMENDATIONS AS TO SENTENCING BY PROSECUTORS AND APPELLATE REVIEW OF SENTENCES

As is well known, the practice of plea bargaining has come in for a great deal of pointed criticism recently.[38]

The practice is probably inevitable in certain cases at least as to what counts of the indictment are to be tried, and may be desirable in certain instances. Mandatory recommendations as to sentence by the prosecutor would tend to introduce plea bargaining as a standard feature of every case. In my opinion as a former Assistant United States Attorney, this would be highly undesirable. It would tend to permit "revolving door" justice and detract from the dignity of the federal courts dealing primarily with cases of too great a seriousness to be disposed of by bargaining on pleas.

If this view is sound, it would follow that mandatory recommendations as to sentence by the prosecution would be most unwise. Such recommendations would expose the prosecutor to tremendous pressures.[39] The risks of corruption could likewise be increased.[40] In addition the need to combat such risks would be likely to lead to time-consuming rigidified internal procedures with the prosecutor's office which would detract from the other vital work of the prosecutor. The gain for better administration of justice would be questionable. The prosecutor is free at the present time to file an affidavit stating facts relevant to sentence which can convey to the court the seriousness of the facts surrounding the offense and also serve to notify the defendant of what the prosecutor believes the facts to be so that any errors can be corrected.

Appellate review of sentencing could be extremely helpful in correcting some extreme disparities. On the other hand, to permit a full-scale review of every sentence with which a defendant is dissatisfied could impose a severe burden on the courts. The suggestion that this be avoided by banning appeals from bargained sentences seems to me to be extremely undesirable for some of the reasons mentioned in connection with plea bargaining.

One way of dealing with the matter would be to require the defendant who wishes to have a sentence reviewed to submit to the court a petition for review similar to a petition for certiorari.[41] Unless the court on a preliminary review deemed the sentence to be such that full review would be appropriate, it would not be necessary for the prosecution to answer and no argument would be held or further briefs filed. A solution along these lines was recommended by Bar

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[33] Blakeslee, "8 Feign Insanity in Test and are Termed Insane," N.Y. Times, 1/21/73; Lindsey, "Sane or Insane? A Case Study of the T.W.A. Hijacker," N.Y. Times, 1/18/73, pp. 43–49; Rensberger, "Which Psychiatrist Can A Jury Believe?" N.Y. Times Review, 3/4/73, p. 6, reviewing Ennis, Mental Patients, Psychiatrists and the Law (1973); Trotter, "Psychiatry as a tool of the State," Science News, 2/17/73, p. 107; Rosenman, "On Being Sane In Insane Places," Science, 1/19/72, p. 250; Morris & Hawkins, The Honest Politician's Guide to Crime Control 176–185 (1969); See also Menninger, The Crime of Punishment 117–118 (1968); Goldstein & Katz, "Abolish the Insanity Defense—Why Not?," 72 Yale L.J. 853 (1963); Douglas, "Should There Be an Insanity Defense?," Corrective Psych. & J. Soc. Therapy, Fall 1968, p. 129.

[34] Report of the Committee on Federal Legislation, New York County Lawyers Ass'n of the Bar of the City of New York, "The New Criminal Code Proposed by the National Commission on Reform of Federal Criminal Laws" 14–15 (1972).

[35] 1 Working Papers of The National Commission on Reform of Federal Criminal Laws 229–260 (1970).

[36] S. 1400, p. 28, § 502; Compare Powell v. Texas, 392 U.S. 514 (1968); Brief for the United States, United States v. Sheller, 369 F. 2d 293 (2d Cir. 1966).

[37] S. 1, p. 32, § 1–3C2.

[38] National Conference on Criminal Justice, "Courts 37–45 (1973).

[39] On the disadvantages of the "power" to bargain in certain cases, compare Thomas C. Schelling, The Strategy of Conflict (1960).

[40] Compare United States v. Kahaner, 317 F. 2d 459 (2d Cir.), Cert. denied, 375 U.S. 835 (1963).

[41] See 1972 Hearings 1561–1562, 1602–03.

groups.[42] Legislation is pending to establish appellate review of sentences [43] and I am sure your Committee will give the structure to be utilized careful consideration.

OTHER MATTERS

Prohibition Of Gratuities "For Or Because Of Official Action".—Present law [44] covers acceptance of gratuities by public employees for or because of official action without proof of a specific agreement to influence such action. This is important because such gratuities have the effect of tending to corrupt officials even where a specific agreement cannot be established.[45] Section 2–6E1 and E2 of S. 1 does not appear to incorporate all of this language. This would, however, be accomplished by Sections 1352 through 1355 of S. 1400, which appears preferable in this respect.

Fraud Against The Government.—Under present law, a prohibition of conspiracies to defraud the United States in any manner or for any purpose contained in 18 U.S.C. § 371 is an important safeguard against fraudulent schemes of many types. Such schemes do not necessarily involve false statements which would come under statutes dealing with this subject.[46]

The provision of S. 1 dealing with schemes to defraud (section 2–8D5) covers part of this ground in extending coverage of schemes to defraud to cases involving federal property jurisdiction. However, this creates the necessity of resorting to a very broad concept of property or else leaving out situations covered by existing law. An artificially broad property concept may create other problems, as where property crimes generally are extended to cover remote intangibles not considered subject to "theft" in ordinary public understanding. The approach of section 1301 of S. 1400 in directly covering this area would seem more advantageous.

Entrapment.—Under S. 1400 entrapment is a defense, whereas under section 1–3B2 of S. 1, entrapment is a bar to prosecution. The difference is that in the case of a bar to prosecution, a separate hearing on the question of whether the prosecution is barred is normally held before trial.

In the case of entrapment, it would seem preferable to consider the matter as a defense rather than as a bar because the issues involved are likely to be intertwined with those relevant to the question of guilt.

Entrapment only arises where the crime has been committed, but committed because of the "creative activity" of enforcement authorities. The same testimony by the agents and defense witnesses necessary to describe the transaction for purposes of determining whether illegal entrapment occurred, would be equally necessary to determine whether a crime had been committed in almost all cases.

Repetition of such testimony would only tend to cause additional confusion and delay as well as encourage inconsistent defenses ("I didn't do it, but if I did I was entrapped into doing it").

Indeed, the argument would probably be raised that the defendant should be entitled to testify at a pre-trial hearing on entrapment without this testimony being useable at the trial in order to facilitate precisely such contentions. However, this would not appear to be a service to the finding of the truth or the proper enforcement of entrapment as a means of preventing improper creation of crime by enforcement agents.

Public Duty As A Defense. In my view the provisions of section 521–523 of S. 1400 appear to be somewhat clearer and more readily understood than the similar provisions of S. 1, although substantive differences are difficult to discern.

CONCLUSION

Apart from the tremendous gain which systematization and codification of the federal criminal code would bring, equal attention is needed to the area of

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[42] Committee on Federal Legislation, New York County Lawyers Ass'n, 1972 Hearings 1407, 1411; Special Committee on the Proposed New Federal Criminal Code, The Ass'n of the Bar of the City of New York, "The Criminal Code Proposed By the National Commission on Reform of Federal Criminal Laws" 94 (1972).

[43] S. 1401, 93d Cong., 1st Sess. (1973). Compare also Committee on Criminal Law, Federal Bar Ass'n of N.Y., N.J. & Conn., "The Need for New Approaches to Sentencing," 3 Criminal L. Bull. 682 (Dec. 1967).

[44] 18 U.S.C. § 201 (f), (g).

[45] See United States v. Irwin, 354 F. 2d 192 (2d Cir. 1965).

[46] See United States v. Tonrine, 428 F. 2d 865 (2d Cir. 1970), also 442 F. 2d. Cir. 1971); Harlow v. United States, 301 F. 2d 361 (5th Cir. 1962).

criminal procedure. Bar groups and others [47] have pointed to many obsolete features of existing machinery which further neither protection of citizen's rights nor effective enforcement.

Attention is also needed to areas in which changes in substantive law outside the scope of the criminal law as such can help to reduce crime, such as to take merely one example, corruption [48] which injures the public, employees, employers and legitimate labor organizations through "sweetheart contracts." [49]

Your Subcommittee is to be congratulated for holding these hearings on the most important subject of reform and codification of the federal criminal laws. If I can be of further assistance in any way, do not hesitate to call on me.

Mr. GIVENS. Well, thank you, Senator. Since my full statement will appear in the record, I will be brief now.

The main difference between S. 1400 and S. 1 as far as the scheme to defraud is that under S. 1 there would be jurisdiction where a fraud affects, or the scheme to defraud would affect interstate commerce, even though interstate instrumentalities may not be used. S. 1400 does not have that particular provision.

Now, this S. 1 provision I think would be helpful in this respect: That there are firms, for example gas stations, which deliberately prey on interstate travelers by putting a hole in the tire, or they remove something when they are pretending to check the oil; and we have numerous instances where that has happened. And yet, the gas station itself may not be in interstate commerce.

Sometimes under the larceny provisions the State authorities have difficulty in prosecuting these cases, because the witnesses have left the State. Also, under a larceny section, unless they had a large enough number, it would not be grand larceny to permit an adequate penalty.

I think S. 1 would be helpful in this type of case. Of course, the argument on the other side which may have moved the Department of Justice not to include this is the fact that the U.S. attorney might be deluged with requests for prosecution. In minor individual instances these could be handled by the local authorities.

My experience as an assistant U.S. attorney was that there were many cases—for example, including a stolen car driven across the State line—where there was concurrent State and Federal jurisdiction, and the U.S. attorney had no difficulty in turning those cases over to the local authorities where Federal action was not truly necessary.

So I would believe that if the S. 1 provision in regard to jurisdiction over schemes to defraud were adopted, it would not create any real practical difficulty; and I would urge the committee to adopt that provision.

One of the main improvements made by both S. 1 and S. 1400, which I discuss in the prepared statement, is that injunctions would be al-

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[47] See "Measures Relating to Organized Crime," Hearings Before the Subcommittee on Criminal Laws & Procedures, Senate Judiciary Committee, 91st Cong., 1st Sess. 219–20, 222–229 (1969); H. Rep. No. 91–1808, "Heroin and Heroin Paraphernalia," Second Report of the House Select Committee on Crime, 91st Cong., 2d Sess. 61–62 (1971); Subcommittee on Search & Seizure, Committee on Criminal Law, Federal Bar Ass'n of N.Y., N.J. & Conn., "New Remedies for Enforcement of the Fourth Amendment," 3 Criminal L. Bull. 630 (Nov. 1967); Givens, "Responding to Violence Through Order and Justice," 14 N.Y. Law Forum 780 (1968); New York State Bar Ass'n, Bulletin of the Committee on Federal Legislation, Par. I(A), pp. 3–16) (1969).

[48] See United States v. Ryan, 350 U.S. 299 (1956); United States v. Gard, 344 F. 2d 120 (2d Cir. 1965); United States v. Ricciardi, 357 F. 2d 91 (2d Cir.), Cert. denied, 385 U.S. 814 (1966); 59 Colum. L. Rev. 810, 813 (1959); Comment, 69 Yale L.J. 1393, 1405–06 (1960).

[49] See Committee on Labor Law, Federal Bar Council, "Sweetheart Contracts." 115 Cong. Rec., S6318 (daily ed. 6/12/69), also in 23 Industrial & Labor Relations Review 101 (1969).

lowed against such violations as schemes to defraud. This is very important because you can have a continuing course of conduct that may go on for a long time pending trial, where the defense changes attorney or has motions for discovery of documents, or other matters; bail pending appeal could continue for a long time; or, where perhaps a long prison sentence is not appropriate and yet something needs to be done to stop the type of practices the defendants were engaged in.

One case that I was involved in involved a scheme to get people to pay $500 for an alleged system to win 10,000 percent profit on horse race bets. And the defendant had a system where you would do mathematical work such as the logarithm of your previous bet and the square root of a certain formula, and you would supposedly be able to win 10,000 percent profit on what you had invested on these bets.

Now, this defendant was sentenced to 2 years. However, at the end of that time there was some indication that he may have been engaging in similar conduct. An injunction might have been more effective than trying to convince the court to send this defendant to jail for a longer time.

Now, there was testimony by Mr. Liebmann, a member of the bar of Maryland, opposing some of the injunction provisions of S. 1 and S. 1400. And I think his arguments have merit in respect to perhaps some of the specific injunctions that were authorized against activities that might have to do with the political processes or areas related to the protection of freedom of expression under the first amendment. He expressed a concern about injunctions against obscenity cases.

But apart from that, I think that injunctions generally against criminal conduct, as permitted by both bills, would be a very, very important safeguard for the public; that something could be done other than to send someone to jail and throw away the key.

I know your next witnesses are going to be from the Committee on Federal Courts of the Association of the Bar, and I looked at their statement, which was more or less along the lines of support for your concept, Senator Hruska, that there should be appellate review of sentencing. And I think if we are going to move in the direction of more careful review of sentences to be sure that they are not excessive, we need some other means whereby serious conduct of a continuing nature could be stopped and stopped effectively. Of course, conditions of probation are one method, but I think an injunction would be an extremely important and effective method which both bills would permit in an appropriate type of case.

The area of the criminal coercion section is one that is very important in my opinion, as far as legitimate activities in such areas as consumer protection or the environment are concerned. I was concerned, and so was the Association of the Bar of the City of New York and the Committee on Federal Legislation of the New York County Lawyers Association in their report that the Brown Commission version could penalize somebody who, for example, called up their landlord and said there are roaches on the floor in my apartment, and unless you fix this or give me back my money, I am going to send a picture of these roaches to the New York Daily News.

The reason for that problem is that, of course, the New York Daily News is a newspaper of interstate circulation. And the tenant would

be threatening to reveal a fact, whether true or false, that might tend to hold the landlord up to ridicule or injure his reputation.

Now, S. 1, I believe, eliminates that problem. It just does not have that type of provision. Section 1723 of S. 1400, as you will see from my prepared statement, contains a number of amendments of the Brown version which I think would also help to eliminate this problem.

However, I would urge the subcommittee to include either further amendments or specific legislative history to make clear something that I am sure is a fact, that Congress would not intend to make criminal the type of conduct that I am referring to.

There is also a problem that under S. 1400 there is a provision for racketeering activity as a separate crime, which I think is section 1861; and there are further provisions in section 3643 separately for private treble damages against persons who are engaged in criminal activity. I think there may have been an oversight in the inclusion of all aspects of criminal coercion under these provisions. I do not believe it was the intent of the Department of Justice, from what I could gather, that the private treble damage action would apply if there were two instances where a call by a housewife occurred that would create a pattern of the type I referred to.

So I would urge that attention be directed by the staff to perhaps a corrective amendment to section 1861 or 3643 if necessary to eliminate what I believe would be an unintended result.

I would now like to turn, Senator, to another area covered in my prepared statement briefly, which is one where I believe that S. 1400, the Justice Department draft, is superior to S. 1, and this relates to the insanity defense.

Three bar association committees recommended that the insanity defense as a separate defense be eliminated, and that instead psychiatric evidence could be offered to show that the defendant lacked the intent necessary to commit the crime under the applicable statute, and that position was taken by S. 1400.

The bar groups of the Special Committee on the Proposed Criminal Code of the Association of the Bar of the City of New York, the Committee on Federal Legislation of the New York County Lawyers Association, and the New York State Bar Association Committee on Federal Legislation, which urged consideration of the approach taken by S. 1400. And I believe Anthony Marshall recently testified as a witness for that committee.

In my opinion, the insanity defense as a separate defense is not really necessary, because the issue could be brought in in connection with the matter of intent. The difference is this: Under the separate insanity defense, in my experience, the jury is very confused. I do not think the jury can determine what is a mental disease or defect, or whether someone could be proved beyond a resonable doubt not to have been substantially unable to conform his conduct to the requirements of law. These are really almost theological questions of free will and determination that I do not think a jury can practically deal with.

S. 1400 puts this matter in an area where the jury can understand what it is all about. Did the person intend to sell narcotics, or did he intend to cheat on his income taxes? And that means not only did he know physically what he was doing, but did he intend the result that the statute prohibits?

The main objection that I have been told about raised against the proposal of S. 1400 is that a moral blame or moral opprobrium is attached to a criminal conviction. And the point is that if a person is sick instead of bad, should they really have that badge of blame attached to them?

Now, my feeling about that, Senator, is that being denominated mentally ill really has at least as much opprobrium connected with it—it hurts the person sometimes even more than—being convicted of a crime. So I think this objection is really unrealistic.

What I think we are really dealing with is antisocial conduct that someone has committed. And of course, if a person is bad, they probably are also partly sick. If the defendant could avoid committing a crime, I do not think he would have been engaged in it anyway.

So you really have not got one group that is sick and one group that is bad, that could be put in separate pigeonholes in some meaningful way, but a spectrum of human activities and mixed motives in every instance.

I think the best way to handle this would be to have the questions of the defendant's mental condition considered on the issue of intent, and in connection with sentencing. What should really be done with this person? That is a question of wise judgment. Psychiatrists can help on that. But I do not think they can help, and I believe many of them have testified or answered questionnaires to the subcommittee indicating that they have a lot of trouble in trying to help, by defining someone as being sane or insane or having a mental disease or not.

The next subject I would like to touch on briefly is requiring recommending of sentences by prosecutors. In my experience in the southern district of New York, this would be a bad thing. It would expose the prosecutor to tremendous pressure from those defense attorneys who come in with an instance of, for example, a crime involving abuse of responsibility, and where they could attempt to bring pressure on the prosecutor. If the prosecutor can say, I have nothing to do with sentencing; that is a problem for the judge, and I cannot give you any promises as to whether your client will go to jail, I think the administration of justice will be more honest than if the prosecutor had to make a recommendation.

I think a danger is going to be created if we require prosecutors to make recommendations as to sentencing.

I think the prosecutor now has the power to make a recommendation if a case really justifies it. And this has been the practice, and I believe the present practice is wise in this respect.

Also, as a prosecutor I frequently filed an affidavit with the court stating the facts in my possession as to why the crime was particularly serious; and this was served on the defense attorney so that he had a chance to contradict, if he had evidence to contradict, anything that I might have said.

I believe this is a better approach than to require a recommendation.

There was a number of other matters covered in my prepared text, which has been made part of the record. I would like to stop now and perhaps reserve the balance of my time, keeping your warning in mind, Senator, about the rollcall, to see if I could answer any questions that might be helpful to you or the staff.

Senator HRUSKA. The New York State Bar Association's Committee on Federal Legislation recently recommended consideration of the possibility of eliminating insanity as a separate defense.

Are you familiar with that?

Mr. GIVENS. Yes, Senator, and I would strongly support that recommendation, I think for the reasons I outlined before and also because there is a danger now that cases can fall between two stools.

I had an income tax case involving a lawyer who earned $80,000 a year, and he reported about $20,000 of that on his income tax return; and his defense was insanity. The judge, interestingly enough, at the trial held that insanity was relevant to intent, exactly what S. 1400 would say, the Justice Department proposal. However, the court of appeals reversed the conviction and sent it back for another trial. At the second trial the evidence was pretty stale, and I think that was one reason that in any event the jury acquitted him in the second trial. I think a case where someone who was earning $80,000 a year trying negligence cases for insurance companies to be able to assert an insanity defense and have an instruction required shows that the law should be changed.

Now, this defendant never went to a mental hospital, and I do not think he ever would have been committed to a mental hospital. So we have a case where the defendant does not fit in the pigeon hole of sick in terms of someone who, you might say, should go to a hospital instead of being handled criminally; and yet, the insanity defense caused the failure of the prosecution in this case.

Senator HRUSKA. Well, it has been said that if the insanity defense continues to be expanded, there is a likelihood that hospitals will become prisons to a greater degree than prisons are prisons.

Could that prove to be the case?

Mr. GIVENS. I think this would be very likely to be the case, because you would have people who would be denominated insane instead of being handled criminally; that means that they don't have, Senator, the protections of due process. They don't have the right to be proved guilty beyond a reasonable doubt.

And I think there is a danger of, in effect, having a therapeutic society where we tap people on the shoulder and say, now please don't complain when we take you away. This is for your own good, and don't be angry about this, we are just trying to help you. The Soviets have used that to crack down on dissidents in the Soviet Union, who have tried to protest things that they felt were violations of their human rights. Many of them have ended up being brought to a mental hospital.

I don't think that that is happening in our country, but I would hate to move in that direction. I think there is a danger that hypocrisy could begin to creep into our thinking if we feel that let's not really punish this defendant, let's try to help him. Well, we are not helping him in the way he wants to be helped. And I think he should have a right to a trial to find out if he is guilty of antisocial conduct. And then if he is, we could decide what to do about it, perhaps a mental hospital could be one alternative in connection with sentencing after, and only after, a defendant has in fact been found guilty.

Senator HRUSKA. That bar committee report also suggested that a new approach to this matter of competence——

Mr. GIVENS. I think so.

Senator HRUSKA. The defendant would be given the right to insist upon a trial regardless of whether the court or the other parties thought to the contrary, if he, the defendant, and his attorney felt that he could be defended adequately. Now then, if a conviction resulted, as I understand it, under those circumstances, the defendant would be granted a new trial only upon showing that he had uncovered new evidence as a result of an improvement in his mental condition, which would tend to establish his innocence and was previously unavailable because of his mental condition.

Now, the reason for this approach, we understand, was given as lack of confidence in our ability to determine for another person whether it is really best for him to face incarceration without trial, instead of going to trial with allegedly reduced competence.

Is that the situation to which you referred?

Mr. GIVENS. Yes; I think the two are intertwined. I was addressing myself before to the insanity defense, that if we are saying that people, such as Mr. Bremer, for example, if he were held to have an insanity defense, and if we say we're going to treat this therapeutically, there would be a danger that the men in white coats tapping people on the shoulders would be society's answer to criminal conduct.

I was talking then about the insanity defense, but I think the point you just referred to, Senator, in the State bar report is very closely related.

My experience as a prosecutor was that if the Government did not bring up the fact that someone might be a little bizarre in their attitude or in their attire or in their manner of speaking, there was always the danger that later, after the defendant had been found guilty, he could say well, I was nuts. I want a new trial.

So the pressure was on the Government to step forward and say, Your Honor, this man seems a little peculiar. I think he should be examined. There was a recent news article where eight people went to a mental hospital pretending to be insane, and once they got in—this was a test—they then told the doctors they were OK, and they actually were sane. But they couldn't get out because once they're in that particular pigeonhole whatever they did was treated as another symptom of their alleged insanity.

So what happens is that once the person is put in that psychiatric track and they are sent to Bellevue, let's say if it was in the southern district of New York, then they stay there for awhile; the doctors may say, well, you know, this fellow has problems. I guess every human being has problems, and they end up being given a lengthier incarceration in the mental hospital, and are unable to get out, and may, in fact, be treated far more harshly than they would be if they were treated criminally.

They may not go to jail, or if they did, it would be for a limited period of time.

I am concerned that really, we can't tell conclusively who is completely competent and who is incompetent. I would rather not take the risk that someone could be salted away who, in fact, could have

been able to assert his defense. The court and the Government are afraid that if they resolve any doubt in favor of competency, that the defendant can come back later and take advantage of the situation.

Now, it has been held to me that if in fact a person is incompetent he would have to be given a new trial. The problem is, who in fact is incompetent, and who should decide that question? Should the person and his attorney have some role?

Before compulsory sanctions could be taken, at least some evidence would have to be put on if the defendant asked for a trial under the bar's suggestion.

I think the other side of the coin is that if someone has a trial, and their attorney believes that they are able to conduct the trial, there ought to be some indication that the trial lead to a wrong conclusion before a new trial would be ordered.

So I would essentially agree with the bar committee about that.

Senator HRUSKA. Now, then, getting back to criminal coercion, the Brown Commission report included in that provision an affirmative defense covering socially acceptable threats to encourage others to act in a particular way.

Would you comment on the final report provision in this regard, and could you suggest a more satisfactory defense approach than that outlined in the report?

Mr. GIVENS. Yes. I'm glad you asked that, Senator. I have given some thought to that, and I think it is very important that there should be such a defense to avoid the type of landlord versus tenant dispute that I mentioned before, being swept within the ambit of the provision.

The problem of the Brown Commission defense, as I saw it, was that the burden was on the defendant to show that he was acting out of good motives, and also the defense was rather vague as far as defining what was socially acceptable. I believe that an alternative defense might run something like this, that this statute or this section shall not apply to any conduct taken by a party in furtherance of a bona fide dispute, that is a dispute which the person honestly believes they have and where the facts that they threaten to reveal, or the information they threaten to pass along to someone else, relates to the subject matter of that dispute.

It seems to me that would eliminate a lot of the problems under this section.

Senator HRUSKA. You do suggest, of course, that if the S. 1400 version is adopted, that appropriate legislative history should be developed.

Mr. GIVENS. Yes.

Senator HRUSKA. This would seek to demonstrate a complete divorcement from the scope of the Brown Commission report?

Mr. GIVENS. Yes, and then I would seek to make it clear what I am sure was the intent, that it would not cover cases such as a businessman who learns of a tender offer to take over his company, and he says look, if you don't stop this, I'm going to tell the press, or I'm going to tell the Senate, or I'm going to tell the SEC, that the money for this takeover is coming from a secret Swiss account, something like that, where the facts being asserted are related to the dispute about which the matter has arisen.

I don't think anyone would intend that that should be criminal and I think the burden should be on the prosecutor, and I say this as a former prosecutor, that the prosecution should have to negative that if there is any evidence that this might have been the case. I don't like to see someone afraid that they themselves may have to prove their innocence in this type of case.

I am also again mindful of the fact that I don't believe it was the intent of the Department of Justice to recommend private treble damages under sections 1861 and 3643 of S. 1400 for all of these types of circumstances; simply because there was a pattern of alleged coercion, I would urge that that be reconsidered.

Senator HRUSKA. Very well. Thank you for your statement.

We note your kind offer to respond to any questions we might develop and will bear that in mind.

Mr. GIVENS. Thank you very much, Senator.

[Letter of August 7, 1973, from Mr. Givens follows:]

AUGUST 7, 1973.

PAUL C. SUMMITT, ESQ.

Deputy Chief Counsel, Committee on the Judiciary, Subcommittee on Criminal Laws and Procedures, U.S. Senate, Washington, D.C.

DEAR MR. SUMMITT: During my testimony before the Subcommittee on Criminal Laws and Procedures of the Committee on the Judiciary on July 25, 1973, Senator Hruska asked me several questions pertaining to the criminal coercion provision of S. 1400 (§ 1723). In my opinion many of the problems which I outlined would be dealt with by a provision such as the following:

> "It is a defense to a prosecution based on paragraphs (2), (5) or (6) of subsection (a) that the defendant believed the threatened accusation or exposure to be true or the proposed official action justified, and that his sole intention was to compel or induce the victim to take reasonable action to prevent or remedy the wrong which was the subject of the threatened accusation, exposure, or proposed official action."

Since this would be a simple defense rather than an affirmative defense, the burden would be on the prosecution to negative the defense. In my opinion this would be reasonable for the reasons outlined in my oral testimony.

Along with the inclusion of such a defense, I believe that legislative history or other clarification of the basic intent of the statute along the lines indicated in my prepared statement would be desirable and in accordance with the original intent of the section.

With these safeguards, my concern over possible abuse of this section as a criminal statute would be in very large degree satisfied. In saying this, I have in mind that the prosecutor would exercise due care in bringing cases under a section of this type, especially with the inclusion of the proposed defense, as pointed out by Senator Hruska during my earlier testimony before the Subcommittee on this subject in 1972 ("Reform of the Federal Criminal Laws," Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 92d Cong., 1st Sess., Part III, B, p. 1567 (3/22/72)).

The safeguards mentioned by Senator Hruska during the earlier hearings would, of course, be absent to the extent that private suits for treble damages might be deemed to be authorized for a pattern of racketeering activity consisting of alleged criminal coercion under sections 1861 and 3643(c) of S. 1400.

In my opinion, private treble damage action should not be authorized for a pattern of alleged violations of all of the subsections of section 1723, especially subdivision (a) (4) and (5) which are rather general ("wrongfully subject any person to economic loss or injury to his business or profession" in the case of subdivision 4).

This language is, of course, extremely broad—perhaps as broad as that of the Sherman Act, and authorization of private treble damage suits for any pattern of alleged violations of such provisions might have unforeseen and unintended

consequences. In this context, the following comments of Alexander Hamilton may be relevant:

". . . In dispensing punishments the utmost care and caution ought to be used. The power of doing it, *or even of bringing the guilty to trial, should be placed in hands that know well how to use it.*" (emphasis added) Letter to Gouverneur Morris, April 20, 1777, in Morris, Ed., The Basic Ideas of Alexander Hamilton, 346 (1956).

Private actions under so general a standard could carry a potential for harassment and intimidation especially in the current period of high cost of litigation. I am sure it was not the intention of the draftsman of S. 1400 to permit this.

Pursuant to your kind invitation, I would respectfully request that this letter be included in the record of the hearings following my oral testimony.

Sincerely,

RICHARD A. GIVENS.

Senator HRUSKA. Our next witness is Mr. Rod Lewis of the Gila River Legal Services, Sacaton, Ariz.

Please identify your associate.

STATEMENT OF ROD LEWIS, GILA RIVER LEGAL SERVICES, SACATON, ARIZ., ACCOMPANIED BY JUDGE WILLIAM G. ROADS, CHIEF JUDGE OF GILA RIVER INDIAN COMMUNITY COURT

Mr. LEWIS. My name is Rod Lewis. I am with Gila River Legal Services, which is a legal service program supported by the Gila River Indian community in Sacaton, Ariz. With me is the chief judge of the Gila River Indian community court, Judge William Roads.

Senator HRUSKA. Your statement will be placed in the record, Mr. Lewis.

You may proceed.

[The information referred to follows:]

STATEMENT OF THE GILA RIVER INDIAN COMMUNITY BEFORE THE SUBCOMMITTEE ON FEDERAL LAWS AND PROCEDURES

Mr. Chairman and Honorable Subcommittee Members, this statement is being filed on behalf of the Gila River Indian Community whose Reservation is located in Arizona. We welcome this opportunity to comment on S. 1400 and this greatly needed effort at reforming, revising, and codifying the criminal law of the United States. As you are aware, Indians living on Reservations are enmeshed in an extremely complex jurisdictional relationship with the various states, the federal government, and tribal governments. The Gila River Indian Community is a typical Reservation and we are forced to continually contend with this unique but strange situation.

A new day has seemingly dawned for American Indians, and many Reservation residents are anxiously awaiting their turn to fully participate in the many opportunities and promises of American life. President Nixon talks of greater participation in the development of Federal Indian Policy by Indians and of his intent to encourage Indian self-determination and to strengthen tribal sovereignty. 48 N.D.L. Rev. 529. The Bureau of Indian Affairs is once again talking of the need to be responsive to the voice of Indians, and other government agencies and even the states are engaged in the development of constructive programs and projects. We are hopeful that all the rhetoric and plans will be implemented so that the immense burden of poverty can be in some way alleviated and that the dignity once held by Indians can be restored.

LEGAL STATUS

The Gila River Indian Community is organized and incorporated pursuant to the Indian Reorganization Act of 1934, Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. A.S. 476. Our constitution and Bylaws were revised in 1960 and subsequently approved by the Interior Department. The Gila River Indian Community has since

time immemorial effectively maintained a system of self-government. Our system of tribal government continues to exist and now is substantially similar to that of other units of government. Arizona state laws are not applicable to our Reservation and we have developed a comprehensive tribal code with criminal jurisdiction over all acts not specifically enumerated in the Major Crimes Act. Our criminal code was recently reformed and revised with the assistance of the School of Law at Arizona State University and a LEAA grant.

Indian tribes have long been recognized as distinct political bodies with full powers of self-government except to the extent that Congress has explicitly limited tribal powers. The Gila River Indian Community has established a poltical system which is in complete accord with this basic principle in Indian law. Our powers of self-government derive from our inherent sovereignty and is not derived from any federal or state grant of power, and these powers have existed since the beginning of time *Worcester* v. *Georgia*, 6 Pet. 515 (1882) ; *Ex parte Crow Dog*, 109 U.S. 556 (1883) ; *Talton* v. *Mayes*, 163 U.S. 376 (1896) ; *U.S.* v. *Quiver*, 241 U.S. 602 (1916) ; *Iron Crow* v. *Ogllala Sioux Tribe*, 129 F. Supp. 15 (W.D. S.D., 1956) affd., 231 F. 2d 89 (8th Cir., 1956) ; *Native American Church* v. *Navajo Tribal Council*, 272 F. 2d 131 (10th Cir., 1959) ; *Williams* v. *Lee*, 558 U.S. 217 (1959) ; *McClanahan* v. *Arizona Tax Commission*, No. 71–834, March 27, 1973. For instance in the recent case of *Kebble* v. *U.S.* (May 29, 1973) 41 LW 4722, 4724 this residual jurisdiction was acknowledged and the Court there clearly stated that their decision was not intended to infringe on the existing extent of tribal sovereignty, by expanding the reach of the Major Crimes Act.

The Gila River Indian Community has responsibility for a wide range of governmental activities. Under our constitution our legislative body, the Community Council, is specifically empowered to provide for the maintenance of a criminal justice system and has established a tribal police force and a Community Court. Article 15, § 1 (a), (17). The jurisdiction of this court encompasses both the civil and criminal law area. However, the Indian Civil Rights Act of 1968 limits possible punishment in our Court to a $500 fine or six months imprisonment or both. The Gila River Indian Community Constitution also provides that the Community Council may enact criminal civil codes to govern the conduct of, not only members of the Community, but also non-Indians who are present on the Reservation. Article XV, § 1 (b), (8).

To provide adequate notice to non-Indians and to clearly define our position in regard to our jurisdiction over non-Indians Ordinance 12–72 was passed on March 15, 1972. This is an implied consent statute and is posted at all entrances to the Reservation.

THE ENVIRONMENT

The Gila River Indian Reservation encompasses an area of some 372,000 acres and is located in South Central Arizona in Pinal and Maricopa counties. The city of Phoenix, is adjacent to the northwest part of the Reservation but lies 45 miles north of our seat of government which is Sacaton, Arizona.

The Gila River Indian Reservation is directly in the path of one of the nation's most dramatic metropolitan growth areas. Maricopa County is now the 24th most populous county in the United States with a resident population of 967,522. This population concentration and rapid growth has reached our Reservation boundaries and carries with it the seeds of many potential conflicts.

It is readily apparent that because of our location a large number of non-Indians are continually crossing, residing, working, or merely visiting on our Reservation. Our concern with jurisdiction over non-Indians is not a hypothetical problem but a real problem with which we are confronted with on a daily basis.

THE PROBLEM—NON-INDIANS ON THE RESERVATION

We are plagued with a variety of serious problems which seem to be a natural consequence of our close proximity to a large urban non-Indian population. One of the most significant problem areas concerns the destruction and theft of our natural resources. Mesquite wood, cactus, and other native plants are often carelessly and thoughtlessly destroyed by non-Indian visitors. These native plants are irreplaceable and the natural balance of nature could be upset to the extent that these plants could not continue to thrive on our Reservation. Sand and gravel are other natural resources which non-Indians pre-

viously had illegally appropriated from our lands with impunity, but we have moved vigorously to correct this situation in recent years.

A major area of concern in recent years is the increasing number of non-Indians who enter tribal land without permission and cause disturbances or deface tribal property. There seems to be the feeling among our non-Indian neighbors that the Reservation is an ideal place to race motorcycles, recklessly drive their dune buggies, or test out any type of vehicle which happens to be new and exciting. The result is frequent trespass on land allotted to tribal members or upon land belonging to the tribe. In either case the noise, disturbance, and destruction of property and native plants has caused much concern among Reservation residents. This is a problem we must be allowed to deal with directly so that the welfare and safety of our Community can be protected.

A problem not unique to us is the increase of violent crimes like assaults, robberies, and muggings. This type of criminal activity seems to occur frequently when welfare or lease checks are received and especially affects our elderly Community members. There seem to be a number of non-Indians who specialize in this activity and prey on Reservation residents. This is not to say that only non-Indians engage in these kinds of acts, but that if we were unable to deal directly with non-Indian criminals, our attempts at maintaining law and order would be greatly hampered.

An area of great concern to us is that involving motor vehicles. Our Reservation is a natural thoroughfare for Phoenix residents to other parts of the state. Inherent in this situation is the commission of the usual traffic offenses which range from driving while intoxicated, to speeding, and reckless driving. The State highways which traverse the Reservation are patrolled by both the Arizona State Highway Patrol and the Tribal Police, while other Reservation roads are within the responsibility of the Tribal Police.

TRIBAL JURISDICTION OVER NON-INDIANS

It is the position of the Gila River Indian Community that we have jurisdiction over criminal acts which are committed by any person within the boundaries of our Reservation. We would urge this Committee in this reform of the federal criminal law to clearly recognize the sovereign authority of Indian Tribes.

We feel there is cause for concern in the language of § 203 (b), (3), (D), which states that special federal jurisdiction is limited to the extent that an Indian Tribe ". . . has tried an offense committed therein by an Indian;". This clearly implies that tribal court has jurisdiction only over the criminal activity of Indians and if allowed to stand would significantly undermine the ability of Indian tribes to maintain an effective criminal justice system. The result would be that non-Indian offenders would have to be bound over to federal authorities while Indian offenders would be processed through tribal court.

The resulting situation is aptly described in the Working Papers of the Brown Commission:

> Indian law enforcement officers often cannot arrest non-Indian offenders in Indian Country; they can only evict them. Moreover, while an Indian who commits a minor offense against an Indian must be brought before a federal court, often far away. Federal prosecutors are often understandably reluctant to go to such lengths for minor offenses. But, if they do not, an Indian may be punished for conduct which a non-Indian will not be punished for. (Brown Commission, Working Papers Vol. III, page 1523.)

Aside from the uneconomical use of criminal justice resources it is clear that this situation could very well lead to a grossly unjust result. That is, an Indian could be punished for a criminal act and the non-Indian could possibly avoid criminal sanction.

We note in the Working Papers of the Brown Commission that they labored under the erroneous assumption that Indian tribes do not have criminal jurisdiction over non-Indians. Brown Commission Working Papers, Vol. III, 1523. This is clearly an unsupported statement and is neither substantiated by case law or by statute. This assertion seems to be a carryover from the nineteenth century which no longer has any validity and should be discarded at this point in history.

Our position in regard to our exercising jurisdiction over non-Indians is strongly supported by the case law in the civil area. In both *Kennerly* v. *District Court*, 400 U.S. 423 (1971), and *Williams* v. *Lee*, 358 U.S. 217 (1959), the court clearly stated that the tribal court was the appropriate forum for a non-Indian plaintiff to seek relief. The decisions referred to the federal policy of strengthen-

ing tribal sovereignty and this was accomplished by a recognition of the vastly improved capabilities of tribal courts. There appeared to be no hesitancy about subjecting civil non-Indian litigants to tribal court jurisdiction and we maintain that the same situation exists in the criminal area.

The Gila River Indian Community is presently exercising jurisdiction over non-Indians who have violated the provisions of the tribal criminal code. There have been very few complaints regarding the quality of justice received and there certainly are no distinctions in treatment of offenses by non-Indians as against those of Indians. In any event our court does not have completely unfettered discretion and conducts itself in conformity with the Indian Civil Rights Act of 1968. 82 Stat. 77, 25 U.S.C. 1301 et seq. This act affords ample protection and regard for the individual rights of any person who is summoned before our courts.

We maintain that our court provides a quality of justice equal to any other court which is of a similar subject-matter jurisdiction. Professional attorneys appear regularly in our court and we soon will be completely a court of record. Our proceedings are recorded and can be transcribed if the need arises. Our judges regularly attend training sessions and seminars offered by Arizona State University, the National Indian Tribal Court Judges Association, and the state Justices of the Peace Association.

There may be questions in the minds of non-Indians regarding the competency of our law enforcement personnel. This sub-committee can be assured that our Tribal police are as well trained and qualified as any other group of law enforcement officers in the State of Arizona. Every officer is sent to a Police Academy for a twelve week course maintained by the Bureau of Indian Affairs, Department of Interior. In addition in-service training sessions are held periodically throughout the year.

An indication of the quality of our Police is the fact that all of our officers are cross-deputized by both the Maricopa and Pinal County Sheriff's Office. Our Officers also hold federal commissions and also can qualify for commissions from the Arizona State Highway Patrol. It is clear that non-Indians are afforded fair treatment by competent law enforcement personnel when they are involved in possible criminal activity on our Reservation.

The day has long passed when American Indians were unfamiliar with the Anglo-Saxon system of jurisprudence and were unable to apply the normal protections of constitutional due process to all persons, whether Indian or not. This is not to say that we do not maintain our distinct customs and traditions or that we are not proud of our cultural heritage. Any non-Indian who appears before our court would not encounter a legal system with which he was completely unfamiliar or a system which would deny him any of the protections necessary to insure that he was treated in accordance with the basic concepts of fundamental fairness.

We maintain that the present language in § 203(b) is too restrictive, interferes with a strong national policy to insure the self-determination of Indian tribes, and seriously undermines the ability of a tribe to provide to its citizenry an adequate measure of protection. Therefore, we respectfully urge this Subcommittee to amend § 203(b) to read:

"Special territorial jurisdiction of the United States includes: . . .

(3) The Indian Country, which includes: . . . Except to the extent that a state has criminal jurisdiction thereover as provided in Title 25 or to the extent that the local tribe, band, community, group, or pueblo has tried an offense committed therein by any person;

CONCURRENT JURISDICTION

We support the position of the Colville Confederated Tribes, the Lummi Indian Tribe, and the Makah Indian Tribe, which requested that § 203(b)(3) be amended to read: "Federal jurisdiction and state jurisdiction over offenses committed on Indian reservations shall be concurrent with tribal jurisdiction over such offenses." We also think it clear that tribes were not divested of jurisdiction over the enumerated acts in the Major Crimes Act of 1855. We contend that the act instead established concurrent tribal and federal jurisdiction over the listed offenses.

Mr. LEWIS. We are grateful for this opportunity to appear before this committee and to offer our comments on S. 1400, as it relates to

the criminal jurisdiction of the United States in relation to American Indians.

As you know, American Indians are traditionally a very complex jurisdictional situation between the Federal Government, the individual States, and the tribal governments. And we think that the attempt in S. 1400 to resolve some of the confusion in some of the disputes which have arisen is a—well, we support generally this attempt to resolve these disputes.

We are especially concerned about section 203(b)(3), which clearly implies that Indian tribes do not have jurisdiction over non-Indians. This also seems to be a statement in the working papers of the Brown Commission, and we are here to attempt to at least clarify the situaiton or to correct any impression that we have.

We would recommend that section 203(b)(3) in the last part, that the language be changed to "any person," and this would, we think, resolve the situation.

Judge Roads is here to talk about our efforts relating to the prison situation as far as jurisdiction over non-Indians is concerned. We, at this time—it is an unclear situation whether or not Indian tribes do have jurisdiction over non-Indians, and this is what we are basically here to testify on.

Perhaps Judge Roads can set up our past situation, our present situation, and the actions we have taken to correct this situation.

Judge Roads. Senator?

Senator Hruska. You may proceed.

Judge Roads. Prior to March 15, 1972, the tribe had had many problems, which the Federal Government would say they are responsible for providing certain protections to the tribes within the reservations. However, due to lack of funding, the forces, our police forces, were year by year cut back rather than increased.

We have an area that covers 65 miles in length and 20 miles at its widest part. Our villages are scattered throughout this area. Therefore, the small police force that we had at the time was not sufficient to provide services to the community. Efforts to work with the surrounding communities were futile because of their lack of personnel also.

Criminal trespass, assaults, different types of violations occurring on the reservation went unpunished, unsolved. Therefore, the tribe asserted jurisdiction about the first part of 1971, after several severe assaults had occurred on some of our Indian members.

After the assertion of jurisdiction, the tribe sought help from the area solicitor in Phoenix, the Federal attorney, and with their help drafted an implied consent ordinance which was passed on the 15th day of March 1972. The Secretary of the Interior did not disapprove it. He allowed it to become a policy, and since that time, we have been operating under that implied consent ordinance.

We have not had any challenges of the jurisdiction, rather we have had full cooperation of all non-Indians who have appeared before the tribal court. To date, we have tried 635 traffic cases, more or less; approximately 75 criminal cases, an average per year; and approximately 75 civil cases involving mostly restitution cases, bad debt cases.

The 1968 Civil Rights Act did cause quite a problem, not only among the Gila River Indians, but other reservations due to the fact that we haven't been given time to revise our codes to coincide with

the Civil Rights Act. However, the Gila River did at that time immediately submit a proposal for assistance from LEAA for money to conduct a criminal code revision. This has been done; however, because of restrictions of the tribal voting approval of this code, it hasn't been adopted as yet. Hopefully, that will be adopted in the next 2 or 3 months.

The district courts at this time have overruled several of the sentences the tribal courts have made concerning not only non-Indians, but Indians, too. At this time, I feel that the district courts should consider that the tribes, I don't think, can legally operate under the 1968 Civil Rights Act unless they do have criminal code revisions. They are bound by the present codes, law and order codes that are existing at this time.

The Secretary of the Interior saw fit not to disapprove it, and I feel that there is one case at this time that is being tried, I believe in the State of Washington, I feel that there needs to be a clarification of the jurisdictions. And I think the tribes should have jurisdiction because of the unwarranted and flagrant violations that non-Indians do when they do come into the reservations.

We have attempted to upgrade the standards of our courts, of our police officers. You will see in our statements what the qualifications are for our police officers. Everyone is required to attend the police academy. They are screened before they are hired.

There are judges. We have the National Indian Judges Association, who attend classes regularly along with the justices of the peace within that State. I think that the Indian courts are qualified to have jurisdiction and try these criminal cases.

I would, unless you have any comments or if you have had any time to look over the statement, I would be happy to answer any questions you might have.

Mr. Lewis. I might add at this point that we are very much concerned, not simply with traffic cases—and none of the Indian offenses in the traffic area which we have which come through our courts are, of course, the usual crimes, speeding, driving while intoxicated, things of this nature.

But we are also very concerned about non-Indians who come on the reservation trespassing on either allotted land or tribal land, race motorcycles, dune buggies, this type of thing and destroy property, or cause a lot of consternation among reservation residents. This is a common type of situation which occurs.

Another type of situation which often occurs is destruction or defacement or destruction of our natural resources; this would include our native plants, and our cactus, rocks, mesquite wood, sand and gravel, things of this sort, for which non-Indians come and they come across our reservations, and just simply destroy or take off the reservation.

This is another problem which is of major concern to the Gila Reservation Indian community. So it is not simply traffic cases. There is a whole range of other things: Assaults and batteries as Judge Roads has mentioned. People prey upon our elderly reservation residents, who receive welfare checks from time to time, or lease moneys which they get from allotted land. And this is another type of problem.

If we don't have jurisdiction to deal with these kinds of people, with non-Indians who come on the reservations, violate our tribal laws, we are greatly hampered in attempting to protect our citizens.

Senator HRUSKA. Mr. Lewis, in regard to jurisdiction, this special territorial jurisdiction of the United States, as contained in S. 1400, section 203(b)(3) provides that the special territorial jurisdiction of the United States includes "Indian country," which is then defined.

Have you a copy before you?

Mr. LEWIS. Yes. Yes, I do.

Senator HRUSKA. Now, then, I call your attention to section 205 of the bill——

Mr. LEWIS. Yes?

Senator HRUSKA [continuing]. Which specifically declares that the existence of Federal jurisdiction does not prevent an Indian community from exercising its jurisdiction in Indian country to enforce its own laws.

Do you feel that this explicit recognition of the jurisdiction of the Indian communities is a sufficient safeguard of that jurisdiction?

Mr. LEWIS. No, we don't. Well, we strongly support section 205, and this is a very, very good thing as far as we are concerned. But our major concern at this point is jurisdiction over non-Indians, we would favor a language which makes this very explicit. And we think the language we have suggested would remedy this situation as far as we are concerned.

Senator HRUSKA. Do you think we have to do a better job?

Mr. LEWIS. Yes. And we think, as I mentioned earlier, that in section 203(b)(3), at the top of page 21 where it says "or to the extent that the local tribe, band, community, Pueblo has tried an offense committed therein by an Indian," we would favor inserting "person" there. And we feel that—well, this language implies that we only have jurisdiction over Indians.

Senator HRUSKA. Very well. Thank you.

Mr. Counsel, have you any questions?

Mr. SUMMITT. No, sir.

Senator HRUSKA. Thank you very much. We will keep in touch with you if there are other points that arise.

Mr. LEWIS. Thank you, sir.

Senator HRUSKA. Our next witness is Mr. Alvin K. Hellerstein, chairman of the Committee on Federal Courts, Association of the Bar of the city of New York, who will speak to us on sentencing practices.

STATEMENT OF ALVIN K. HELLERSTEIN AND ROBERT H. HERMANN, THE ASSOCIATION OF THE BAR, THE CITY OF NEW YORK

Mr. HELLERSTEIN. I am Alvin Hellerstein and with me is Robert Hermann. We are very glad to appear here this morning on a subject that has so interested you, Senator Hruska, and as to which you have made so much of a legislative contribution.

We, this year, made a study of sentencing practices in the local courts of New York.

Senator HRUSKA. First let me say, for the record, that your statement and the report of your bar association on sentencing practices will be printed in the record in their full text.

[The material referred to follows:]

STATEMENTS OF ALVIN K. HELLERSTEIN AND ROBERT H. HERMANN OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

I am Alvin K. Hellerstein and with me is Robert H. Hermann. We are representing the Committee on Federal Courts of the Association of the Bar of the City of New York. I am the chairman of the Committee on Federal Courts and a member of Stroock & Stroock & Lavan, a New York City law firm.

The Committee on Federal Courts is a standing committee of the Association of the Bar of the City of New York. The Committee has nineteen members, appointed to staggered three year terms by the President of the Association upon the recommendation of the chairman. The jurisdiction of the Committee is broad, as broad as the jurisdiction of the federal courts. The membership of the Committee is intended to reflect differing philosophies and specialties in order to bring together as wide and representative a perspective as possible.

Mr. Robert Hermann, a member of the Committee for two years, is head of the special litigation division of the Legal Aid Society of New York City. He chaired a subcommittee of the Committee on Federal Courts that was principally responsible for preparing our report on sentencing disparities in the federal courts in New York City. The report was carefully reviewed by the entire Committee and adopted without dissent. Its publication on June 11, 1973 was noted by articles in *The New York Times* and the *New York Law Journal.* I ask that a copy be appended to the record as an exhibit to our testimony.

We shall also soon be submitting to Hon. J. Edward Lumbard, in conjunction with the Committee on Federal Legislation of the Association, a report on proposed Rule 35 to the Federal Rules of Criminal Procedure, which provides for panels of District Judges in each district to review sentences. This report is subject to review and approval by the membership of the two Committees, so that I will not submit it as an exhibit to our testimony, although we will refer to it in our testimony. When approved, the report on Rule 35 will of course be sent to this subcommittee, and I ask that it then be made an exhibit to our testimony.

In our June 11 report, we concluded that there is an undesirable degree of sentence disparity even within the federal courts in our local area. We made several suggestions for reforms which we believe can be implemented by rule-making or informally at the local level in order to ameliorate the incidence of unwarranted sentence differentials and contribute to more rational sentencing. Mr. Hermann will summarize our findings and recommendations and relate our experience to the matter immediately before this Committee—the review of sentences of federal District Judges either by District Judge panels or by the Courts of Appeals.

STATEMENT OF MR. HERMANN

Our report was divided basically into three parts. In the first part, we considered the question of whether there really was such a phenomenon as sentence disparity, a question about which judges and journalists do not always agree. Based on the available study material—which includes the Federal Offender Datagraphs prepared by the Administrative Office, the recent Law Enforcement Assistance Administration study [pages 3896 to 3912 of Part IV of this Subcommittee's' present hearings], and some data published this year by the former United States Attorney for the Southern District of New York [45 N.Y.S. B.J. 163 (1973)]—we concluded that there is strong evidence of an unjustifiable degree of sentence disparity among similarly situated individuals, both nationally and locally in the federal courts.

The second part of our report surveyed the views of federal judges in our area about sentencing problems. We observed that District Judges overwhelmingly favor some form of sentence review but that there is an uncertain division among judges as to whether review should be by an appellate or by a trial court panel. It was also indicated that slightly more than half of the District Judges believed that only sentences above a specified minimum term should be reviewed.

Furthermore, most judges felt that if the defendant were given a right of sentence review, the government should be given the same right and the Courts of Appeals should be granted the power to increase as well as decrease sentences. I will deal further with these issues later in my testimony.

In the third part of our report, we made some recommendations as to procedures which should be adopted locally to enhance the rationality of the sentencing process. Specifically, we recommended that: (1) the court should hold an informal presentence conference among all interested parties to discuss the desirability of various sentencing alternatives; (2) the sentencing judge should confer with two other judges familiar with the facts of the case to obtain their views before imposing sentence (as is presently done in Brooklyn federal court); (3) the sentencing judge should state on the record the reasons for imposing the sentence that was settled upon; (4) a procedure should be established for judges to be informed on a regular basis of what happened to individuals whom they have previously sentenced; (5) comparative information as to sentences imposed by other judges in similar cases should be computerized and made available to inquiring judges; and (6) more frequent seminars for judges should be held to discuss the problems and alternatives of the sentencing judge. By adoption of such procedures, the report suggests, much of the apparent disparity in sentences could be reduced.

Our Committee felt, however, that any thorough attempt to mitigate the sentence disparity problem required also the taking of action on a national scale. As is shown in the study recently done by the Law Enforcement Assistance Administration, one of the major types of sentence disparity is that which exists among the various circuits throughout the country. An example from the study data is that for defendants with no prior records who are convicted of interstate theft, the percentage who are given prison terms varies from 0% in the Tenth Circuit and 2% in the Sixth Circuit to 15% in the Second, Fifth, Seventh and Ninth Circuits and up to 28% in the First Circuit [page 3901].

Another type of disparity, documented graphically in a recent report by the former United States Attorney for the Southern District of New York, is evident in the types of sentences meted out by different District Courts within the same circuit and even within the same state. Thus, it was shown that the average prison sentence in draft cases was 14 months in Manhattan federal court and 41 months in Brooklyn federal court; in stolen car cases, the average prison sentence is 21 months in Albany federal court and 43 months in Buffalo federal court.

What these figures demonstrate is that there are very pronounced geographical sentence disparities both nationally and regionally. Locally adopted measures, such as those now under scrutiny in the Second Circuit [see "U.S. Courts Act to End Disparity in Prison Terms," *New York Times*, July 5, 1973, p. 1 (Late City Ed.)], may help to ease these problems, but we believe that the only fully effective approach to resolving sentence disparities is to meet the problems directly by providing in some manner for review of sentence decisions.

In the preliminary report which we prepared on the proposed Rule 35, we indicated generally our approval of sentence review by three-judge panels of District Judges. There are many considerations which might support a policy decision to give sentence review power to the trial court rather than the appellate court. For example, the increased workload in criminal cases in recent years has been felt more at the appellate than at the trial court level; the increase in criminal filings in the past three years has been 40% in the District Courts and 59% in the Courts of Appeals. Considering that there would be a much larger number of judges doing sentence review if the District Courts rather than the Courts of Appeals performed the task, it is clear that more time could be spent on each case if the panels contemplated by proposed Rule 35 were established. Furthermore, District Judges who are regularly required to sentence defendants are arguably more likely to have an appreciation of the complexities of the sentencing process than are appellate judges.

Although we would prefer the proposed Rule 35 to the current law of unreviewability, we also believe that for practical and principled reasons review by the Courts of Appeals is the most desirable change that could be made. Our reasons for so thinking are as follows.

First of all, a major shortcoming of any proposal such as that to amend Rule 35 of the Federal Rules of Criminal Procedure to establish three-judge District

Court panels to review sentences[1] is that it would have no effect on the problem of disparities among different districts within the same circuit. Sentence review by the Courts of Appeals, on the other hand, would operate on this problem. (Of course, even with appellate court review, the question of inter-circuit disparities would remain. Arguably, these are more supportable than are the intra-circuit ones, but even disparities from one circuit to another which are as great as those previously cited are surely hard to justify.

Secondly, to quote from an unpublished analysis of the proposed Rule 35 by District Judge Marvin Frankel of the Southern District of New York:

"It is not suitable or comfortable to have district judges sit in review of other district judges. Experience and common sense teach that there are in such an arrangement counterproductive qualities of constraint and embarrassment. This is not a personal matter, but an institutional one . . . Court of Appeals judges are formally commissioned to review district judges. The formality is a meaningful source of reassurance on both sides of the relationship. The best of personal friendships are easily put to one side when the judge of the higher court decides professionally whether to affirm or reverse the lower (and different) court. There are no ambiguities or inhibitions. The situation is quite different when someone from your own court or level is reviewing you or being reviewed by you. There may be feelings of solicitude, discomfort, or leanings-over-backward to resist such feelings. We avoid even the possibility of such problems in provisions for review of everything else by higher courts. We should do at least as much for a subject so potentially laden with emotion as that of sentencing."

Thirdly, if, as we hope, the sentencing process is more and more to become one based on articulated principles of law, it is essential that guidance in the form of judicial opinions be provided to the District Judges. This task is best done by appellate judges, not only because it is a logical extension of their normal duties but also because of the practical factor that opinions by shifting panels of their peers will inevitably be given less weight by District Judges than would be given to appellate opinions.

Fourthly, we question whether the fact that District Judges are regularly involved in sentencing defendants by themselves is an argument in favor of having them be the ones also to review sentences. Of course, many Circuit Judges are former District Judges, and the argument would have less force as to them. Putting that aside, however, there is much to be said for the proposition that it is detachment from rather than intimacy with daily sentencing duties that is needed, both as a check on disparities and as a basis for formulating a law of sentencing. And in any case, the fact that trial judges form certain dispositive opinions based on a defendant's demeanor is an argument not for review by District Judge panels but rather against any sentence review at all.

Turning now to the issue of what sort of national system of appellate sentence review is to be preferred, we believe that the soundest of the bills currently under consideration by this Subcommittee is S. 716, offered now as in three previous Congresses by Senator Hruska and this time co-sponsored by Senator McClellan and others. As you gentlemen know, S. 716 basically would add a new section to Title 18 [§ 3742] granting the Courts of Appeals discretionary power to reduce prison sentences. Perhaps the best way to explain why we think that S. 716 is worthy of passage is first to discuss why we think that the other bills now being examined by the Subcommittee are inadequate.

There presently are two alternate versions in the Senate of a proposed new Federal Criminal Code. They are S. 1 and S. 1400, and both differ substantially from the legislation originally advocated by the Brown Commission. A point-by-point comparison of these proposals with S. 716 is instructive.

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[1] During the appearance before this Subcommittee of former Chief Judge J. Edward Lumbard of the Second Circuit (who is the Chairman of the Advisory Committee on Criminal Rules of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States), some questions were raised about whether the Conference's rule-making power would not be exceeded by the proposed Rule 35. Certainly it is arguable that because of the mechanisms provided by Section 3771 of Title 18 of the United States Code for the delay or prevention of the adoption of procedural rules approved by the Judicial Conference and the Supreme Court, the proposed Rule 35 may properly be initiated in this fashion. It should be conceded, however, that the question of whether the proposed rule is one of "pleading, practice and procedure" (within the meaning of Section 3771) is not free from doubt. It may be that the fact that Congress may prevent or, as it recently did with the proposed Federal Rules of Evidence, delay the adoption of rules approved by the Supreme Court with a view to amendment is sufficient to indicate that the legislative branch is in fact the ultimate arbiter of policy in this area.

The most recent bill to create a new Federal Criminal Code, S. 1400, simply does not provide for any form of sentence review. Consequently, because we support the concept of appellate review of sentences, we are not in favor of the approach taken in S. 1400.

An earlier proposed Code, S. 1, permits appellate review only of sentences in the upper range of imprisonment meted out to dangerous special offenders [§3–11E3]. This bill would thus authorize appellate review only of long sentences and only of some long sentences, since under S. 1 persons could be sentenced to terms of up to twenty years with no review available to them as long as they were not denominated dangerous special offenders. One can readily see how easily the appellate review provisions of S. 1 could be circumscribed. Additionally, the very limited scope of appellate review under S. 1 would preclude its having any real impact on the overall problem of sentence disparities.

The Brown Commission proposal would amend Section 1291 of Title 28 of the United States Code to give the appellate courts jurisdiction to review sentences in criminal cases. However, the Commission purposely refrained from recommending what types of sentences should be reviewable and what procedures should be established for the review process [see page 469 of Part I of this Subcommittee's present hearings]. In previous testimony before this Subcommittee, representatives of the Special Committee of the Association studying the proposed Federal Criminal Code, a committee of which I am also a member, indicated agreement with the general tenor of the Brown Commission proposal [see page 3181 of Subpart D of Part III of the hearing of this Subcommittee].

S. 716 in essence provides for appellate sentence review whenever a prison term is imposed on a defendant in a felony case. We favor this approach allowing for review of all felony sentences to prison because it offers a potential solution to the problem of disparities that is nearly co-extensive in scope with the problem itself. In other words, S. 716 embodies a recognition that even a prison sentence that in absolute terms is not severe can be unjust and substantially disparate with what other persons similarly situated have received.

In connection with the appellate jurisdiction defined by S. 716, we do suggest one change and also raise an additional consideration. The change we propose is the removal of the limitation of sentence review only to "felony" cases. Under the present wording, a defendant convicted of, say, the felony of destruction of mail [§ 1705] who is sentenced to three months in prison could seek review of his sentence, but a defendant convicted of the very similar misdemeanor of destruction of mail [§ 1703] who is sentenced to one year in prison could not obtain review. This, of course, would be an undesirable situation. Simply by excising the word "felony," it could be made clear that the right to seek review of a sentence turns not on the label of crime but on a more relevant consideration, *viz.*, the nature of the sentence actually imposed.

Whether there should be a minimum length of prison term that is reviewable is not answered in S. 716. In our report on the proposed Rule 35, we suggested that the two-year minimum for review there specified be reduced to one year. Similarly, we believe that if appellate jurisdiction under S. 716 is to be keyed to a minimum sentence length, that minimum should be no greater than one year—and quite possibly less, since in the view of many the most critical decision which the sentencing judge makes involves the type of sentence (prison or probation) rather than its length. [See American Bar Association Project on Minimum Standards for Criminal Justice, *Sentencing Alternatives and Procedures* 72–73, approved Draft 1968).]

Secondly, the Subcommittee might wish to consider some limiting language to indicate that there would be no right to sentence review in cases where there was a negotiated guilty plea with a promise by the judge of a certain sentence or range of sentence. Whether to add such qualifying language depends in part, of course, on this Subcommittee's estimate of the likelihood that the two-year old proposal to amend Rule 11 of the Federal Rules of Criminal Procedure to establish sentence bargaining in the federal courts will be approved [see 52 F.R.D. 415–431].

The various proposals for appellate review now before this Subcommittee differ on whether there should be some preliminary procedure for screening sentence appeals by establishing a leave or a certiorari requirement. Once again, the Brown Commission did not attempt to grapple with this question. In S.1, there appears to be a right to review without any screening procedure. With S. 716, a defendant must first obtain leave of the Court of Appeals before that court may examine the merits of the sentence to determine whether it is excessive.

The purpose of the leave requirement, as previously stated by Senator Hruska [see "Appellate Review of Sentences," 8 Am.Crim. L.Q. 10, 13 (1939)], is to serve as a control valve on the volume of sentence appeals, many of which, it is feared, are likely to be devoid of arguable merit. We do not believe that such a control valve is necessary and we have serious reservations about the likely effectiveness of leave procedure in accomplishing the intended goal of alleviating the tasks otherwise added by the bill to the Courts of Appeals.

Establishment for an appellate court of a screening process, in the nature of a requirement that leave or certiorari first be obtained, makes the greatest amount of sense where it is readily possible for the reviewing court to separate the substantiality of the issues in a case from the actual merits of that case. Thus, under the Supreme Court's certiorari jurisdiction [28 U.S.C. §§ 1254, 1257], the Court may consider the importance of a case apart from the merits of the lower court's ruling. Likewise, in habeas corpus actions by state prisoners, the Court of Appeals, in ruling upon the application for a certificate of probable cause [28 U.S.C. § 2253], weighs the substantiality of the legal issues involved without a full-dress factual presentation [see Blackmun, *Allowance of In Forma Pauperis Appeals in Section 2255* and *Habeas Corpus Cases*, 43 F.R.D. 343, 352–353 (1968); Zeigler & Hermann, *The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts*, 47 N.Y.U.L.Rev. 157, 220–221 (1972)].

On the other hand, the problem that we have with using the leave procedure for sentence appeals is that the preliminary question which the appellate court must answer is identical to the ultimate question on the merits which it must answer, *viz.*, whether the sentence is excessive. Consequently, any capable lawyer will treat the presentation of the leave application with precisely the same degree of care and detail as he would devote to a full brief on the merits. In the absence of articulated standards for granting or denying leave—an absence which at least initially is inevitable without a legislative declaration of the controlling principles of a substantive law of sentencing—the only time saved by allowing the appellate courts to refuse to review a sentence is that which would be spent in oral argument. This may in fact be no saving, since many appellate courts allow oral argument only at their request and the others could certainly adopt rules to this effect for sentence appeal cases, since we doubt that oral argument would be helpful to the court on issues of sentence. Balanced against the dubious saving of time for argument must be considered the fact that for those cases which are ultimately reviewed on the merits, the leave procedure makes the appellate process *more* cumbersome than it would otherwise be.

In addition, we think it undesirable as a matter of policy to employ the leave procedure only in cases where there was a guilty plea, a suggestion which the American Bar Association discusses somewhat ambivalently [see *op. cit. supra* at 35–14]. Our reason for this position is simply that the primary aims of the review process are to correct individual injustices and to minimize instances of disparity, and there is every reason to believe that these problems are qualitatively the same and thus quantitatively greater in guilty plea as opposed to trial cases. Therefore, no differentiation between the two types of cases with respect to access to appellate review is warranted.

The most complicated and certainly the most divisive sub-issues of the question of appellate review of sentences are first, whether the government as well as the defendant should be permitted to appeal the sentence and second, whether the appellate court should be empowered to increase the sentence. Here again, the various bills before this Subcommittee differ. It was the position of the Brown Commission that the appellate courts ought not be given the power to increase sentence. [See Working Papers, volume II, p. 1335.] As introduced by Senator Hruska, S. 716 permits neither appeal by the government nor an increase of the sentence on appeal; however, the bill's co-sponsor, Senator McClellan, said at the time of its introduction that he could not support its enactment unless it were made "more even handed . . . to provide for prosecutor appeal and the increase of inadequate sentences." [Congressional Record, vol. 119, no. 18, p. 8 (February 1, 1973).] Under S. 1, the government has a right to appeal the sentence wherever appeal is authorized (that is, only in dangerous special offender cases), and if the government does elect to do so the appellate court can increase the sentence and impose any sentence that the trial judge could originally have fixed.

One of the primary reasons why we do not favor the granting of power to increase sentences or a right of prosecutorial appeal is the belief that these would inevitably operate to prevent defendants from taking sentence appeals in many

arguably meritorious cases because of their fear of receiving an increased sentence instead. An attempt is made in S. 1 to remove this possible apprehension by permitting a sentence increase only if the government seeks it and by specifying further than the government's notice of appeal must be filed at least five days before the defendant's time to appeal expires. Thus, the government would be barred from making its decision on whether or not to seek a sentence increase turn on whether the defendant were seeking a decrease. However, S. 1 also permits the government to withdraw its appeal later on and thereby to foreclose the possibility of an increased sentence. These two provisions may, in some cases, induce the government first to seek a sentence increase and then offer to withdraw same, as a lever to discourage a defendant from filing his own petition seeking review to obtain a decrease of sentence.

Such possibilities are admittedly remote, but they must nonetheless be considered in determining whether authorizing the Courts of Appeals to increase sentences could be done constitutionally, a question which we suggest is far from clear. Two cases decided this past term by the Supreme Court suggest to us that a major consideration affecting the question of the constitutionality of any statute authorizing the imposition of an increased sentence on appeal is whether it could create on the defendant's part a reasonable apprehension of vindictiveness which would deter the exercise of the right to seek a reduction in sentence [*Michigan* v. *Payne*, 93 S. Ct. 1966, and *Chaffin* v. *Stynchcombe*, 93 S. Ct. 1977]. It seems to us that S. 1 creates this risk. [But see *Robinson* v. *Warden, Maryland House of Correction*, 455 F.2d 1172 (4th Cir. 1972).]

Similarly, no federal court has yet ruled on the precise issue of whether an appeal by the prosecutor on the question of sentence would infringe the Double Jeopardy Clause of the Fifth Amendment. The recent testimony before the Subcommittee of Professor Hall of Harvard indicates that the American Bar Association now believes the answer to that question to be relatively clear and in the negative by virtue of a 1970 decision by the Supreme Court [*Price* v. *Georgia*, 398 U.S. 323], but, as lawyers often do, we disagree and believe that the question is still an open one.

Leaving aside questions of constitutionality which for the present time are insoluble, we think that it would nonetheless be undesirable as a matter of policy to vest in the appellate courts the power to increase sentences. If sentence increases on appeal were authorized in the absence of an appeal by the government on the sentence issue, the fear of an increase would prevent the taking of many appeals, and those defendants whose sentences were increased might feel entrapped and be less amenable to therapeutic correctional efforts. On the other hand, if prosecutorial appeals on sentence were permitted, the government would again be enmeshed in a role which, as Senator Hruska has noted [*op. cit. supra*, 8 Crim.L.Q. at 14], the Department of Justice wisely abandoned many years ago. Today, the government's removal of itself from the sentencing process is a matter of public expectation the alteration of which might adversely affect the popular perception of the even-handed administration of justice. It is interesting to observe that in my state, where there has long been statutory power in the appellate courts to reduce "unusually harsh or severe" sentences [New York Criminal Procedure Law §§ 470.15 and 470.20], there has not been any serious movement to grant the courts the power to increase sentences as well, despite the variety of solutions that have been offered to the mounting crime problem.

The effect of prosecutor appeals and the possibility of a sentence increase on other areas is hard to foretell. For example, consider the impact on the prevalence of guilty pleas, which in fiscal 1972 accounted for 85% of all dispositions in federal criminal cases. In federal practice today, for reasons that are not wholly clear, the vast majority of defendants plead guilty, even in the absence of a promise of a certain sentence from the court or a promise of a certain sentence recommendation by the government to the court. If one were to add to the defendant's and his lawyer's state of uncertainty about the likely sentence from a particular judge the fact that the government might ask to have the sentence raised on an appeal to a panel of judges whose identity the defendant could only guess at, many persons who are admittedly guilty and in whose best interests it would be to admit their guilt would instead be persuaded to gamble on the vicissitudes of a trial. Such possibilities suggest that one should move with caution in the area of prosecutorial sentence appeals, since there is little experience with this type of provision in this country. Additionally, the number of sentences that an appellate court may vote to increase will no doubt be few, and it does not seem worth it to involve the proposal for review of sentences with

the controversies that will arise from a provision allowing the prosecutor to appeal.

One of the aims of appellate sentence review would surely be to encourage the growth and articulation of substantive principles. By itself, however, the institution of appellate sentence review will have little effect on the development of a federal body of jurisprudence as to sentencing. The experience which Professor Hall reported with respect to his home state of Massachusetts I think is true of mine as well: even where the appellate courts have the power to alter sentences, the principles which govern their judgment have not emerged as a body of law because opinions have rarely been written in the cases where sentences have been modified. S. 716, which would require the Courts of Appeals to state their reasons whenever a sentence is modified, would correct this undesirable silence and would likely cause the gradual development and pronouncement of some substantive principles of sentencing. Hopefully, this would lead eventually to the codification by the Congress of some "meaningful . . . specific legislative declarations of the principles justifying criminal sanctions," which, as Judge Frankel again has forcefully pointed out, are so sorely needed. [See his article reproduced at pages 3923 to 3976 of Part IV of this Subcommittee's hearings.] We would just add that S. 716 should be amended to indicate expressly that the appellate court's statement of reasons must be put in writing, as is of course necessary if the rendering of opinions is to have the intended effect just discussed. This further requirement should not prove overly burdensome to the courts, since experience in other jurisdictions indicates that even when given the power to modify sentences appellate courts exercise it rather sparingly [see page 1592 of Part III, Subpart B of this Subcommittee's hearings].

One of the arguments most frequently advanced in opposition to appellate review of federal sentences is that the Courts of Appeals' dockets are already very congested. Undoubtedly the statement is true, but it is also true as to the District Courts and, in any case, the scarcity of resources should not end the matter. If some form of federal sentence review will be established in the near future, as I think will happen, the chief question is whether that review power should and will be vested in the Court of Appeals or, as the proposed Rule 35 would have it, in panels of District Judges. It should be clear that in either case some amount of additional resources will have to be provided. We feel, as did the District Judges in New York whom we surveyed by a four to three margin, that the place where the resources should be committed for sentence review is at the appellate level. As Senator McClellan said in introducing S. 716, "We must not refuse to do justice for a lack of courts. Court congestion is a reason to move with care. It is not a reason to fail to act." [Congressional Record, vol. 119, no. 18, p. 8 (February 1, 1973)]

To summarize what has been said, it is our view that Congress should act promptly to vest in the Courts of Appeals power to reduce federal prison sentences. We feel that toward this end S. 716 is clearly the bill most deserving of the Subcommittee's approval, with the slight modifications we have suggested.

The Association of the Bar of the City of New York Report on Sentencing Practices in the Federal Courts in New York City

by committee on the federal courts

The legal profession has for many years debated the issue of irrational sentence disparity, and the subject has recently become one of popular concern as well.[1] Much of the discussion of this topic has proceeded on the simplistic assumption that sentence disparity is a readily recognizable and clearly undesirable phenomenon. The problem, however, is infinitely more complex than that, and reasonable men differ not only on what can and ought to be done about sentence disparity, but also on whether it is desirable and, indeed, whether it even exists.

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[1] See, *e.g.*, Leslie Oelsner's far-ranging and thoughtful front-page series of six stories that ran in *The New York Times* between September 26 and October 3, 1972; K. Davis, *Discretionary Justice* 134 *passim* (1969); compare N. Sobel, "Sentencing Disparity 'Grossly Exaggerated,'" N.Y.L.J., December 12, 1972, p. 4. Chief Judge Kaufman of the Second Circuit, while on the Southern District bench, was one of the first to write about the disquieting problems facing the sentencing judge in this area. See "Sentencing: The Judge's Problem," in *Atlantic Monthly* (January 1960), excerpted in N.Y.L.J., November 7 and 8, 1972.

This report deals with the issue of sentence disparity, focusing particularly on the District Courts located within New York City. It will present the results of some surveys (one of which, see Appendix A, was taken by us) of the views of local District Judges on problems of sentencing. Several possible reforms of existing practices are suggested, with an emphasis on those which can be implemented merely by the promulgation of local rules or even by informal adoption of new procedures.

Modern penology, the Supreme Court has said, takes the view that the punishment should fit the criminal as well as the crime.[2] Such an approach, it was postulated, would permit an effective mode of rehabilitation to be individually tailored to each offender. Today, however, it is common ground that this theory is a legal fiction and that prisons do not rehabilitate; they punish and they isolate offenders, and that is all they do.[3] A growing awareness of this reality has produced a call for uniformity in sentencing, the lack of which is frequently cited as a cause of prisoner unrest.[4]

What is meant by uniformity in sentencing is not identity of sentences for the same offense. Even if prisons do no more than punish and isolate offenders, more or less punishment and isolation may be called for among those who have committed the same crime. Rather, the point of the criticism is that the task of evaluating the need for punishment and isolation involves the gauging of community norms and requires scant judicial expertise. Once this reality is confronted, the rationale of individualization and the claimed need for judicial discretion become less compelling. Many of the complaints urged today under the heading of "disparity in sentencing" reflect skepticism about the success of past efforts at individualizing sentences under the guise of a rehabilitative program. They lead in the direction of a return to a rougher but arguably more egalitarian method of dispensing criminal sanctions. The sentencing judge, once conceptualized visionarily as akin to a physician who possesses expert powers of diagnosis and knowledge of a broad range of available treatments, is now seen more as a part of the political process from whom more relevant considerations of equality and consistency in treatment may be demanded.

Many studies have shown that courts have meted out disparate sentences for the same crime; no study of which we are aware, however, has conclusively documented the thesis that there is disparity in sentencing unrelated to factors which the courts are authorized to consider. In other words, one cannot say with assurance that variations in sentences for the same crime are not due to the variant admixture of factors which judges are legally permitted to take into account at sentencing. Once having stated that agnostic proposition, however, it becomes necessary to add with emphasis that the matter cannot be allowed to end there.

The state of uncertainty about disparity *vel non* is a product of two limiting factors, one legal and one factual. The legal impediment to meaningful comparison is the fact, recently underscored with eloquence by Judge Marvin Frankel of the Southern District of New York, that federal law does not enumerate what the goals of the sentencing process are.[5] As a result, when one looks at a sentence to determine whether it is out of line with other sentences, it is nearly impossible to undertake an analytical evaluation without knowing whether it is isolation or general deterrence or rehabilitation, or any combination thereof, that is the yardstick. Likewise, the absence of guiding principles means that one cannot state, except by means of subjective judgment, the factual considerations to which a court may properly accord weight at the time of sentence.

However, even if the above objections were satisfied by the enactment of sentencing criteria, with ensuing development of interpretive case law thereunder, still—and this is the second impediment to meaningful comparison of sentences—many legitimate factors would be incapable of measurement. Surely, for example, contrition and repentance are matters which courts properly do and likely always will consider at the time of sentence; they are relevant to the need for deterrence of crime by the individual before the court and the likelihood of his rehabilitation. But, it is submitted, these are intangibles which cannot be

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[2] *Williams* v. *New York*, 337 U.S. 241, 247 (1949).

[3] See the McKay Commission Report, *Attica* (Bantam Books 1972); see also n. 47, *infra*.

[4] *Id.* See also, "Federal Judge Urges Coordination in Sentencing by U.S., State Courts," N.Y.L.J., Nov. 30, 1972, p. 1.

[5] Frankel, "Lawlessness in Sentencing," 41 U. Cin. L. Rev. 1, 41–48 (1972).

quantified. Nonetheless, to ignore such matters in a study of sentence disparity is clearly to skew the findings.

Several recent attempts have been made to document disparity in sentencing in the federal courts. Using national data from the federal system, the Law Enforcement Assistance Administration completed a study in October, 1972 using sophisticated techniques of statistical analysis.[6] It showed that for ten listed types of crimes, there was a significant variation among the eleven circuits as to type and length of sentence. Within given circuits, however, there was found to be substantial consistency in sentencing when the crucial variable of prior criminal record was taken into account. Prior record, sex, age and, to a lesser extent, race were found to be correlated to length of sentence. Only one of each such variables, however, was held constant at any given time. One therefore cannot properly draw from the study the conclusion that people who are similarly circumstanced in all legally pertinent respects are being treated dissimilarly. (For example, blacks who commit bank robberies may receive on the whole longer sentences than whites who commit bank robberies, but it is not shown that the relevant members of the two racial groups are similar in pertinent respects other than the crime committed—*e.g.*, age and prior record.) Indeed, no such claim was made, and the study report clearly pointed out that "information on defendant attitudes and general behavior" and "all the physical, social and psychological characteristics that could influence the sentencing process" have not been evaluated.[7]

Using local data, the United States Attorney for the Southern District of New York recently issued a report on sentence disparities in that court. It showed that at sentencing, white collar crimes (*e.g.*, securities fraud and bank embezzlement) were treated less harshly than the arguably comparable "common crimes" (here, securities theft and bank robbery);[8] what conclusions might instructively be drawn from this observation were not stated. The study also sought to show a wide divergence in sentencing practices among the judges in the district, but there is not enough data to support that broad a conclusion.[9] It pinpoints the fact that in the Southern District as compared with the federal system as a whole, the likelihood of imprisonment is greater for most specified crimes (*e.g.*, postal embezzlement, securities fraud and draft violations), but the average length of prison sentences is substantially less (with the exception of narcotics crimes). Again, however, no more refined data are forthcoming; only purportedly illustrative case histories, which are of limited persuasive value, are offered.

Although the proposition that there is irrational disparity in sentencing has not been yet proven empirically, there is nonetheless widespread sentiment that there is a more than desirable degree of variation among sentences meted out by courts for the same or comparable crimes. The statistics, although they do not conclusively demonstrate irrational disparities, are still too strong not to leave one with the clear and uneasy feeling that there is a great lack of uniformity in sentences. As will be shown below, there are numerous sources, or "types," of disparate sentences, and the attempt at equalization often of necessity encounters very real political stumbling blocks.

To begin with, there is disparity according to jurisdiction and geography. Sentences imposed by American courts are generally considered to be the harshest in the world.[10] Within this country, the type and length of sentence for comparable offenses vary even within different parts of the same state. (For example, it is generally believed that in New York, people convicted upstate get harsher sentences than those convicted of the same offense in New York City.) Interstate variation may be evident in several possible permutations and combinations; to use New York State again as an example, there are four state judicial depart-

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[6] The study is reprinted in Part IV of *Reform of the Federal Criminal Laws* (Hearings before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary), 92d Cong., 2d Sess., 3896–3912.

[7] *Id.* at 3897.

[8] See *The New York Times*, January 14, 1973, p. 41 (Late City Ed.), reporting on the results of the "1972 Sentencing Study Southern District of New York" (hereafter "the Seymour Report"), reprinted in 45 N.Y.S. B.J. 163 (1973).

[9] Two examples are offered. A compilation of sentences in draft cases is based on too small a sample to be statistically significant; of twenty-five judges studied, only three had sentenced more than seven defendants. (See Exhibit B.) The table illustrating the likelihood of imposition of a prison sentence in inside postal theft cases over a five-year period (Exhibit C) is more nearly persuasive, but that is only one offense and the discussion fails to consider any of the variables other than the type of crime.

[10] Frankel, *op. cit. supra* n. 5, at 1–2 & n. 3.

ments, four federal districts, and variations on a county basis within each of these areas in the same state.[11] Disparities are thought to be most pronounced from one state to another, and although the federal system is theoretically unitary, wide divergences in sentences for the same offenses were noted in the recent LEAA study.[12]

Even within the same court, disparities are readily observable.[13] It is an essential part of the upbringing of any criminal practitioner to learn the sentencing practices of each judge before whom he may appear, and this is especially true in the federal system because of the general unavailability of a pre-pleading sentence commitment from the court. In addition, there are other, less discernible types of variation within a court, for not only do different judges have different sentencing practices, but also the practices of a single may vary from case to case and from time to time. As the United States Attorney for the Southern District of New York recently concluded: "There are plain indications that white collar defendants, predominantly white, receive more lenient treatment as a general rule [in that court], while defendants charged with common crimes, largely committed by the unemployed and uneducated, a group which embraces large numbers of blacks in today's society, are more likely to be sent to prison." [14] It is also evident that over a period of time, there are discernible changes nationally and locally in the type and length of sentence imposed. For example, in a recent five-year period ending in 1971, the percentage of persons given a prison term declined in fourteen out of seventeen selected federal offenses and remained unchanged for two of the other three offenses.[15] Finally, there is the possibility—debate centers on whether it is frequently an actuality—that the same judge, confronted with the same crimes and defendants with similar backgrounds, will impose widely differing sentences for reasons that are not and perhaps cannot be articulated.

The defensibility and, conversely, the difficulty of correcting a particular type of sentence disparity is directly proportional to its scope. In other words, sentence variations among distant geographic regions is both arguably justifiable (*e.g.*, the desirability of having sentences reflect regional norms) and exceedingly difficult to prevent without Supreme Court review of sentences. At the other extreme are variations by a single judge or differential treatment from judges on the same court; variability is difficult to justify and should be more readily able to be minimized, either by improvement of the information flow to the court or by establishment of a review procedure. The most difficult questions as to justification and solution are perhaps presented by the sort of gross disparity in sentence type and length for the same offense evident, for example, among the four federal judicial districts within the State of New York and, indeed, even between the two federal courts located within a mile of each other in New York City.[16]

From recent pronouncements of the Supreme Court, it seems reasonably clear that the allowance of differential sentencing, assuming that disparity could be proven to exist, would be assessed under the loose equal protection standard to determine whether it could "be shown to bear some rational relationship to

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[11] See, *e.g.*, Exhibit D to the Seymour report, which shows a remarkable variation in length of prison sentences for selected offenses within the four federal districts in New York. To cite some examples, in the Northern District the average prison sentence for a Dyer Act violation is 21 months, and in the Western District it is 43 months; in the Northern District, the average prison sentence for forgery is 15 months, whereas in the Eastern District it is 37 months; in the Northern District, the average prison sentence for a draft violation is 48 months, whereas in the Southern District it is 14 months. 45 N.Y.S.B.J. 168.

[12] See note 6, *supra*. For example, among those convicted of postal theft with no prior criminal record, 28% in the Second Circuit get a prison sentence, versus 8% in the First Circuit, 2% in the Third Circuit, and 0% in the District of Columbia Circuit. (Table 4a, at p. 3901).

[13] With regard to the Southern District, see the Seymour Report at p. 168 and Exhibit C. at p. 169.

[14] *Id.* at 164; see also the illustrations given *id.* at 167–169.

[15] Administrative Office of the United States Courts, *Federal Offender Datagraphs* (1972), at A–18, A–19. One frequently cited cause of unrest among "old law" prisoners in New York State (*i.e.*, those who committed offenses prior to the September 1, 1967, effective date of the new Penal Law) is the fact that sentences in those times were much harsher than the sentences authorized and imposed for the same offenses since then.

[16] See note 11, *supra*. In the Eastern District, the average prison sentences, according to the Seymour Report, are substantially higher than in the Southern District. Examples offered are stolen motor vehicles (51 months versus 31 months), Selective Service violations (41 months versus 14 months), and robbery (152 months versus 100 months).

legitimate [governmental] purposes." [17] Constitutionally speaking, therefore, it is only wholly irrational disparity that is invalid. Traditionally, the approach of most federal Courts of Appeals to correction of excessive sentences has been to intimate, sometimes none too subtly, that on remand the District Court possibly should grant a motion under Rule 35 to reduce the sentence.[18] As yet, however, reduction of a federal sentence by an appellate court on the ground of disparity has been a rarity.[19] Likewise, in those cases where appellants have sought to show statisticaly that there was a discriminatory disparity in the court's sentencing policy, their arguments have met with little success.[20] As yet, however, no in-depth study of the sentencing process, giving consideration to all legitimate variables, has been presented in litigation to buttress an equal protection argument about disparity, and that avenue of attack on the problem does not yet appear foreclosed.

There is good evidence from several recent polls that District Judges on the whole would willingly yield some of their presently vast sentencing prerogatives to further the goal of uniformity. Ten years ago, District Judges in the Second Circuit voted 31 to 5 in favor of some form of sentence review.[21] This year, District Judges in the First and Second Circuits also voted 24 to 7 in favor of some form of sentence review,[22] and District Judges in only the Southern and Eastern Districts voted 20 to 4 in favor of some form of sentence review.[23] Thus, it is clear that District Judges in this area overwhelmingly favor the sharing of their responsibility for the imposition of sentences.

In 1962, District Judges in the Second Circuit voted almost unanimously (34 to 2) that if there were to be sentence review, it should be done by the Court of Appeals. However, among federal judges in the Southern and Eastern Districts of New York alone, twelve favored review by the Court of Appeals and nine favored review by a District Court panel, and in each group two-thirds felt the reviewing standard should be "only for clear abuse of discretion." Thus, there is an uncertain division of opinion among federal judges locally as to which court should be vested with the jurisdiction to review sentences.[24]

If there is to be sentence review, most federal judges feel it should be available only if a specified minimum term is imposed. In 1962, 26 out of 38 judges in the Second Circuit who said they favored sentence review said only sentences of a year or more should be reviewable. At the 1973 Sentencing Institute, more than half of the District Judges (18 out of 34 who voted) from the First and Second Circuits felt that there should be sentence review only on sentences above a certain minimum term.

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[17] *San Antonio Independent School District* v. *Rodriguez*, U.S. ——, 93 S. Ct. 1278, 1284 (March 21, 1973); see also, *McGinnis* v. *Royster*, U.S. ——, 93 S. Ct. 1055, 4261 (February 21, 1973) ("only some rational basis"). Equal protection concepts are applicable to the federal government via the Due Process Clause of the Fifth Amendment. *Bolling* v. *Sharpe*, 347 U.S. 497 (1954); *Bolton* v. *Harris*, 395 F. 2d 642 (D.C. Cir. 1968).

[18] See, *e.g.*, *United States* v. *Walker*, 469 F. 2d 1377 (1st Cir. 1972), and cases there cited; see also *McGee* v. *United States*, 465 F. 2d 357 (2d Cir. 1972). The language in such cases indicates that the appellate courts were concerned with excessiveness in the sense of disparity, not excessiveness *per se*. See also, *United States* v. *Brown*, Slip op. 3737 (2d Cir. Docket No. 73–1058, May 23, 1973).

[19] In *United States* v. *McKinney*, 466 F. 2d 1403 (6th Cir. 1972), the Court of Appeals twice essayed the technique adopted in *Walker*, *supra* n. 18, to persuade the lower court to reduce a five-year sentence in a draft case. Both times the District Judge refused to change the sentence. On the third go-round, the appellate court itself lowered the sentence to one year, thus releasing the defendant at once. The court added: "It is a well known fact that disparity in sentencing causes considerable resentment among prison inmates and it is made worse when the disparity exists in the same Circuit." *Id.* at 1404.

[20] See *United States* v. *McCord*, 466 F. 2d 17 (2d Cir. 1972), and Judge Feinberg's dissent, *id.* at 21–24; *United States* v. *Meyers*, 446 F. 2d 37 (2d Cir. 1971); see also, *United States* v. *Mitchell*, 392 F. 2d 214, 217 (2d Cir. 1968), *cert. denied*, 386 U.S. 972 (1969) ("Sentences should not be meted out on the basis of a comparison study . . .").

[21] See "Appellate Review of Sentences" (Symposium at the Judicial Conference of the United States Court of Appeals for the Second Circuit, September 24, 1962), 32 F.R.D. 249, 319 (hereinafter "1962 Conference"). Seven of eight Circuit Judges also voted for some sort of review. *Id.*

[22] This vote was taken on January 13, 1973, the final day of a three-day Sentencing Institute for District Judges in the First and Second Circuits held in Crotonville, New York and arranged by Judge Harold Tyler of the Southern District of New York and Judge Frank Murray of the District of Massachusetts (hereafter "1973 Institute").

[23] This Committee sent a questionnaire on sentencing to all of the forty-five active and senior District Judges on the two courts and received twenty-seven responses (hereinafter "1973 Questionnaire"). For a summary of responses, see Appendix A.

[24] The A.B.A. believes that review should be by the Court of Appeals. See A.B.A. Project on Minimum Standards for Criminal Justice, *Appellate Review of Sentences* § 2.1 (Approved Draft 1968). On the other hand, the recently proposed amendments to Rule 35 of the Federal Rules of Criminal Procedure call for sentence review by a panel of the District Court (see n. 29, *infra*).

A large majority of federal judges believes that sentence review should be available to the Government as well as the defendant.[25] An even larger percentage believes that the reviewing court should have the power to increase as well as to decrease the sentence if the defendant appeals on the question of his sentence,[26] even though this possibility raises serious constitutional questions.[27]

Legislation by Congress in the sentencing area has in recent years been directed by and large at increasing the number of dispositional options available to District Courts. There has been little if any change, by statute, federal rule or otherwise, in the nature of the sentencing process itself. The Congress has historically been indifferent to proposals for appellate review of sentences. The most recent Administration draft of the proposed Federal Criminal Code has retreated from provisions in earlier drafts which would have instituted appellate review of sentencing,[28] and prospects for passage of this perennial proposal for reshaping the sentencing process are now unclear. If the responsibility for decision-making in sentencing in the federal courts is to become within the near future a shared one, this will probably have to be done by national or local rule.

One promising development along these lines is the proposal presently before the Judicial Conference for nonappealable review of sentences by a panel of three District Judges.[29] This proposal is likely to stir a great amount of constructive discussion among federal judges, and whether it will suffer the same fate as previous bills for appellate review by the Courts of Appeals cannot presently be foreseen. Without here delving into the specifics of the proposed rule, it can nonetheless be said that the review mechanism will likely have the effect of ameliorating the likelihood of sentence disparity and deserves sympathetic consideration.

In addition to post-sentencing review effectuated by national rule, there is room for reform on the local level of the sentencing process prior to judgment.

(1) One suggested change, presently in use in the Eastern District of New York and two other districts in the country, is the use of three-judge sentencing conferences ("panels").[30] Basically, the system works as follows: One day a week is scheduled for sentencing conferences. Five days in advance of the conference, the sentencing judge delivers to the two conferring judges a copy of the presentence report and a form on which the judges are to mark their proposed sentence in advance of the conference. At the conference, the Chief Probation Officer is also present, and a discussion as to the appropriate sentence ensues. Ultimately, the decision is made by the single judge assigned to the case, who then reports to the Chief Judge as to his initial proposed sentence, the proposals of his two conferees, and the final disposition.

Available evidence shows that the sentencing panel procedure reduces disparity within the court and produces on the whole shorter prison sentences and more frequent use of probation.[31] In a sampling conducted in the Eastern District of New York covering a period of five years, it was shown that the sentencing judge altered his originally proposed sentence in 41% of the cases, and of these cases

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[25] The voting in favor of this proposition was 24 to 14 at the 1962 Conference, 19 to 11 at the 1973 Institute, and 14 to 8 on the 1973 Questionnaire.

[26] The voting on this question was 26 to 10 at the 1962 Conference, 28 to 4 at the 1973 Institute, and 18 to 3 on the 1973 Questionnaire. (Of the 18 in the last group, 7 would limit the court's power to raise the sentences to cases where the Government requested that relief.)

[27] See *North Carolina* v. *Pearce*, 395 U.S. 711 (1969).

[28] See, *e.g.*, Part I of Hearings before the Subcommittee on Criminal Laws and Procedure of the Senate Committee on the Judiciary, 92d Cong., 2d Sess., *Reform of the Federal Criminal Laws* 469. Such a provision was part of all drafts of the proposed Code until the introduction of the official Administration version. S. 1400 (93d Cong., 1st Sess.). This bill was presented by Senators Hruska and McClellan on March 27, 1973, presumably as a replacement for the draft they had introduced shortly before on January 4, 1973, which had provided for appellate review. See S. 1 (93d Cong., 1st Sess.), § 3–11E3(a). The subject of appellate review is thoroughly and concisely discussed in Frankel, *op. cit. supra* n. 5, at 23–28.

[29] In January, 1973, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States issued its Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure in which it suggested this drastic change in Rule 35 which would, in essence, create a panel system with three District Judges who would have power to reduce or modify (but not increase) all prison sentences of two years or longer. See Preliminary Draft, at 15–24.

[30] The other two are the Eastern District of Michigan (Detroit) and the Northern District of Illinois (Chicago). See Mishler, "The Sentencing Panel Procedure: How It Works In Eastern District," N.Y.L.J., January 24, 1973, p. S2, from which the descriptive material that follows is drawn.

[31] Frankel, *op. cit. supra* n. 5, at 21. At the 1973 Institute, Dean Abraham Goldstein of the Yale Law School spoke of the collegial system as producing a "regression to the mean."

the sentence ultimately imposed was, four times out of five, a lesser one than the sentencing judge had originally proposed.[32]

Despite this evidence, and despite the virtually unanimous praise for the collegial sentencing system by those judges who have participated in it, there has been a great deal of resistance, especially among older judges, to the establishment of sentencing panels in the Southern District of New York and elsewhere. Of the twenty-three District Judges responding to our poll on this subject, a majority (57%) did not favor instituting a sentencing panel procedure within the Southern District.[33] Judge Frankel hypothesizes that the two reasons for this opposition are the belief that the panel procedure would impinge on the judge's independence and the conviction that it would be a waste of time; he further points out that neither view is defensible or even borne out by experience.[34]

We recommend that the Southern District of New York establish on an experimental basis the advisory sentence panel procedure. Few things that federal judges do are more important or require a more finely tuned judgment than the imposition of sentences, and the time spent in sentence evaluations and conferences is small by comparison with the possible gain in uniformity of sentence practices. Collegial conferences are especially needed and are least open to objection in the bulk of the cases where the defendant has pleaded guilty, since in the usual guilty plea situation all that the sentencing judge knows that may not be known to the conferring judges is what he derives from the defendant's demeanor during the taking of the plea, and we doubt that this can be of any appreciable significance. Collegial conferences are especially important in large courts such as the Southern District of New York where, more so than in smaller District Courts, informal exchanges of views among all the judges are at best uncertain to occur.

(2) It is equally essential for the court to have a frank interchange with counsel for both sides. A common complaint of lawyers is that there is no meaningful opportunity for defense counsel to discuss openly with the court the alternative dispositions available at the time of sentencing. By consensus, the value of the constitutional right of allocution is much over-rated because, most lawyers feel, judges generally have settled upon the appropriate treatment to give to a defendant in advance of the sentencing. Even with liberalized disclosure of presentence reports,[35] there is still a great deal of resistance by judges to revealing their contents to counsel,[36] and consequently counsel's arguments and suggestions given at the time of sentence, whether impassioned or otherwise, are often not addressed to the matters which are in fact influential on the court's decision.

We recommend that in addition to collegial sentencing conferences, there should be adopted, by formal rule of court or, failing that, by individual judges, a practice of having pre-sentence conferences to discuss alternative courses of action with respect to sentencing.[37] This conference would not be in open court and not on the record. It would be attended by the defendant,[38] his counsel, the Assistant United States Attorney,[39] possibly the Probation Officer (if there were no later collegial panel discussion at which he would be present), and, of course, the judge. Hopefully the court would, in such an informal setting, encourage, receive and partake in a frank discussion of what sentence is appropriate. It would

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[32] Mishler, *op. cit. supra* n. 29. Chief Judge Mishler observes that the sentencing panel is a "valuable tool" for reducing disparity.

[33] The Court of Appeals, on the other hand, has said that "we regard the operation of the sentencing panel as a sensible and imaginative approach to the problems of sentencing in the district court . . ." *United States* v. *Brown*, — F. 2d —, — (Slip op. 827, 835, 2d Cir. Docket No. 72–2063, December 6, 1972).

[34] Frankel, *op. cit. supra* n. 5, at 21–22.

[35] See Fed. R. Crim. P. 32(c)(2); see also, Proposed Amendments to Criminal Rules, 52 F.R.D. 409, 452 (1971), which would mandate disclosure.

[36] This resistance was viewed "with dismay" by the Second Circuit in *United States* v. *Brown*, supra n. 33.

[37] This proposal was advanced by Murray Mogel, Chief of Operations of Federal Defender Services in the Southern and Eastern Districts of New York at the 1973 Sentencing Institute, and by Robert Kasanof, Attorney-in-Charge of the Criminal Defense Division of the Legal Aid Society, in a speech on sentencing at the Association on February 15, 1973. Former Chief Judge Lumbard expressed a similar proposal in his concurring opinion in *United States* v. *Frazier*, — F. 2d —, — (Slip op. 3629, 3636, 2d Cir. Docket Nos. 72–2210, 2408, May 17, 1973).

[38] The defendant's presence may be constitutionally required. *Cf. United States* v. *Clark*, 475 F. 2d 240 (2d Cir. 1973) (suppression hearing).

[39] The former United States Attorney for the Southern District of New York, Whitney North Seymour, Jr., in a speech on sentencing at the Association on February 15, 1973, expressed the position that the prosecutor's participation in the sentencing process should be minimal. See n. 40, *infra*.

inform the parties as to the aspects of the case about which it had questions and problems and seek to channel discussion in those directions. The court might suggest to defense counsel the possibility of exploring certain programs and resources which are available and which it might deem acceptable to divert the defendant from the prison system. If desired, the recommendation of the prosecutor might be solicited.[40] After hearing the parties, the court would then have an opportunity to weigh their views and examine their proposals before proceeding actually to impose sentence.[41]

(3) It is the position of the American Bar Association that once a judge has imposed sentence, he or she "should be required in every case to state [the] reasons for selecting the particular sentence imposed." [42] This recommendation is only sporadically followed in the federal courts in New York. We believe that it should be the universal rule, even in the absence of some type of post-sentence review, and we believe that this end can be accomplished by local court rule.[43]

Some federal judges have opposed any requirement that they state reasons for the sentence they have imposed on the ground that the factors which go into a sentence cannot be quantified readily and articulated precisely, and to require an explanation of the complicated mixture of these legal and factual considerations would only encourage judicial dishonesty with an eye toward insulation against appellate scrutiny. Even if this cynical assumption will in some cases be correct, we feel that the danger of it is outweighed by several other considerations. First of all, the statement of reasons to the defendant realistically may have therapeutic value to him in evolving an appropriate attitude toward his conviction, sentence and prospects for rehabilitation.[44] Secondly, the knowledge that reasons for the sentence will have to be supplied will cause at least some judges to consider even more thoroughly than they do at present the appropriateness of their decree. Thirdly, the statement, if it is forwarded to correctional and parole authorities, as it should be, would be of great value in gauging the expectations of change on which the sentence was founded.[45]

(4) Most judges, both federal and state, simply do not know what the effect of type and length of sentence is on deterrence (general or individual), and they have no way of finding out except by attempting regularly to learn what later happened to the individuals whom they have sentenced. This should be done. Correspondingly, judges should tell the Bureau of Prisons and the Parole Board

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[40] This has been a topic of some controversy in the Southern District of New York. At the Crotonville Sentencing Institute on January 13, 1973, some judges suggested that the United States Attorney be called upon to make a sentencing recommendation. Others felt that such a recommendation would not be helpful. Of the District Judges in the Southern and Eastern Districts of New York who responded to our questionnaire, twelve said they would like the prosecutor's recommendation if requested and fourteen said they were opposed to this idea. In his speech at the Association on February 15, 1973, Whitney North Seymour, Jr. stated that his Assistants generally were directed not to make a sentence recommendation for two reasons: first, the variance in their experience and philosophies would itself create disparity problems; and secondly, the common problem of the cooperating defendant-witness might raise questions as to the integrity of the law enforcement process. However, he said, if the latter problem were not present and if the sentencing judge informed the prosecution in advance that a sentence recommendation was sought, one would henceforth be made.

[41] The A.B.A. Project on Minimum Standards for Criminal Justice, in *Sentencing Alternatives and Procedures* § 5.3 (Approved Draft 1968), delineates the duties of counsel in the sentencing process. The prosecutor should disclose to defense counsel and the court information favorable to the defendant on the sentencing issue. § 5.3(d)(ii). The defense attorney has an obligation to investigate all sentencing alternatives, § 5.3(f) (i), (v), and to attempt to verify the facts alleged in the presentence report if given access to it. § 5.3(f)(iii)(a).

[42] *Op. cit. supra* n. 24, at § 8.3(c). See also *op. cit. supra* n. 41, at § 5.6 (ii).

[43] Some judges have reacted with strong and unrestrained criticism to the suggestion that they state why a seemingly long sentence was imposed. See, *e.g.*, Judge Murphy's comments in *United States* v. *McGee*, 344 F. Supp. 442 (S.D.N.Y.), *aff'd*, 465 F. 2d 357 (2d Cir. 1972) (*per curiam*).

[44] *Op. cit. supra* n. 24, at 46–47.

[45] *Id.* at 46; *United States* v. *Brown*, *supra* n. 18, at 3741–3742. In *Brown*, Judge Feinberg in dissent felt a statement of reasons should have been required. *Id.* at 3747.

in the first instance what they expect their sentence to accomplish.[46] There appears to be little understanding by District Judges of what the Bureau of Prisons feels it is able with its limited resources to do with an offender.[47] A statement of the court's reasons for imposing the specific sentence which it decided upon would not only aid those who must supervise the terms of the sentence but would also, when coupled with periodic inquiries about sentenced defendants, continually educate the court as to the degree to which expectation came to fruition.[48] To a large extent, the sentencing court determines only the rough contours of the defendant's course of treatment, with substantial if not almost total powers being delegated to the Board of Parole.[49] For the court to act as if it were lodged with the exclusive power to fix the precise terms to which the defendant will be held is to ignore very crucial realities about parole practices and probation supervision.[50]

(5) Another type of information would be extremely valuable to District Judges in trying to fix upon an appropriate sentence: knowledge of what other federal judges have done in similar cases. Some have argued that if meaningful statistical data could be developed, it would be observed that disparity in sentencing is largely imaginary.[51] It would seem that an effort at recordkeeping along these lines would be extremely valuable not only as a test of this hypothesis but, more importantly, because the data acquired would be helpful to the many judges (especially those of limited experience on the bench) who wish to know the range of sentences meted out by their contemporaries in circumstances even roughly comparable to those which they face.[52] If the available information were sufficiently detailed and a pre-sentence conference among the parties were a regular practice, there would be less need than otherwise for collegial sentencing panels.

A form could readily be developed for compiling comparative data which included such basic matters as the district and date of conviction, the crime for which the defendant was convicted, the length and type of sentence, whether there was a trial or a guilty plea, whether the defendant had committed the same or a similar crime before, whether the defendant had any prior criminal record and a history of incarceration, the defendant's sex, age, family and employment situation, and perhaps additional factors contributing to the sentence. Such a form could be completed in a few minutes and, indeed, could be filled out substantially by the probation officer or a clerk rather than by the court. The bulk of the

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[46] Chairman Maurice Sigler of the United States Board of Parole told the participants at the Crotonville Sentencing Institute on January 13, 1973 that the Bureau of Prisons has a form (no. 792) to be used by the sentencing judge for just this purpose, but it is rarely employed.

[47] No doubt many judges at the Crotonville Sentencing Institute were surprised to hear Norman Carlson, Director of the Bureau of Prisons, tell them on January 13, 1973 that they should not send persons to a federal prison in the hope of rehabilitating them because the penitentiary system is designed only to isolate offenders, not to rehabilitate them, and does exactly that.

[48] See *op. cit. supra* n. 44, at § 7.5.

[49] This is especially important in view of the increasing percentage of offenders who are given indeterminate sentences with immediate eligibilty for parole under 18 U.S.C. § 4208(a)(2).

[50] Judge Jack Wenstein of the Eastern District of New York observed at the Crotonville Sentencing Institute on January 12, 1973 that he, like most judges, had little idea what it is that the Probation Department does with a defendant once he is placed on probation. Parole practices are largeliy obscure from general view. See Leary & Nuffield, *Parole Decision—Making Characteristics: Report of A National Survey*, 8 Crim. L. Bull. 651 (1972). Professor Leslie T. Wilkins of the School of Criminal Justice at the State University of New York in Albany has been studying release decisions of the United States Board of Parole. In tentative and as yet unpublished findings, he has discovered that the most important factor affecting the Board's decision to release is the seriousness of the crime for which the defendant was convicted. Query: Should not the sentencing court, knowing this to be the fact, be influenced as to the type and length of sentence to be imposed?

[51] See Sobel, *op. cit. supra* n. 1. Several of the judges who responded to our questionnaire expressed this viewpoint.

[52] See the Seymour Report, *supra*, at 17, where it is suggested that the Circuit Court monitor the information gathering and that quarterly reports be circulated to each judge.

information could be stored on computer tape and summoned back in a matter of moments for use by a judge seeking to know what others have done in like cases. To those who cry out against sentencing by computer—a concept which we do not advocate—the proper response is that, first, the sentencing court is not compelled to seek comparative information if it feels that all comparisons are invidious, and secondly, once informed, the court is still nonetheless free to choose any lawful sentence it deems appropriate.

(6) As a final suggestion, we feel that there should be frequent local sentencing seminars. Because of the infrequency with which the large sentencing institutes are held, they tend to become somewhat ceremonious occasions at which necessarily too much is essayed in too short a time. The seminar model—a smaller number of participants, more frank and intense discussion, a flexible curriculum—might be more appropriate than the formal structure seemingly envisioned by Congress.[53] With shifting groups of perhaps a dozen among the more than three dozen District Judges in New York City alone, seminars of two or three days available on perhaps a semi-annual basis would allow the trial judges of the federal bench to partake more frequently in interchange with their peers about the problems of sentencing.

"In proposing to write about sentencing today," it has recently been observed, "one should in self-defense avoid the appearance of a silly arrogance that would disregard the recent array of substantial efforts of scholarship and proposed law reforms in this area."[54] No attempt has here been made to deal with some of the broader issues in the sentencing process—the lack of consensus on the goals of the criminal process, the absence of legislative guidance on fundamental principles of substantive law, and, in a more immediate way, the apparent failure of the system of criminal sanctions to deter a significant amount of crime.[55] Similarly, one of the matters that has been discussed—uniformity in sentence practices—cannot even be agreed upon as being a real problem. Nonetheless, even though all of the evidence as to sentence disparities is still not in, there are small changes which we have discussed that can and should be taken locally which virtually indisputably would enhance the rationality of the sentencing process and would in all likelihood decrease the probability of irrational disparities. We urge the institution of such reforms.

APPENDIX A

Sentencing Questionnaire

1. Would you favor a change in existing practice so that the Assistant United States Attorney prosecuting a particular case would, if requested to do so by the Court, make a recommendation as to the sentence which the Court should impose?

(a) Yes 12.

(b) No 14.

2. Would you favor instituting in the Southern District a type of three-judge conference procedure ("collegial sentencing") such as that now used in the Eastern District? (See Chief Judge Mishler's description of the practice in N.Y.L.J., Jan. 24, 1973, p. S2.)

(a) Yes 9.

(b) No 13.

(c) Yes, but with the following modifications: 2.

3. Regardless of how you feel about collegial sentence procedures, do you believe that there should be some form of review of a District Judge's decisions on sentencing?

(a) Yes 20.

(b) No 4.

4. If you do believe that some form of post-sentence review should be available:

(a) Should that review be to the Court of Appeals (12): (i) *de novo?* 3; (ii) or only for clear abuse of discretion? 7; (iii) other 2.

(b) Or should it be to a three-member panel of District Judges (9): (i) *de novo?* 2; (ii) or only for clear abuse of discretion? 6; and (iii) other 1.

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[53] 28 U.S.C. § 334.

[54] Frankel, *op. cit. supra* n. 5, at 3.

[55] Many of these broad questions are now under consideration in connection with the proposed revised Federal Criminal Code, which is the subject of study of a separate committee of the Association under the chairmanship of Hon. Sidney Asch, J.S.C.

(c) Should both District and Circuit Court sentence review be available? (i) Yes 2; and (ii) No 10.

5. Should such sentence review be available to the Government also if it is made available to the defendant?

(a) Yes 14.

(b) No 8.

6. Should the reviewing court have the power to increase as well as lower the sentence if the defendant appeals the length of sentence?

(a) Yes 11.

(b) Yes, but only if the Government requests such an increased sentence 7.

(c) No 3.

7. Do you have any further suggestions for sentencing reforms which could be implemented by District or Circuit Court rules?

FOR EASTERN DISTRICT JUDGES ONLY

8. During the sentencing conferences which you have attended, has there been: (i) A helpful interchange of ideas?

(a) Yes 3.

(b) No 1.

(ii) An observable impact in some cases on the sentence ultimately imposed?

(a) Yes 3. (1) In the direction of less stringent sentences; (2) In the direction of more stringent sentences.

(b) No 1.

(iii) An alteration of judges' sentencing practices over a period of time so that there is a noticeable convergence toward a mean among the judges of the court?

(a) Yes 3.

(b) No 2.

9. On balance, do you believe that the sentencing conference procedure used in the Eastern District is a worthwhile aid in the determination of an appropriate sentence?

(a) No 1.

(b) Yes 4.

(c) Yes, but with the following reservations:

THE LEGAL AID SOCIETY,
CRIMINAL DEFENSE DIVISION.
New York, N.Y., December 7, 1973.

MS. MABEL DOWNEY,
Dirksen Senate Office Building,
Washington, D.C.

DEAR MS. DOWNEY: When Alvin Hellerstein and I testified before Senator Hruska's Subcommittee on Criminal Laws and Procedures on July 25, 1973 on behalf of The Association of the Bar of the City of New York and on the subject of appellate review of sentences, Senator Hruska asked us if we would submit, when ready, our Association's report on the proposed Rule 35 of the Federal Rules of Criminal Procedure. Our final draft of this report on the Rule has now been completed, and I am enclosing a copy for insertion in the record along with our testimony.

Very truly yours,

ROBERT HERMANN.

RULE 35

The Advisory Committee's proposed amendment to Rule 35 ("Correction or Reduction of Sentence") would for the first time establish a post-sentence procedure for review of assertedly excessive sentences. The details of the proposal are concisely explained in the Advisory Committee Note, set out here in somewhat condensed form:

"Rule 35 is amended to provide a procedure for the review of sentence thought by a defendant to be excessive. The review is to be before a panel of three district judges designated by the Chief Judge of the Circuit. The panel is empowered to modify or reduce a sentence found to be excessive or to confirm a sentence found not to be excessive. The review panel is not empowered to increase a sentence.

". . . [A] motion to reduce a sentence must be made within 120 days, a period not extended (as under current rule) by the taking of an appeal . . . Both an appeal and a motion to reduce sentence can be taken at the same time . . .

"Subdivision (c) is entirely new. It provides a procedure for reviewing a trial judge's refusal to grant a reduction of sentence . . .

"Subdivision (c)(1) conditions the right to a review of sentence on three things.

"First, the sentencing judge must have denied a motion to reduce the sentence under subdivision (b) . . .

"Second, the right to review is limited to those defendants whose sentence may result in imprisonment for two years or more. This would include a sentence of two years which is imposed and suspended and the defendant placed on probation . . . It does not include a case in which sentence is not imposed and a defendant placed on probation. Should probation be revoked and a sentence of two years or more be imposed, review of that sentence would then be available to the defendant. . . .

"Third, the defendant must make his motion to review within thirty days after a denial of a motion to reduce the sentence made under the provisions of subdivision (b) . . .

"Subdivision (c)(2) prescribes the manner for selecting the review panel. The panel consists of three district judges with an additional district judge as an alternate. The alternate will make it possible to exclude from the panel the judge who imposed the sentence being reviewed . . .

"Subdivision (c)(3) prescribes the procedures to be followed by the panel. There is no requirement that the panel hold a formal meeting. It is only required that each member of the panel review the sentence. The need for meetings will vary.

"The panel is required to consider the papers on file in the district court which were available to the sentencing judge including the presentence report of a diagnostic facility [such as that following a commitment under 18 U.S.C. § 4208(b) or § 4010(e)], and any other written data relevant to sentencing. The panel, at its discretion, may also order the preparation of the transcript of the trial or other proceedings held in the case . . .

"The panel is given discretion to hear oral argument and to accept a written brief. The proposed rule is not explicit on the right of a defendant to be represented by counsel during a sentence review procedure . . .

"The rule does not attempt to specify what evidence is admissible on the issue of the propriety of the sentence under review . . .

"The rule does not require either the sentencing judge or the review panel to give written reasons for the sentence imposed . . .

"Subdivision (c)(4) gives the reviewing panel the power to modify or reduce the sentence under review only if the panel deems the sentence to be excessive. The right to "modify" the sentence includes the right to adopt other sentencing alternatives. The panel is without authority to increase the sentence being reviewed . . . To ensure against a flood of frivolous claims, the proposed rule limits the right of review to sentences of two years or more rather than to try to deter frivolous appeals by the threat of an increased sentence.

"The rule does not impose a duty on the sentencing judge to notify the defendant of his right to move for reduction or review of sentence."

We approve of both the underlying concept and most of the mechanics of this proposed Rule 35. However, because of several limitations contained in the Rule and which are discussed hereinafter, we disapprove it in its present form.

Recently, we dealt at some length with the problem of sentence disparities in the federal courts, and we concluded that the establishment of review procedures would, along with other reforms, have the salutary effect of reducing the incidence of widely disproportionate sentences.[1] Further, we believe that sentence review by a panel of District Judges affords one reasonable and potential solution to at least the problem of intra-district sentence disparities. Arguably, the task of sentence review would be less burdensome on the participating judges and therefore might be more meaningful for all concerned if done by different panels within each District in a Circuit, rather than by the Courts of Appeals.

[1] See Report of the Committee on Federal Courts on Sentencing Practices in the Federal Courts in New York, Records of the Association of the Bar of the City of New York (1973).

In addition, District Judges who are regularly required to sentence defendants are, as appellate judges have frequently observed, likely to have the necessary appreciation of the complexities of the sentencing process.[2]

However, as the Committee on Federal Courts recently observed in testimony before the Subcommittee on Criminal Law and Procedures of the Senate Committee on the Judiciary, perhaps the optimal form of sentence review would be by the Courts of Appeals, a change which of course would necessitate legislation. (The pertinent portion of that statement to the subcommittee is included in a footnote.[3]) Similarly, many of us believe that a better solution to the disparity problem than the proposed Rule 35 would be the establishment by rule of the type of mandatory *pre*-sentencing, advisory collegial panel conferences, such as have been used for some time and with success in the Eastern District of New York.[4] Our preferences for either type of review, however, are accompanied by a recognition that there are strong and valid arguments as well for the point of view embodied in the proposed Rule 35. Thus, we approve of the concept of sentence review by District Court panels if the realistic alternative to that is not pre-sentence collegial review or post-judgment appellate review but (as has historically been the case) no review at all.

A difficult and, somewhat surprisingly, untreated question in the Advisory Committee draft is whether the proposed Rule 35 is within or in excess of the rule-making authority vested in the Judicial Conference by the authorizing statute, Section 331 of the Judicial Code. Certainly it is not self-evident that the establishment of federal jurisdiction for sentence review and the authorization of special tribunals for that purpose are matters of "practice and procedure," rather than substantive law. Compare the issue of appellate review of sentences, which has been before the Congress for many years but has never resulted in passage of a review measure; could the Judicial Conference and the Supreme Court amend the Federal Rules of Appellate Procedure and create such review?

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[2] One possibility which is not discussed in any of the proposed rules or statutes discussed here is to have two District Judges and one Circuit Judge on each of the review panels. This seems to be a sensible compromise between the views of those who advocate review at the trial court level and those who prefer appellate review.

[3] "Although we would prefer the proposed Rule 35 to the current law of unreviewability, we also believe that for practical and principled reasons review by the Court of Appeals is the most desirable change that could be made. Our reasons for so thinking are as follows:

"First of all, a major shortcoming of any proposal such as that to amend Rule 35 of the Federal Rules of Criminal Procedure to establish three-judge District Court panels to review sentences is that it would have no effect on the problem of disparities among different districts within the same circuit. Sentences review by the Court of Appeals, on the other hand, would operate on this problem. (Of course, even with appellate court review, the question of inter-circuit disparities would remain. Arguably, these are more supportable than are the intra-circuit ones, but even disparities from one circuit to another which are as great as those previously cited are surely hard to justify.)

"Secondly, to quote from an unpublished analysis of the proposed Rule 35 by District Judge Marvin Frankel of the Southern District of New York: 'It is not suitable or comfortable to have district judges sit in review of other district judges. Experience and common sense teach that there are in such an arrangement counterproductive qualities of constraint and embarrassment. This is not a personal matter, but an institutional one. . . . Court of Appeals judges are formally commissioned to review district judges. The formality is a meaningful source of reassurance on both sides of the relationship. The best of personal friendships are easily put to one side when the judge of the higher court decides professionally whether to affirm or reverse the lower (and different) court. There are no ambiguities or inhibitions. The situation is quite different when someone from your own court or level is reviewing you or being reviewed by you. There may be feelings of solicitude, discomfort, or leanings-over-backward to resist such feelings. We avoid even the possibility of such problems in provisions for review of everything else by higher courts. We should do at least as much for a subject so potentially laden with emotion as that of sentencing.'

"Thirdly, if, as we hope, the sentencing process is more and more to become one based on articulated principles of law, it is essential that guidance in the form of judicial opinions be provided to the District Judges. This task is best done by appellate judges, not only because it is a logical extension of their normal duties but also because of the practical factor that opinions by shifting panels of their peers will inevitably be given less weight by District Judges than would be given to appellate opinions.

"Fourthly, we question whether the fact that District Judges are regularly involved in sentencing defendants by themselves is an argument in favor of having them be the ones also to review sentences. Of course, many Circuit Judges are former District Judges, and the argument would have less force as to them. Putting that aside, however, there is much to be said for the proposition that it is detachment from rather than intimacy with daily sentencing duties that is needed, both as a check on disparities and as a basis for formulating a law of sentencing. And in any case, the fact that trial judges form certain dispositive opinions based on a defendant's demeanor is an argument not for review by District Judge panels but rather against any sentence review at all."

[4] See Mishler, "The Sentencing Panel Procedure: How it Works in Eastern District," N.Y.L.J., January 24, 1973, p. S2.

A similar question has been raised, it appears, by congressional action taken in connection with delaying implementation of the proposed Federal Rules of Evidence (12 Cr. L. Rep. 2552), and the issue in this instance seems even more uncertain than it does in that one. Does the fact that under the statute Congress can stay the effect of rules adopted by the Court thereby give to the judicial branch what are usually thought of as legislative powers, without doing violence to the principle of the separation of powers? The late Justice Black's dissent from the adoption of federal rules concerning trials of minor offenses under magistrates took the negative on this question (91 S. Ct. 2306–2310).

There is no indication in the Advisory Committee that these issues of power have been considered, and on this ground alone we would hesitate to approve of the proposed Rule 35. At a different level, however, Rule 35 as presently proposed raises several practical issues and potential problems that by themselves preclude our approval of the proposal in its present wording. These are discussed below.

If a defendant is to avail himself of the sentence review procedures, he must move for modification before the sentencing judge within four months after judgment. (Such a motion is a prerequisite to invocation of three-judge review, which can be done only within one month after denial of the modification motion by the sentencing judge.) Under the terms of the Rule, the pendency of an appeal does not, as under present Rule 35, extend the time within which to move for a sentence modification before the trial judge. Thus, in many instances a sentencing judge and a review panel will be compelled to decide a Rule 35 motion in a case that will later be reversed on the merits.[5] Since the motion addressed to the sentence will in a few cases be decided by the time that a notice of appeal or even a brief on appeal must be filed, the proposed sentence review procedure will not deter any significant number of appeals which are taken on dubious legal grounds and which might be foregone if the defendant succeeded in his bid for sentence review.

In terms of judicial economy, what would make the most sense if Rule 35 is to be changed would be also to amend Rule 37(a)(2) to permit a notice of appeal to be filed within ten days after the judgment *or*, in the event that a Rule 35 motion is made, within ten days after the sentence review panel decides the motion. Arguably, some appeals on frivolous legal grounds would thereby be deterred. Alternatively, if the timing provisions of current Rule 35 were retained so that the period in which to make a sentence reduction motion would be tolled during the appellate process, the review panel would be spared some amount of effort that might ultimately prove to have been superfluous.

Under the Rule as proposed, the motion to the review panel is made from "the denial of an application made [to the trial judge] for the reduction of a sentence . . ." (subd. (c)(1)). If interpreted literally, this would prevent many motions for review from being taken in cases where the motion to the trial court was granted but only in part. For example, as presently phrased, the Rule would preclude a motion for panel review by a defendant who was originally given a fifteen-year sentence, who moved the trial court for a substantial reduction, and who was re-sentenced by the trial judge to a twelve-year term. Thus, a second motion to the trial judge would be needed before panel review could be sought. An alternative construction of the present wording would make the sentence in the above-hypothesized case totally unreviewable by the panel. Both possibilities are probably unintended by the drafters. Thus, the Rule should be rewritten to indicate that the appeal is from the decision of the sentencing judge—whatever that may be, unless it is to reduce the term to less than two years in prison—on the defendant's motion to reduce the sentence.

Only those sentences "which may result in imprisonment for two years or more" are subject to panel review. The obvious aim of the provision is to prevent the overburdening of the panel with relatively minor cases. We agree with the goal but disagree as to the point at which the line should be drawn.[6] Any prison sentence of felony length (one year or more) is a long one by any standard; further, under the circumstances of a given case, a sentence of twelve or eighteen months may well be excessive, at least by comparison with what others

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[5] In fiscal 1972, 13.4% of all federal criminal appeals resulted in reversal. 1972 Report of the Director of the Administrative Office of the United States Courts, at II–8. In some of these cases, of course, the defendant will have received a sentence of less than two years.

[6] The American Bar Association believes that there should not be any jurisdictional limitation keyed to minimum sentence length. See A.B.A. Project on Minimum Standards for Criminal Justice, *Appellate Review of Sentences* 20 (Approved Draft 1968).

similarly situated have received. Prison sentences of a year or more should be reviewable by the panel.

On the other hand, the Rule would have to be clarified in the event that the proposed Rule 11(e), which institutionalizes sentence bargaining in federal courts, is adopted. Presumably, a bargained-for sentence or range of sentence, no matter how long, would not be subject to the review procedure. Where, however, there is a plea bargain without a sentence commitment, the review procedure should still be available.

The sentence review panels are to consist of three District Judges appointed by the Chief Judge of the Circuit to "serve for such periods of time as [he] may designate." We believe that the amended Rule should expressly indicate that the sentence review function is to be regularly shared among all of the District Judges, except perhaps those lacking even one or two years of judicial experience. It would be unfortunately destructive of the aims of the proposed Rule if there were to be a quasi-permanent review tribunal; a rotating panel of judges is necessary to achieve the desired collegiality of deliberations, to maintain a freshness of approach to what could easily become a tedious assignment, and to bolster the value of the panel as an instructive experience for District Judges.

The members of the review panel, under the proposed Rule, are to consider the sentence reduction motion "either individually or in joint session . . ." We believe that except in Districts where travel problems were serious, the review panels should meet to discuss each case before a decision as to whether to modify, reduce or confirm the sentence is made. Experience with pre-sentencing collegial conferences among District Judges indicates that a helpful interchange of ideas occurs at such sessions,[7] and post-sentencing conferences would likely be similarly helpful in arriving at an appropriate disposition. Perhaps this conference function could be fulfilled by an interchange of memoranda, but such a procedure would likely be more time-consuming and less productive of frank interchange than a meeting, and, we fear, might tend to reduce the review process to a mere averaging of numbers.

Another manner in which the Advisory Committee has attempted to informalize and shorten the panel review process is by providing that the panel need not hear the parties or even accept briefs. Part of the rationale offered for this curtailment of normal procedures is that the panel is limited in power to reviewing "the factual information in the written record" (p. 21). That, however, is equally true of a judgment appeal, where counsel's assistance has been held to be required[8] and where the filing of briefs and the hearing of argument are matters of course. Certainly, the sentence review, if there is to be one, will be a critical stage in a criminal case. From the defendant's point of view, it would probably be second in importance only to the original sentencing, at which the right to counsel is established;[9] and from the government's perspective as well, the sentence is often the crucial bottom line. Both parties should be granted the right at least to file papers with the panel; the question of whether oral argument would be helpful or necessary might appropriately be left to the panels.

The proposed Rule, the Advisory Committee states, leaves open the question of the right to counsel during the sentence review procedure. Unnecessarily, the subject is discussed in terms of constitutional requirements and not in the policy terms which may be more pertinent in light of the supervisory authority over the federal courts possessed by the Congress and the Supreme Court, both of which may function on this proposal. Since all defendants are granted counsel in the District Court and, if desired, in the Court of Appeals, no great hardship to advise his client of the right to seek sentence review, just as he must advise him of the right to appeal,[10] and to prepare the necessary papers for setting the review process in motion. Especially if counsel is not required to file a brief with the review panel or argue the motion to it, there is little burdensome about such a requirement.

Both the text of the Rule and the Advisory Committee Note plainly imply that the review panel may not consider any factual information that was not in the record before the sentencing judge. In some cases, however, relevant new information will emerge (*e.g.*, a commitment by an employer to hire the de-

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[7] See Mishler, *op. cit. supra* n. 4.

[8] *Douglas v. California*, 372 U.S. 353 (1963).

[9] See *Mempa v. Rhay*, 389 U.S. 128 (1967).

[10] *E.g., United States ex. rel. Randazzo v. Follette*, 444 F. 2d 625 (2d Cir.), *cert. denied*, 404 U.S. 916 (1971).

fendant) after the motion to reduce is made to the sentencing judge. Thus, the Rule should permit the review panel to consider pertinent data that was not presented to the judge who imposed the original sentence. The chances that defendants will withhold favorable information at the time of judgment in order to improve the prospects of review at a later stage seem quite remote.

The Advisory Committee has decided not to require a judicial statement of reasons for the sentence imposed. Since the review panel's decision is not appealable, there is less justification than otherwise for requiring a statement of reasons from it. However, we believe that whenever a motion to review a District Judge's sentence is filed, the court should be required to inform the parties and the review panel in writing as to why the particular disposition was chosen. This would aid the review panel, which presumably does not get to see or hear the defendant; would minimize the chances that a District Judge's reasons for imposing a certain sentence would not be fully appreciated by the review panel; would lessen the possibility of a District Judge's imposing a sentence that was not supportable under all the circumstances; would be of therapeutic value to the defendant in many instances; and would be of aid to correctional authorities in formulating a means of dealing with the defendant.[11] The possibility of "unhelpful opinions" (p. 22) is easily overbalanced by the value of helpful ones. Similarily, in order to aid in the growth of a substantive law of sentencing and to apprise the sentencing judge of the panel's reasons, opinions should be required to be written whenever the panel modifies or reduces a sentence.[12]

The proposed Rule raises anew a general and frequently voiced problem in federal sentencing practice. To establish a procedure for review of sentence length and type without in any way attempting to define what is an "excessive" sentence is to force judges to make judgments on sentences with no clear guiding principles other than personal notions of fairness.[13] In that sense, this Rule puts the cart before the horse. Whether it is possible to arrive at a meaningful and usable definition of "excessiveness" is open to debtae, but there is little evidence that the Advisory Committee—or, more appropriately, the Congress—has seriously undertaken this essential endeavor.

The questions and suggestions noted here should not be permitted to detract from our basic conclusion: the proposed Rule 35 is a desirable and important innovation deserving of support. If implemented, it should cause some amelioration of the serious problem of irrational disparity in sentences in the federal courts.[14]

Undoubtedly, it will be argued by some who oppose the adoption of the proposed Rule that the burden of sentence review will add enormously to the responsibilities of the already overworked federal courts. Although we share this concern, we are not at all certain that it will be borne out factually. Beyond that, however, we regard the sentencing process as among the most important of the tasks with which federal judges are concerned, and consequently it is our conviction that the merits of sentence review should be judged not in isolation but rather as against existing and perhaps less essential subject matter of federal jurisdiction. If it is correct that the federal courts are presently overburdened and would become significantly more so were the proposed Rule 35 to be adopted, the proper response, we suggest, is a reexamination of the contemporary priorities of federal jurisdiction, with necessary pruning in areas having marginal importance at present.

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[11] See Report of Committee on Federal Courts, *op. cit. supra* n. 1, which discusses supporting authorities, including the American Bar Association Project on Minimum Standards for Criminal Justice, *Sentencing Alternatives and Procedures* § 5.6 (Approved Draft 1968).

[12] Many have questioned whether it is possible to develop a cohesive or usable set of governing substantive principles of sentencing, and it is usually those who take the negative on this issue who argue concomitantly that written opinions would not be helpful. We share this concern but nonetheless hold that the effort is too important not to be made. Clearly the cause of equal justice would not be aided merely by flowery or abstract pronouncements about fairness or the lack of it. Rather, what we contemplate in the way of written opinions are relatively brief and factual descriptions of all pertinent circumstances relating to the sentence; what caused the reviewing court to believe that the sentence imposed was excessive; what factors the reviewing panel felt were given too much or too little weight; and whether, and why, the panel thought that the sentence was disparate with what other individuals similarly situated had received. Such opinions, we are hopeful, could be written without dishonesty and would be helpful to all concerned.

[13] See, generally, M. Frankel, *Criminal Sentences* (1973); K. Davis, *Discretionary Justice* (1969).

[14] The Chief Judge of the Second Circuit has recently appointed a study group of judges and lawyers to consider this problem. See *New York Times*, July 5, 1973, at 1, col. 8 ["U.S. Courts Act To End Disparity In Prison Terms"].

Mr. Hellerstein. We reported this year on sentencing practices in the local Federal courts in New York, that is, in the southern district of New York and in the eastern district of New York. We undertook the study because it seemed to us that with the advent of the individual calendar system, that is, where cases are assigned early in their stages to a single judge and with there being 24 active judges in the southern district of New York, we could have a situation where there were, in effect, 24 different courts rather than one. The same thing is true in Chicago, in Los Angeles and, I think, in practically every municipality in the United States.

Something, we thought, had to be done to bring together the judges in some form of a collegial system, so that the random selection of a judge at the outset of a case does not remain the largest determining factor of the outcome in terms of the sentence a defendant might end up with at the end of a case.

Our study was chaired by Mr. Robert Hermann, a member of the Committee on Federal Courts. Mr. Hermann is uniquely qualified to do this job. He is head of the special litigation section of the Legal Aid Society of New York—which is tantamount to our defender system—and has had extensive experience in criminal matters in both the State and the Federal courts. Mr. Hermann's credentials are enhanced by those of his wife, who was formerly a pro se clerk of the U.S. Court of Appeals for the Second Circuit. Both Mr. Hermann and his wife are authors of articles on various aspects of criminal procedure; both are attorneys with the Legal Aid Society and both practice in the Federal courts.

Mr. Hermann and his subcommittee were responsible for the report that you have been kind enough to put into the record. The report was unanimously adopted by the full committee of 19 members. The committee, as I pointed out in my prepared statement, brings together many different points of view and experiences, and was selected to be as free as possible from any parochial bias.

The report was issued on June 11, and was sent to all the judges of the U.S. Court of Appeals for the Second Circuit and of the southern and eastern districts of New York. It has had a wide circulation beyond that.

I would like Mr. Hermann to briefly summarize what we have said in our report, and then address himself to some continuing work we are doing. We are now involved, for example, in a study of proposed rule 35 to the Federal Rules of Criminal Procedure which, as you know, provides for a three district-judge-panel to review sentences. Mr. Hermann and I are prepared to discuss proposed rule 35 as well, and to compare it with the proposals that are before you providing for appellate review of sentences.

I might ask that when we complete our study on rule 35, and when a report on the subject is adopted by my committee and by the Committee on Federal Legislation of the Association of the Bar, which I anticipate will occur in September, we send copies of the report to you, and perhaps if the record is not yet printed, the report might be made part of the record of our testimony.

Senator Hruska. When might this occur?

Mr. Hellerstein. I would think September. A preliminary draft should be completed by the end of the week and then sent to Judge

Lumbard. But the full committee will not have an opportunity to adopt or reject or modify this preliminary draft until September.

I could send the preliminary draft to you by the end of this week, subject, of course, to later revision.

Senator Hruska. Well, thank you very much. [See p. 6519.]

Mr. Hermann. The report that Mr. Hellerstein described, on sentencing practices in the southern and eastern districts of New York is divided basically into three parts. In the first part of the report, we consider the question of whether there really is such a thing as disparity in sentencing in the Federal courts—a matter about which I had thought there was unanimity when I began the study, but later I found out there was less than unanimity the more that I looked into the question. I think, however, that based upon the available statistical information, which includes the LEAA study which is in this subcommittee's hearings and the Federal offender datagraphs done by the Administrative Office, and especially in our area a study done by Whitney North Seymour, Jr., the former U.S. attorney for the southern district of New York, it is quite clear that there is an unjustifiable amount of disparity among similarly situated individuals in Federal court both on a national scale and on a regional scale.

The second part of our report was a survey of the views of the Federal judges in our area. We found that by and large the district judges overwhelmingly favor some form of sentence review, but they are divided on the question of whether that review should be by a panel of district judges or by a panel of the court of appeals.

Most of the judges who felt that there should be some form of review felt that that review should be limited to sentences only above a certain minimum. They also felt that if there were sentence review available to the defendant, it should also be made available to the Government, and also that the court of appeals of the district court, depending on which had the power to review sentences, should be given the power to increase sentences as well as to decrease them. I will deal with some of these issues later on in my discussion.

In the third part of our report, we made some recommendations as to procedures which should be adopted locally in the district courts in order to enhance the rationality of the sentencing process. We had begun with this aim of directing our report at the local level to see what could be done at that level to improve sentencing procedures.

Among the procedures we recommended were first, that the court should hold an informal conference among all of the parties prior to sentencing an individual to consider all of the alternatives available. Secondly, the sentencing judge should confer with two other judges on the same court to discuss what the appropriate sentence might be. This is a practice that is currently being used in the Federal court in Brooklyn.

Thirdly, the sentencing judge should state on the record the reasons for the sentence he imposed. Fourthly, a procedure should be established by which Federal judges could be informed on a regular basis of what subsequently happened to individual offenders whom they have sentenced. Fifthly, comparative data ought to be made available to judges through the information obtainable from the Administrative Office of the U.S. courts, so that judges would have access to infor-

mation on what types of sentences were given out to similarly situated individuals. Sixth, and finally, there should be more frequent sentencing seminars for judges to discuss the problems that they feel they have in common on the questions of sentencing.

We felt that the adoption of these procedures, or some of them would help to eliminate some of the more gross instances of disparity.

On the other hand, our committee felt that if anything serious were to be done about the problem of sentencing disparity, action would have to be taken on a national level as well as on a local level.

One thing that the LEAA study pointed out is that there is a tremendous amount of disparity of sentencing between different circuits in the country. An example that I picked up just reading through the data was that among defendants who have no prior criminal records and who are convicted of interstate theft, the percentage who are given a prison term varies from 0 percent in the Tenth Circuit and 2 percent in the Sixth Circuit to 15 percent in the Second, Fifth, Seventh, and Ninth Circuits, and all the way up to 28 percent in the First Circuit.

Another type of disparity which could not be touched by local rule is that which exists between different districts within the same circuit. In the study that was done by the former U.S. Attorney in New York, it was shown that in draft cases, for example, the average prison sentence was 14 months in Manhattan Federal Court and 41 months in Brooklyn Federal Court, which is just a mile away from Manhattan Federal Court.

Senator HRUSKA. Now, is that in the same time frame?

Mr. HERMANN. That's during the same time period.

Senator HRUSKA. Because there has been a shift nationwide in the imposition of sentences in offenses of this kind. So if we're going to treat these figures as sound and valid, we should be assured that they are in the same time frame.

Mr. HERMANN. Yes, sir. These figures were compiled on a 5-year basis predating his report. The report was filed in early 1973. He had assistants compile data for that district and all the other districts within New York, and these were figures for the same time frame.

A similar example is that in stolen car cases, the average prison sentence is 21 months in Federal court in the Northern District in Albany, and 43 months in Buffalo in the Western District.

We felt that these figures demonstrate clearly that there are geographical disparities in sentencing, and that the only fully effective approach to resolving these types of disparities is to adopt an approach nationally that deals directly with the problem by providing for some from of review of sentencing.

In the report which Mr. Hellerstein mentioned that we are preparing on rule 35, we indicate generally our approval of the concept of three judge panels of district judges——

Mr. BLAKEY. Mr. Hermann, would you mind if I asked you a question at that point? To back up a bit, in quoting the statistics and differences in stolen car cases, you indicated it was probably a result of disparity.

Did you make any attempt or was any attempt made in the studies that you had access to, to evaluate prosecutor policy? I wonder if that kind of disparity could not be accounted for by a conscious effort; for

example, in the Southern District to prosecute only certain kinds of car cases, whereas in Buffalo, they prosecuted a different range of car cases.

I know that there is a sharp difference in this particular area between districts. For example, I'm told in the southern district, they will not handle an interstate transportation case unless there is some indication of syndicated theft involved; whereas, for example, in some of the Southern States, all classes of car theft cases are handled.

If this was true, the selection unit, since it was not general in both districts would skew the appropriate sentencing scheme, would it not?

Mr. HERMANN. It would. The answer to your question is that we did not study that factor. One of the problems in studying the question of sentencing disparity is that there simply is not enough information available so that one can say with certainty that all possible factors have been considered. Indeed, that's why that was the first question we considered in our report and why our conclusion—that there is such a thing as sentence disparity—has to be made with some reservations, because not all the possible data have been or can be considered. Nonetheless, we felt that the disparities were so gross—when you have sentences for the same crime within the same State but in two different districts being three times as long as another—that we were justified in concluding that there was strong evidence of disparity. But again, we cannot say conclusively that there is such a thing.

Mr. HELLERSTEIN. Judge Charles Breitel of the New York Court of Appeals told me of an interesting experience that bears upon your question, concerning the difference in treatment between Washington County, which is an upstate county in New York State and Bronx County, which is part of New York City, in sentencing defendants convicted of forging endorsements on welfare checks.

Judges in Bronx and New York Counties generally give out a suspended sentence, unless there is a history of prior convictions of that crime. In Washington County, even the first act will result generally in a sentence of a few years.

The reason may be because of a difference in community attitudes about the two crimes. Perhaps, also, a person in Washington County, who commits the crime is a more hardened criminal than a comparable defendant in Bronx or New York Counties. This difference suggests the question whether it truly is a disparity to recognize, in sentencing, different community standards in different parts of a State.

Mr. BLAKEY. Let me raise this question with you. Would it be permissible to evaluate the breach of a socially determined standard reflected in the law differently in different sections based on peculiarities of local social mores? Wouldn't this directly have a law different in different communities?

And if you would assume the principle of legality, which surely would be reflected in the law and in the judge's application of the law, shouldn't welfare fund cheating be the same in New York City as it is upstate?

Mr. HERMANN. I think that insofar as that difference relates to the need, for example, for a sentence to deter other people because the particular crime problem is widespread, those considerations may

weigh in favor of allowing for regional differences based on those community norms. But I do think, on the other hand, that what we are talking about is a national policy in specific types of cases, and indeed the basis for the national law is that there is such a national policy. Regional differences cannot account for all the discrepancy between areas, or at least they should not be permitted to account for that wide a discrepancy.

Mr. HELLERSTEIN. On the other hand, where the legislature has given a judge discretion within a range of punishment, the legislature is, in effect, providing that every violation of the same act does not have to be regarded in the same fashion, especially if different localities are involved.

I would defer to Mr. Hermann's greater experience in criminal matters. But it does seem to me to be relevant that the depth of feeling of a community may be different in one area of the country from that in another area of the country. That is not to say that there cannot be gross disparities even taking such differences into account.

I believe that the bills proposing review of sentences, as do yours, Senator Hruska, would allow a change in sentence only if there is some substantial and manifest disparity, thus allowing for proper differences in treatment.

Our point is that there are sentences that are so in excess of any measurement of different community standards, as to be grossly disparate.

Mr. HERMANN. To return to what I started to say about rule 35, in our preliminary report we indicated approval of the concept of three judge panels, and we feel there are several reasons which might support the institution of three judge district court panels to review sentencing. For example, the increased workload in criminal cases in recent years, has been felt more at the appellate level than at the trial level. Considering that there would be more judges involved in reviewing cases if it were done at the district court level, there might be more time for individual cases to be considered by the judges in the district court.

There's also an argument that can be made that district judges are the ones who are most familiar with the process of sentencing. They sentence people on a day-to-day basis, and thus would have an appreciation of the complexity of the process which would not be shared by appellate judges.

I hasten to add that although we would prefer the proposed rule 35 to no review at all, we feel that the best solution to the problem is that which is currently contained in bill S. 716, proposed by Senator Hruska. Our reasons for thinking that that is a better bill are as follows.

First of all, the major shortcoming of the proposed rule 35 is that it would have no effect on disparities between different districts within the same circuit, and these are very substantial disparities, as we have noted before. Sentence review by the courts of appeals, of course, wouldn't do anything about the other problem of intercircuit disparities, but as we were just discussing, our view is that there is some greater justification for these.

Second, I would like to quote from an analysis of the proposed rule 35 that was written by District Judge Marvin Frankel in the

Southern District of New York for a special committee that has been commissioned by Chief Judge Kaufman in the second circuit, because I don't think I could put it any better than Judge Frankel did. "It is not suitable or comfortable to have district judges sit in review of other district judges. Experience and common sense teach that there are in such an arrangement counterproductive qualities of constraint and embarrassment. This is not a personal matter but an institutional one.

"Courts of appeals judges are formally commissioned to review district judges. The formality is a meaningful source of reassurance on both sides of the relationships; the best of personal friendships are easily put to one side when the judge of the higher court decides professionally whether to affirm or reverse the lower, and different court. There are no ambiguities or inhibitions.

"The situation is quite different when someone from your own court or level is reviewing you or being reviewed by you. There may be feelings of solicitude, discomfort, or leanings-over-backward to resist such feelings. We avoid even the possibility of such problems in provisions for review of everything else by higher courts. We should do at least as much for a subject so potentially laden with emotion as that of sentencing."

Third, one of the hopes that we have, if there were to be some form of sentence review, is that this would eventually lead to the articulating of principles of a substantive law of sentencing, which we feel are sorely needed. This, of course, would have to come about through the writing of judicial opinions. This task, we feel, would best be accomplished by appellate judges, not simply because they are the persons who are best trained in it, but also because the opinions of appellate judges would be more likely to be given deference and consideration by district judges than opinions by rotating panels of district judges, who are after all the peers of other district judges.

Fourth and finally, we question whether the fact that district judges are regularly involved in sentencing argues for district judge review, rather than against district judge review, although many of the circuit judges were, of course, district judges as well. The general problem would be that the review process should be one that involves detachment from the regular duties of sentencing on a day-to-day basis rather than intimacy with it. Thus, we feel that overall the best solution to the problem of disparity in sentencing would be to allow appellate review rather than district review.

As to the specifics of the various bills that are now before this subcommittee, we favor, as I said before, S. 716. It basically would add a new section to title 28 granting the courts of appeals discretionary power to review sentences. Perhaps we can explain why it is that we favor this bill by explaining why we do not favor the other bills that are presently before this subcommittee.

The two versions of the Federal Criminal Code that are being now considered by this subcommittee are of course S. 1 and S. 1400. Originally there was also the Brown Commission report, which led to the discussion that finally resulted in these two bills. S. 1400 we are not in favor of, insofar as the sentencing provisions go, because it simply doesn't provide for any form of appellate sentence review.

Mr. BLAKEY. Mr. Hermann, wouldn't you have to consider the minimum mandatory a species of sentence review insofar as you might characterize it as that because it recognizes there is at least potentially the problem of inadequate sentences in certain classes of cases, and attempts to resolve this by setting a minimum mandatory by the Congress?

In other words, if you take the assumption that in certain narcotics cases, for example, judges are sentencing too low you could make that either by authorizing an appellant review by the Government, or by mandating the minimum mandatory.

Would you comment on minimum mandatories as an alternative to sentencing review?

Mr. HERMANN. Well, I do think that would be an alternative to the possibility of increasing a sentence on appeal at the Government's behest. The problem I find with the mandatory minimum is that which the Congress found when it repealed mandatory minimums the last time around, and that is that some way or other judges who feel that those mandatory minimums are higher than the term to which they would like to sentence somebody are always going to get around those mandatory minimums. Basically, the optimal sentencing structure would give judges a large range of sentencing options, rather than tie them down to specific mandatory minimums.

Mr. BLAKEY. If you were given the hard choice between prosecutor review and mandatory minimums, what would you take?

Mr. HERMANN. It's kind of a rock-and-a-hard-place type of choice. I think I would probably favor the availability to the Government of sentence review rather than the mandatory minimum.

S. 1 permits appellate review of sentencing only in the very narrow instance of the specially denominated classes of dangerous special offenders.

Mr. BLAKEY. You are aware this is present law, too.

Mr. HERMANN. Yes, I am; but because we favor generally the process of appellate review of sentencing as a check on disparity, we think that the provisions of S. 1 would not be sufficiently broad to cover the entire problem. The problem we have had with the review provision in S. 1 is that it provides only for review of long sentences, and it only provides for review of some long sentences. A person could still get 20 years in jail without having any sentence review available to him.

As to the recommendations that were made by the Brown Commission, they suggested that there should be some form of appellate review, but their recommendations were very general and didn't go into any specifics as to how that should be structured. In an earlier report of the Association of the Bar of the City of New York, we indicated that we are generally in favor of that approach, but we didn't go into more detail than that either.

S. 716 would essentially provide for a review of sentence by the court of appeals whenever a prison term is imposed in a felony case. We favor that approach because, unlike bills such as S. 1, it would provide a mechanism for dealing with sentencing disparities that is nearly as broad as the problem of disparities itself. It recognizes that even a relatively short prison term can be both unjust and perhaps out of line with what other people similarly situated have received.

Mr. Blakey. When you recognize that a sentence might be unjust because it is too severe, do you recognize that a sentence might be unjust because it is too lenient?

Mr. Hermann. I find it harder to grasp the concept of how a sentence could be unjust because it is too lenient, simply because the word "unjust" in the context I am thinking of means unjust to a particular individual. When you think about "unjust" in the other context of its being too lenient, you're talking about unjust to society. I think that is a much more difficult concept for a court or any person to measure.

Mr. Blakey. Doesn't society have rights?

Mr. Hermann. There is no question that society has rights.

Mr. Blakey. Can't they be violated by too lenient sentences?

Mr. Hermann. If there were some way of establishing that society's rights were being violated by a too-lenient sentence, I would agree with you. But the problem I have is in finding how a sentence is too lenient and finding out what society expects in a given sentence.

I think that determination——

Mr. Blakey. Why would that be more difficult than finding out it is too severe?

Mr. Hermann. I think the judgment of what society expects is one that is too hard to entrust to the judicial branch. I don't think it has any tools to deal with that question of what society——

Mr. Blakey. Well, that would seem to be true on both ranges.

Mr. Hermann. No, because I think when you are dealing with a specific offender before the court, the court can look at this man's record and background, the crime that he committed, and can say: "This sentence is too long; his rehabilitation doesn't require it." And I think what we are mostly talking about is rehabilitation.

Mr. Blakey. Well, couldn't you say the sentence is too short? He needs rehabilitation or at least incapacitation.

Let me ask you a more specific question. Are you familiar with the data—first the recommendations of the President's Crime Commission that there be sentencing review?

Mr. Hermann. Yes.

Mr. Blakey. Are you familiar with the data that was developed by a Subcommittee on Criminal Laws and Procedures as a preface to the enactment of sentencing provisions of S. 30 authorizing Federal review?

Mr. Hermann. I have seen them. I didn't review them in connection with my testimony here.

Mr. Blakey. Perhaps it would be helpful if you would take a look at them, and answer or comment on it by letter as to whether they represent a significant body of materials indicating leniency.

I might also refer you to a similar study done of organized crime offenders in New York, in the New York system. It is incorporated in the——

Mr. Hermann. I have seen those in the hearings.

Mr. Blakey. I would be very interested. I'm sure the subcommittee would, too, on your comments on that as a body of data indicating leniency.

Mr. Hellerstein. There is a very interesting discussion, which I am sure you are familiar with, in appendix B of the ABA standards relat-

ing to appellate review of sentences discussing the English practice allowing review of sentences at the instance of the prosecutor and attempting to measure whether there was any deterrent to the willingness of a defendant to seek review of what he thought was a harsh sentence by his fear that the prosecutor might then seek review.

The article in the appendix pointed out that there were very few cases where the prosecutor sought review, but that there was thought to be a deterrent to the willingness of a defendant to seek review.

The issues of prosecutor review are most complicated. For example, will the willingness of defendants to plead guilty be affected? As you know, 85 percent of the criminal cases in the Federal courts are terminated by pleas.

Mr. BLAKEY. How many of the racketeer cases are determined by a guilty plea?

Mr. HELLERSTEIN. I don't know.

Mr. BLAKEY. If you found out that very few were, and this is the kind of case that there might be a possibility for appellate review, would that reflect or have an effect on your comments?

Mr. HELLERSTEIN. I do think that all of us have to be prepared to modify our preconceptions. I think the data, so far as I have been able to become aware of statistics, is very difficult to evaluate in terms of actual court experience.

Mr. BLAKEY. Isn't there a basic question of symbolism, if you would, in defending data? Doesn't fairness necessarily imply mutuality?

Mr. HELLERSTEIN. I think mutuality is one measure of fairness but not the only measurement of fairness. I also think that the issues are not well solved by notions like mutuality or general notion of what is excessive or inadequate or the like.

I think one has to think in terms of data, in terms of impact and the like. My feeling, I think it is a bias, is that it is more important to take a harsh sentence and reduce it than to take an inadequate sentence and increase it. I say that this is a bias because I don't have any data to support it. My feeling is that the impact on society of inadequate sentences in particular situations is hardly felt at all, whereas the impact on the individual of an excessive sentence is manifest and great.

Mr. BLAKEY. Isn't there a conception by a large number of people that the sentences are in fact inadequate, and wouldn't the consent of the Government be more easily obtained where there was at least potentiality in the system an opportunity for the correction of inadequate sentences?

Mr. HELLERSTEIN. I would answer in two ways. If the assumption you say is correct, I think the argument you make is an effective one. However, I think the popular conception is based not on crimes involving syndicates and organizations, but more in terms of street crimes. People feel unsure of themselves because of muggers and robbers and dope addicts, and much less by organized crime, even though the consequences of organized crime may lead to an increase of street crime.

Mr. BLAKEY. Would you not grant that the general feeling is that the big guy never gets caught, and when he gets caught he always gets off?

Mr. HELLERSTEIN. Well, I would not want to trust that kind of a general feeling. I do not know if it is a general feeling. I think we all have an idea that the fellow who is very sophisticated and can get

behind the scene is much less apt to be caught and put in the dock than someone who is visible and on the street. And I think that is true about different areas from that which we are talking about precisely this morning.

But I think when you ask a citizen what he thinks about inadequate sentences, he thinks about the purse snatcher that got off without any sentence, or the fellow that stole his car, or his having to go to court on seven different occasions because of adjournments, and not so much about what happens with some fellow who is connected with organized crime.

Mr. HERMANN. Mr. Hellerstein said before that he thought that the taking of appeals on sentence cases was more important as a defense right than as a prosecution right, or something to that effect. I think one of the reasons why I am opposed to sentence increases on appeal or to prosecutorial appeals is that inevitably the effect of those would be to deter defendants from taking meritorious sentence appeals.

Mr. BLAKEY. Even in the concept of S. 30's provisions?

Mr. HERMANN. Well, for example, consider the effect of what is now the proposal in S. 1, where there is an attempt made to solve that problem of apprehension on the defendant's part by providing that the Government has to file its notice of appeal 5 days before the defendant has to do so. Thus, the Government would theoretically be barred from taking an appeal based on a defendant's determination of whether he was going to appeal. But the loophole, as I see it, in S. 1 is that the Government also has the power to withdraw its appeal, and thereby to remove from the appellate court the power to increase the sentence. That could conceivably be used by the Government to induce the defendant either to forego or to abandon an existing appeal.

Mr. BLAKEY. If the Government attempted to do that, the statute also provides that the Government can lose its right to appeal by the abuse of it. And any contact made by the Government to the defendant or a person such as yourself, I'm sure, would produce a motion in the Court of Appeals to dismiss the appeal based on contact.

Mr. HERMANN. My problem with that is how would anyone prove the nefarious motives of the Government? It's always——

Mr. BLAKEY. If the Government came to you and said if you do not appeal, we will withdraw ours.

Mr. HERMANN. Well, if it were that blatant, certainly that would be possible. But I think it would become more subtle.

Mr. BLAKEY. And if there were no contacts between the Government and you, how would that have an impact on your exercise of the right to appeal, unless there was an expressed quid pro quo? How would that affect your exercise of your rights?

Mr. HERMANN. I think defendants as a class or defense lawyers as a class might gain a general understanding that it would be a good idea to delete that section of a brief on an appeal, in the belief it would be a common practice on the part of the Government thereafter to withdraw its request for an increase.

Mr. BLAKEY. If it became a common practice, don't you think the Court of Appeals would discipline it?

Mr. HERMANN. I think that is possible. I don't think it's inevitable.

Mr. BLAKEY. Would you grant, as I think you do in your testimony, that the possibility you are raising is extremely remote?

Mr. HERMANN. It is a remote possibility. I was going to say that one of the questions which would determine the constitutionality of any procedure providing for increased sentence on appeal, as I read the two latest cases from the Supreme Court this past term, would be whether the procedure might induce on the part of the defendant a reasonable apprehension of vindictiveness on the part of the Government. I think that is the problem with a provision of the sort that S. 1 is—not whether it is likely to happen, but whether it might induce such an apprehension on the defendant's part. I should add that I think the constitutional question is far from clear at this point, and similarly I think that the constitutional question as to whether there could be a right of prosecutorial appeal would violate the double jeopardy clause is equally unclear. Although I know that Professor Hall when he was before this subcommittee said that he felt that a 1970 Supreme Court decision resolved that matter, I think I have to disagree with him. I think that is still an open question.

Also with respect to this question—and I would be the first to concede that it is a very difficult question, and perhaps it is just a matter of personal bias—it might be undesirable as a matter of policy to institute the possibility of increased sentences on appeal. I think many defendants would feel entrapped by a procedure which permitted them, in case of an appeal, to get a higher sentence, which would hardly make then feel amenable to correctional efforts at that point.

If prosecutorial appeals were to be authorized, I think that would again thrust the Department of Justice into a position which, as Senator Hruska noted in his article in the American Criminal law Review, it wisely abandoned in the 1950's, that is its adversarial role, becoming sort of counsel to the court as to what the appropriate sentence would be. I think it was a wise decision for the Department of Justice to get out of that.

Mr. BLAKEY. Let me raise this question with you. How will we ever develop a jurisprudence of sentencing unless the court can expect from both the defendant and the prosecutor an able presentation of all the principles involved?

Mr. HERMANN. I don't see any problem with that. I think that the court can always write an opinion in a case, and in cases where sentences are excessive say why they're excessive or——

Mr. BLAKEY. What I'm raising with you is the necessity to have briefs and arguments from both sides, and wouldn't that necessarily cast the prosecutor in an adversary role; if the Government is to act merely as an intermediary, and that defendant is to argue for his client, will the people's interest be fairly represented?

Mr. HERMANN. Well, I wonder about that. S. 716 doesn't say anything about the Government having the right to be heard on this. The U.S. Attorney in New York generally does not take a position on sentencing, so I don't think that it would necessarily follow from the fact that there would be appellate review that the Government would want to be heard, or that it would have a right to be heard. Although it's possible, it's not there in the bill.

Mr. BLAKEY. Do you think we could develop a jurisprudence of sentencing without the Government having the right to be heard?

Mr. HERMANN. I think it would be preferable if the Government had the right to be heard. I think it would be helpful toward the

development of a jurisprudence of sentencing, which I think would be a desirable development.

Mr. BLAKEY. Let me ask you another question that is a little broader than this. You seem to be pitching the provisions of S. 716 and present law as mutually exclusive or necessarily inconsistent alternatives.

Wouldn't it be possible to simply leave provisions of the present law alone dealing with special offender sentencing, permitting Government appeal then; and enact in essence the provisions of S. 716 to be applicable to all other sentences?

Mr. HERMANN. That would be one possibility. I think I would have a great deal less difficulty if the right of the Government to appeal would be confined to those cases.

Mr. BLAKEY. And there would be no necessary inconsistency between the two provisions?

Mr. HERMANN. No, there wouldn't be necessarily. The dangerous special offender type of case is a very special type of case, and at least as it is done in S. 1, I believe, there is a very closely defined category of persons. I have less difficulty with that concept, but this is not something which our subcommittee or committee has considered.

Mr. BLAKEY. I take it then that the burden of your argument is that S. 716 should be accepted rather than be accepted and substituted for present provisions?

Mr. HERMANN. Yes. We haven't made recommendations that there be any substitution for present law. We simply feel that with that narrow exception, S. 716 should be enacted into law.

Senator HRUSKA. Does counsel have in mind that S. 716 has for its purpose the supplanting of the present sentencing provisions for "dangerous special offenders?"

Mr. BLAKEY. No, sir. I just was reading their statement as perhaps raising this as what they are advocating.

Mr. HELLERSTEIN. I should say, Senator, that we did not focus on the problem of the "dangerous special offender" except in a limited way, when we commented that a provision for appellate review confined to such class was too narrow a treatment.

Our focus was on the general problem of appellate review of sentencing. If you would like, we could take up a special study, the proposed treatment of "dangerous special offenders," but I don't think what we would have to say on that subject would really bear on our comments on the general concept of appellate review of sentencing.

Mr. HERMANN. I would just like to say one other thing on the subject of prosecutorial appeals on sentence questions, and that is that it would be very difficult to foretell the impact of such a provision on many of the other areas of the criminal process. For example, on the prevalence of guilty pleas, last year's Annual Report of the Director of the Administrative Office of the U.S. Courts reports that there is a national guilty plea rate of 85 percent. Many guilty pleas are properly taken. They are in the best interest of the defendant. They are in the best interest of the Government.

I venture to say that very few defendants would plead guilty when not only would they not know what the district judge would give them, but they would know also that if the Government did not like the sentence that was given to them by the district court, it could take the

case to the court of appeals, whose composition the defendant has no way of knowing in advance, and it could seek to have his sentence raised on appeal. I think this may have a very substantial effect on the prevalence of guilty pleas.

Senator HRUSKA. It might be well for the record to contain an observation by the author of S. 716, because he had no intention at all of interfering with the sentencing of the dangerous special offenders. To the extent that I was able, I helped Senator McClellan get that enacted into law, and I am in full sympathy with it. I think a great deal of the suggestion that there should be an ability to increase the sentence as well as decrease it, and to have the Government possess the right of appeal stems from the fact that in organized crime cases, where there are dangerous special offenders, there has been quite a consistent history of inadequate sentencing.

Terrifying data has been collected. The tendency for some reason or another has been to be much lighter in the sentencing by the courts in those cases.

It was the purpose of this law, as it now exists, that these cases would be treated specially. They have committed crime as a patterned way of life, so they should be treated in a special way when it comes to their sentence. The law is sound, and I hope it is never disturbed because it can serve a very useful purpose. The objective of 716, however, is a little different and in a separate area.

When a man goes to prison for 22 months for a given offense, and he finds that somebody else in his same category and his same circumstances gets a 3-month sentence, he gets hurt. He gets unhappy, and he not only gets puzzled, but he gets frustrated. That is a little different situation.

However, the points that you list in your statement, are the points that will ultimately have to be decided. Whether the Government should appeal and whether the appellate court would be empowered to increase the sentence, and whether there should be any limit on the length of the sentence, and whether it should be limited to a felony or not, are points that will eventually be thrashed out and they are negotiable.

I think they are negotiable, and certainly as one of those who favors 716, I wouldn't want to say that there has been a monopoly of wisdom and of foresight in this draft. We would be willing to discuss these things and to find if possible the best possible solution.

Do you want to continue?

Mr. HERMANN. Yes; thank you.

Senator HRUSKA. For the benefit of the witnesses, we have gone over this territory many times, and I think it is well to review it in those ways, because these same considerations continue to come up. And as I say, we are going to have to deal with them in due time.

Mr. HERMANN. In connection with something you were just saying, Senator, one of the changes we would propose in S. 716, is the elimination of the word "felony"——

Senator HRUSKA. Yes.

Mr. HERMANN [continuing]. Because of the possibility that someone could be sentenced to a longer term for a misdemeanor than a felony, and yet not be able to get review.

Senator HRUSKA. That's a point well made.

Mr. Hermann. Also there remains the question, as with this rule 35 proposal, of whether there should be a minimum sentence length. In our report on that proposal, we took the position that it should be no longer than 1 year.

One additional thing I would like to add is about the question of whether there should be a screening procedure for sentencing appeals. We do not feel that there is any need for a screening procedure, and even if there were a need for a screening procedure, I think that inevitably it would not work.

If I could, I will elaborate a little on why I think that is so. Generally, the purpose of a screening procedure is to separate cases on the basis of a determination that allows them to split the case in two. Thus, in the Supreme Court certiorari jurisdiction where the Court tries to determine how important the case is before determining whether the lower court was right or wrong in its decision. There is a similar procedure for habeas corpus appeals by State prisoners where they have to get a certificate of probable cause in order to go to the court of appeals.

In many instances, it is possible for a court to birfurcate the decision process and say first of all: Is the case important? And second: What do we think of it on the merits? The problem with using that kind of a device for sentence appeals I think is that the question which the court has to consider at the screening level is the very same question which it has to consider on the merits: Is the sentence excessive?

Unquestionably, unless there were some strict limit as to the number of pages one could submit, it would become the practice among lawyers simply to present their full case on a leave application. The only time that would really be saved by such a screening procedure would be the time that would be saved by having no oral arguments, and in many circuits, there wouldn't be oral argument in any case. As for those circuits where there would normally be oral argument, a special rule could be established so that there wouldn't be any oral argument on sentence appeals.

So we think the savings of time by a screening procedure would be dubious. A consideration pointing in the opposite direction would be the fact that for those cases which ultimately were reviewed by the courts of appeals, there would be two sets of papers that would have to be read instead of one: the papers presented on the leave application, and the papers ultimately presented on the merits.

One final thing: There is a suggestion that is advanced hesitantly by the American Bar Association that there should be a leave procedure in guilty plea cases. We don't see any reason why that should be so, because the problem of disparate sentences is just as prevalent in guilty plea cases as it is in trial cases. Thus, no differentiation of treatment would be warranted.

Just to summarize in two sentences what our position is: it is our view that Congress should act promptly to establish appellate review of sentences. We feel that toward that end, S. 716 is the measure best designed to reduce the problems of disparity of sentencing and individual injustices.

Thank you.

Senator Hruska. We thank you both.

Mr. Blakey, do you have any further questions?

Mr. BLAKEY. No; but I would like to extend to both Mr. Hellerstein and Mr. Hermann the sincere gratitude of the staff for a very thoughtful and very helpful paper. It makes our work a lot easier when people do our thinking for us, and you certainly have gone along with us on that.

Thank you very much.

Mr. HERMANN. Thank you very much.

Mr. HELLERSTEIN. Thank you very much.

Senator HRUSKA. Thank you very much for coming.

Our final witness of the day is Prof. Robert P. Davidow of Texas Tech in Lubbock, Tex., the home of one of our very valued and distinguished colleagues in the Congress, Representative George Mahon.

Professor Davidow will testify on procedural reforms.

Now, we have not been favored with a statement, Professor. We are reaching the noon hour, but you may go ahead and testify.

STATEMENT OF ROBERT P. DAVIDOW, TEXAS TECH UNIVERSITY, SCHOOL OF LAW

Mr. DAVIDOW. Thank you, Senator Hruska.

I wonder if I may submit as an opening statement, my letter of March 13. I have a copy here now if I may submit that.

Senator HRUSKA. That will be fine. It will be admitted and printed in the record.

[The material referred to follows:]

TEXAS TECH UNIVERSITY,
SCHOOL OF LAW,
Lubbock, Tex., March 13, 1973.

Hon. JOHN L. MCCLELLAN,
U.S. Senator from Arkansas, Chairman of the Subcommittee on Criminal Laws and Procedures, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR SENATOR MCCLELLAN: I am writing in response to your request for comments regarding the proposed "Criminal Justice Codification, Revision and Reform Act of 1973." In order to meet the March 15 deadline, I am including in this letter a series of comments on a number of different and somewhat unrelated points which are of particular interest to me. I had hoped to respond more broadly to your inquiry, but time limitations have made that impossible.

With respect to the overall organization of the Bill, I wonder why Part III, entitled Administration, is disassociated from the Federal Rules of Criminal Procedure. It seems to me that many of the provisions under Part III are no different conceptually from the kinds of provisions now found in the Federal Rules of Criminal Procedure. For example, determination of competency to stand trial (Sec. 3–11C3) is a matter related to normal criminal procedure. The same is true of provisions for sentencing and appellate review.

With respect to the question of definitions, as long as there is going to be a distinction made between defenses and affirmative defenses, it seems to me that these terms ought to be defined either in Sec. 1–1A4 (General Definitions), or at least in a section of Subchapter C, Chapter 3, Part I, dealing with defenses generally.

A more basic question dealing with defenses is this: Is there a proper conceptual basis for the distinction between affirmative and ordinary defenses? If a defense, whether affirmative or otherwise, is defined as a negation of an element of the offense, then it would seem logical that, if some evidence reasonably raises the defense, the government ought to bear the burden of establishing beyond a reasonable doubt the nonexistence of the defense. For example, under Sec. 1–3C2, a mental disease or defect is made a defense; in other words, if evidence is introduced suggesting that the defendant "lacks substantial capacity to appreciate the

character of his conduct or to control his conduct," the government must bear the burden of showing that the defendant had such substantial capacity. Presumably this is so because the criminal law operates on those who are blameworthy—i.e., those who are able to conform their conduct to the requirements of the law. It is not merely the act that the criminal law punishes; rather it punishes the combination of act and intentional, controllable departure from the norms of society, as established in the criminal laws. In a broad sense, therefore, the defense of mental disease or defect relates to the nonexistence of *mens rea*. When we turn our attention to Sec. 1–3C7, however, we find that if the defendant engages in conduct which would otherwise constitute an offense because "he is compelled to do so by threat of imminent death or serious bodily injury to himself or another person," he is to be acquitted, but only if he can establish the fact of compulsion by a preponderance of the evidence. Why should this be so? Just as in the case of mental disease or defect, the person acting under duress has no effective control of his actions. He is no more blameworthy than the individual who is unable to control his conduct because of mental disease or defect. Can this distinction in application of the burden of proof be justified? I believe that the answer is "no." It is true, of course, that there are criminal statutes which provide criminal penalties for actions unaccompanied by *mens rea*. The Supreme Court has even recently implied that there is no constitutional objection to such criminal imposition of punishment without *mens rea*. See *United States* v. *Freed*, 401 U.S. 601 (1971). However, a strong argument can be made that it is the concept of blameworthiness that distinguishes the criminal law from other forms of social control; indeed, without the concept of blameworthiness, the criminal law would have no reason to exist. After all, we have other methods of social control of dangerous persons—e.g., civil commitment. See P. Brett, An Inquiry Into Criminal Guilt (1963).

One important element of criminal procedure seems to be entirely neglected in this proposed act. I refer now to the problem of plea bargaining. If your subcommittee has not already done so, I strongly urge that you give serious consideration to the system of pre-trial agreements as it has been administered in the Army and the Navy. Unfortunately time does not permit me to deal exhaustively with the subject; therefore, I will have to content myself with including a copy of the concluding remarks which I made in a paper written in 1969 while I was doing graduate work at the Harvard Law School. Although the paper is somewhat out of date, the remarks in the conclusion do suggest some of the lessons which can be learned from the military experience in plea bargaining. If plea bargaining is to continue to be practiced—and it seems likely that it will be—it seems better to regularize it and make it subject to judicial scrutiny.

Sec. 2–9G1 would criminally proscribe knowing mutilation or defilement of an American flag. Although a number of the justices in *Street* v. *New York*, 394 U.S. 576 (1969), expressed the view that there is no first amendment impediment to the punishing of such mutilation of the flag, the Supreme Court did not so hold. Indeed, as Mr. Justice Harlan noted in his majority opinion in *Street*, the flag is "our national symbol." 394 U.S. at 593. It is precisely because it is a symbol that, in my view, the first amendment proscribes any infliction of punishment for mutilation or desecration of the flag. Unlike the situation in *United States* v. *O'Brien*, 391 U.S. 367 (1968), in which the Government could make at least a colorable argument that it had an interest in preservation of selective service certificates that was unrelated to speech, the only possible interest which the United States Government has in protection of the flag is a desire to protect "our national symbol." As all of speech involves the use of symbols, it is difficult to see how the flag, and one's reaction to it, can be anything other than pure speech. Indeed, in *Street*, Mr. Justice Harlan emphasized that the first amendment protected the defendant's remarks about the flag; however, it is arguable that his remarks were no different symbolically from the act of burning the flag itself. If he could not be punished for making remarks about the flag and about his country, how is it that one can be punished for symbolically doing the same thing by burning or otherwise mutilating the flag? Again, the United States has no interest in the flag other than that relating to its symbolic value. Additionally, it cannot be argued that Sec. 2–9G1 is intended to prevent violence which might be thought to be the response of some individuals to the sight of a flag being defiled or burned. This is so because Sec. 2–9G1 is not limited to *public* mutilation or defilement of the flag.

Sec. 3–11A4 is, of course, inconsistent with the principles enunciated by the United States Supreme Court in *Miranda* v. *Arizona*, 384 U.S. 436 (1966). Apart from the fact of this inconsistency, this section is deficient because it deals, not

with the basic problem, but only with the symptoms of the problem. It demonstrates an unhappiness with the decisions of the Supreme Court, but does nothing to deal with the problem of police lawlessness which led the Supreme Court to enunciate the rule of *Miranda*. With respect to an analogous situation (*i.e.*, where evidence seized in violation of the fourth amendment is ruled inadmissible), even Mr. Chief Justice Burger has stated that he does not "propose, however, that we abandon the suppression doctrine until some meaningful alternative can be developed." *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 420 (1971) (Burger, C. J., dissenting). Therefore, it is Congress' duty to respond to the basic problem by developing a realistic alternative. Accordingly, I am enclosing a copy of an article which is to appear in the Spring Edition of the Texas Tech Law Review, in which I have set forth a proposed act of Congress which would, I believe, deal appropriately with the problem. Specifically, I have proposed the creation of a criminal procedure ombudsman which could enforce the fourth, fifth, sixth and fourteenth amendments of the United States in the area of criminal procedure, and make unnecessary the application of the exclusionary rule.

My final comment deals with no specific aspect of the code, but rather with the assumptions underlying the continuation of our present federal system in the area of the criminal law. I believe that the time has come to give serious consideration to the question whether, apart from tradition, it makes any sense to continue to have at least 51 different criminal jurisdictions in this country. Accordingly, I am enclosing a reprint of a recent article in which I have proposed the creation, by federal constitutional amendment, of a national system of criminal justice.

I regret that I have not been able to deal in greater detail with the matters which I have discussed, and that I have not had sufficient time to even mention other matters which I would like to discuss. However, I hope that these materials will be of some help to you. Also, I look forward to appearing before the Committee sometime in April or May.

Sincerely,

ROBERT P. DAVIDOW,
Associate Professor of Law.

Enclosure.

Mr. DAVIDOW. Additionally, I would like to submit as items to be included in the record a copy of each of two articles, which I have already previously forwarded.

Senator HRUSKA. Very well.

[The material referred to follows:]

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CRIMINAL PROCEDURE OMBUDSMAN AS A SUBSTITUTE FOR THE EXCLUSIONARY RULE: A PROPOSAL

*Robert P. Davidow**

INTRODUCTION

The problem of the exclusionary rule is well known to all those familiar with the administration of criminal justice in the United States today. The problem has at least three aspects. First, the exclusionary rule (that is, the rule which requires exclusion of trustworthy evidence seized in violation of the fourth, fifth, sixth, and fourteenth amendments[1] of the United States Constitution) does, in some instances, permit guilty persons to escape punishment because the police have violated the defendant's constitutional rights. Second, police lawlessness has not been deterred by the existence of the exclusionary rule, especially in those instances in which the police have pursued goals other than that of prosecution of criminal defendants.[2] Third, the exclusionary rule has

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1. In the minds of many lawyers, the exclusionary rule is probably most closely associated with the holding in Mapp v. Ohio, 367 U.S. 643 (1961), that physical evidence seized in violation of the fourth amendment, as made applicable to the states through the fourteenth amendment, must be excluded in a state trial. Of course, the origins of the exclusionary rule go back at least as far as Boyd v. United States, 116 U.S. 616 (1886), in which the Supreme Court, in effect, excluded an invoice of goods which the district attorney had obtained through a statute requiring a defendant in a forfeiture proceeding to produce such documents. Gibbons, *Practical Prophylaxis and Appellate Methodology: The Exclusionary Rule as a Case Study in the Decisional Process*, 3 SETON HALL L. REV. 295, 299 (1972). In so ruling, the Court in *Boyd* relied on the interrelationship between the fourth and fifth amendments. In Weeks v. United States, 232 U.S. 383 (1914), the Court again relied upon the interrelationship between the fourth and fifth amendments in ruling, in effect, that evidence seized during a warrantless search of a dwelling was inadmissible in a federal trial. If, however, the essence of the exclusionary rule is the exclusion of evidence, otherwise trustworthy, because of a violation of an individual's constitutional rights, then the rule encompasses the exclusion of confessions secured in violation of Miranda v. Arizona, 384 U.S. 436 (1966) (protection of fifth amendment right to be free from self-incrimination through the enforcement of the sixth amendment right to counsel), and Massiah v. United States, 377 U.S. 201 (1964) (evidence inadmissible if secured through interference with the attorney-client relationship, as protected by the sixth amendment).

2. *E.g.*,

> Especially in the "small pinch," the policeman is not usually interested in arresting the man with a "joint" or two of marijuana, but in using him to "turn" his supplier. In that situation, the exclusionary rule may not appear salient to the defendant.

J. SKOLNICK, JUSTICE WITHOUT TRIAL 223 (1966).

Even where the police desire to prosecute, the rule may have encouraged police fabrication.

provided no remedy for the innocent person, who, presumably, is never brought to trial and thus never has an opportunity to invoke the exclusionary rule.[3]

The question arises whether there is some realistic alternative which would substantially reduce the evils mentioned above. Some proposals have been offered. Most of these would provide a tort remedy[4] against individual policemen or some sort of administrative recovery against a governmental agency.[5] In this latter category is Mr. Chief

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For example, several commentators have reported a rather dramatic increase in "dropsy" testimony (i.e., testimony that the defendants dropped narcotics to the ground in plain view of the police, thus giving the police probable cause for arrest) on the part of New York police after the Supreme Court decision in Mapp v. Ohio, 367 U.S. 643 (1961). *See* Barlow, *Patterns of Arrests for Misdemeanor Narcotics Possession: Manhattan Police Practices 1960-62*, 4 CRIM. L. BULL. 549 (1968); Note, *Effect of Mapp v. Ohio on Police Search and Seizure Practices in Narcotics Cases*, 4 COLUM. J.L. & S.P. 87 (1968); Comment, *Police Perjury in Narcotics "Dropsy" Cases: A New Credibility Gap*, 60 GEO. L.J. 507 (1971). Several explanations have been offered for this increase in addition to the possibility of fabrication. Barlow, *supra* at 557-60. However, even some judges now suspect fabrication. *See Police Perjury in Narcotics "Dropsy" Cases, supra.*

Dallin Oaks has reported that some police have described to him a new tactic which has been adopted as a presumably lawful response to *Mapp*:

> A person in possession of narcotics who sees a policeman approaching has a dilemma that grows out of the exclusionary rule. If the officer has a warrant for his arrest, the narcotics will be discovered and usable as evidence unless he can discard them. If the officer has no warrant, then the person should retain the narcotics since any search necessary to discover them will probably be illegal and the exclusionary rule will prevent their use in evidence. Knowing the difficulty that an uncertain possessor will have in resolving this dilemma, a police officer without a warrant may rush a suspect, hoping to produce a panic in which the person will visibly discard the narcotics and give the officer cause to arrest him and a legitimate ground to use the evidence.

Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 699 n.90 (1970). Is it clear that this is a lawful response to *Mapp*? Is the "rush" an assault? *Cf.* R. PERKINS, CRIMINAL LAW 133 (2d ed. 1969). Is it a type of detention? If so, the standards of Terry v. Ohio, 392 U.S. 1 (1968), would at least have to be met. Additionally, there is a question whether, given Sibron v. New York, 392 U.S. 41 (1968), and despite Adams v. Williams, 407 U.S. 143 (1972), a stop is authorized in narcotics cases in the absence of probable cause for arrest.

3. For criticisms of the exclusionary rule see authorities cited in the Appendix to Mr. Chief Justice Burger's dissenting opinion in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 426-27 (1971). Of these, one of the most helpful is Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970). In addition, see Gibbons, *Practical Prophylaxis and the Appellate Methodology: The Exclusionary Rule as a Case Study in the Decisional Process*, 3 SETON HALL L. REV. 295 (1972); Horowitz, *Excluding the Exclusionary Rule—Can There Be An Effective Alternative?* 47 L.A.B. BULL. 91 (1972); Little, *The Exclusionary Rule of Evidence as a Means of Enforcing Fourth Amendment Morality on the Police*, 3 IND. L.F. 375 (1970); Wingo, *Growing Disillusionment with the Exclusionary Rule*, 25 SW. L.J. 573 (1971); Wright, *Must the Criminal Go Free if the Constable Blunders?* 50 TEX. L. REV. 736 (1972); Comment, *The Exclusionary Rule in Context*, 50 N.C.L. REV. 1049 (1972); Comment, *The Decline of the Exclusionary Rule: An Alternative to Injustice*, 4 SW. U.L. REV. (Los Angeles) 68 (1972).

4. *E.g.*, Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955).

5. *E.g.*, Horowitz, *Excluding the Exclusionary Rule—Can There Be an Effective Alternative?* 47 L.A.B. BULL. 91 (1972). Other suggestions include criminal prosecution of offend-

Justice Burger's proposal, put forth in his dissenting opinion in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.[6] An examination of the Chief Justice's proposal will illuminate most of the difficulties with nearly all of these specific proposals which have been offered.

In *Bivens*, the majority concluded that one who alleged that his federal constitutional rights had been violated by federal employees had a cause of action for damages in a federal court. Mr. Chief Justice Burger dissented, urging congressional enactment of a statute with the following provisions:

> (a) [A] waiver of sovereign immunity as to the illegal acts of law enforcement officials committed in the performance of assigned duties;
>
> (b) the creation of a cause of action for damages sustained by any person aggrieved by conduct of governmental agents in violation of the Fourth Amendment or statutes regulating official conduct;
>
> (c) the creation of a tribunal, quasi-judicial in nature or perhaps patterned after the United States Court of Claims, to adjudicate all claims under the statute;
>
> (d) a provision that the statutory remedy is in lieu of the exclusion of evidence secured for use in criminal cases in violation of the Fourth Amendment; and
>
> (e) a provision directing that no evidence, otherwise admissible, shall be excluded from any criminal proceeding because of violation of the Fourth Amendment.[7]

This proposal does eliminate some of the problems associated with traditional tort remedies against individuals: *E.g.*, difficulties created by jury trial (which is guaranteed in federal courts by the seventh amendment),[8] including delay, expense, and the likelihood that an aggrieved person who has engaged in criminal activity will not arouse much sympathy on the part of most jurors.

One difficulty with this proposal is that it provides no remedies

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ing policemen and "suspension [or] forfeiture of office." Comment, *Search and Seizure in Illinois: Enforcement of the Constitutional Right of Privacy*, 47 NW. U.L. REV. 493, 506 (1952).

6. 403 U.S. 388 (1971) (Burger, C.J., dissenting).

7. *Id.* at 422-23. While still a judge of the United States Court of Appeals for the District of Columbia, Mr. Chief Justice Burger suggested the creation of "an independent review body" consisting of both senior police officers and members of the legal profession. Burger, *Who Will Watch the Watchman?* 14 AM. U.L. REV. 1, 17 (1964).

8. "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of jury trial shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII. For a general discussion of seventh amendment problems, see James, *Right to a Jury Trial in Civil Actions*, 72 YALE L.J. 655 (1963). In addition, see note 66 *infra*.

against state officials or for violations of the fifth and sixth amendments. Another difficulty is suggested by Mr. Chief Justice Burger's own criticism of the exclusionary rule, as set forth in his dissent in *Bivens*:

> The [exclusionary] rule does not apply any direct sanction to the individual official whose illegal conduct results in the exclusion of evidence in a criminal trial. With rare exceptions law enforcement agencies do not impose direct sanctions on the individual officer responsible for a particular judicial application of the Suppression Doctrine.[9]

The main feature of Mr. Chief Justice Burger's proposal is the waiver of sovereign immunity and the creation of a right on the part of the person aggrieved by official misconduct to proceed against the federal government before a quasi-judicial tribunal. But, as with the exclusionary rule, success of the aggrieved person before this quasi-judicial tribunal would have no immediate impact upon the official who has been guilty of wrongdoing. The Chief Justice apparently assumes that the added cost to the taxpayer would create pressure on law enforcement officials to abide by the fourth amendment.[10] Whether this would occur is debatable.[11]

Moreover, Mr. Chief Justice Burger would not make any provision for the appointment of counsel to represent the aggrieved individual. Just as is the case with the present tort actions, aggrieved persons might not know of their right to recover; also they might not have the ability to present their claims without the assistance of counsel, whose fees might exceed the aggrieved persons' financial resources.

Is there some other alternative to the exclusionary rule? One suggestion that has been made is that an ombudsman ought to enforce constitutional restrictions on the actions of both state and federal law enforcement agencies.[12] Although the literature dealing with the om-

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9. 403 U.S. at 416 (Burger, C.J., dissenting).

10. "If Fourth Amendment violations are going to cost hard public cash, the public, legislative, and executive pressure could cause rapid change in police priorities." Little, *The Exclusionary Rule of Evidence as a Means of Enforcing Fourth Amendment Morality on Police*, 3 IND. L.F. 375, 406 (1970).

11. *See* Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. CRIM. L.C. & P.S. 255, 261 (1961); Plumb, *Illegal Enforcement of the Law*, 24 CORNELL L.Q. 337, 387 (1939). Many persons might regard the increased public expense as merely the added cost of effective law enforcement. This of course raises the problem of the need to educate the public with respect to the values expressed in the Bill of Rights. *See* note 32, *infra*, and accompanying text.

12. "For an effective control of police lawlessness much can be said for some overseeing agency, like the Scandinavian ombudsman, capable of acting promptly and flexibly on informal complaints." L. FULLER, THE MORALITY OF LAW 82 (rev. ed. 1969). In addition, see Spiotto,

budsman generally is voluminous,[13] apparently there has been no attempt at elaboration of the features of such a special purpose ombudsman in this country.[14] Nevertheless, the suggestion does deserve serious consideration.

Application of the Ombudsman Principle

It is becoming increasingly difficult to generalize about the ombudsman as this Swedish institution is more widely employed throughout the world and in several of the United States.[15] It is possible, how-

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Search and Seizure: An Emperical Study of the Exclusionary Rule and Its Alternatives, 2 J. Legal Studies 243, 277 (1973); *see* T. Aaron, The Control of Police Discretion (1966). For the application of the ombudsman principle to the control of police conduct at the municipal level see Gellhorn, *The Ombudsman's Relevance to American Municipal Affairs*, 54 A.B.A.J. 134, 138 (1968). For a suggestion that a "federal ombudsman might be created to insure compliance by the local police" with the rules of criminal procedure in the context of a national system of criminal justice, see Davidow, *One Justice for All: A Proposal to Establish, by Federal Constitutional Amendment, A National System of Criminal Justice*, 51 N.C.L. Rev. 259, 269 (1972).

13. *See, e.g.*, The American Assembly, Columbia University, Ombudsman for American Government? (1968); W. Gellhorn, Ombudsmen and Others (1967); W. Gellhorn, When Americans Complain (1966); The Ombudsman, Citizen's Defender (D. Rowat ed. 1968); C. Smith, Ombudsman, Citizen Defender: A Bibliography (1966); L. Tibbles & J. Hollands, Buffalo Citizens Administrative Service: An Ombudsman Demonstration Project (1970).

14. A Canadian proposal to establish a municipal agency analogous to an ombudsman whose purpose would be the review of complaints against the police has been offered. Barton, *Civilian Review Boards and the Handling of Complaints Against the Police*, 20 U. Toronto L.J. 448 (1970). In the related field of corrections, there have been several proposals made in the United States to establish correctional ombudsmen. *E.g.*, Tibbles, *Ombudsmen for American Prisons*, 48 N.D.L. Rev. 383 (1972); Comment, *The Penal Ombudsman: A Step Towards Penal Reform*, 3 Pacific L.J. 166 (1972). Lance Tibbles has reported the operation of a so-called "penitentiary ombudsman" in Oregon, an experimental ombudsman project in the Philadelphia prisons, and a Maryland inmate grievance commission. *Ombudsmen for American Prisons, supra*, at 415-19. These institutions are not truly ombudsmen, because of a lack of independence. Similarly, Law Enforcement Assistance Administration is sponsoring two correctional ombudsmen projects—one in Minnesota and one in South Carolina. Again, in neither case is the ombudsman truly an ombudsman, since the element of independence is lacking. In the case of Minnesota, the ombudsman is appointed by the governor; in the case of South Carolina, he is appointed by the head of the department of corrections. Telephone conversations with Theartrice Williams (Ombudsman for the State of Minnesota) and Alvin Neal (Ombudsman, South Carolina Department of Corrections), December, 1972.

15. For a comprehensive report on the spread of the institution of the ombudsman internationally and nationally, see American Bar Association Ombudsmen Committee, Section of Administrative Law, Development Report, April 15, 1971-June 30, 1972. Of particular interest to Americans are the statutes creating the Hawaiian ombudsman (Hawaii Rev. Stat. § 96-1 (Supp. 1971)); the Nebraska Public Counsel (Neb. Rev. Stat. § 81-8, 240 (1971)); and the Iowa Citizens' Aide (Iowa Code Ann. § 601G.1 (Supp. 1973)). Also of interest are the statutes creating ombudsmen in several of the Canadian provinces: Alberta Rev. Stat., c. 268 (1970); Manitoba Rev. Stat., c. 045 (1970); New Brunswick Stat., c. 18 (1967); Newfoundland Stat., no. 30 (1970); Nova Scotia Stat., c. 3 (1970-71); Quebec Stat., c. 11 (1967).

ever, to note several common features. The ombudsman is an independent governmental official who receives complaints, conducts investigations, and makes recommendations relating to the actions of other governmental agencies. He succeeds mainly through persuasion, which is made more effective by the publicity which he can give to his recommendations.

Could an ombudsman make unnecessary the application of the exclusionary rule? If he were to make the exclusionary rule obsolete, he would apparently have to do more than merely publicize the results of investigations into alleged wrongdoing on the part of the police. This is so because police conduct is apparently the result of peer group pressure within the police force; that is, the individual policeman acts in accordance with the norms of his fellow policemen and his superiors within the police organization.[16] It is doubtful that mere publicity from the outside could entirely alter the situation. The ombudsmen in Finland, Denmark, and Sweden, however, have, among others, the power either to prosecute or to order the prosecution of public officials, including the police, for violations of the law.[17] Thus, there is precedent for the giving of additional power to the ombudsman for the purpose of directly affecting the actions of the individual policeman and his superior. There are, however, two difficulties with the granting of such power to an ombudsman in the context of enforcement of the fourth, fifth, sixth, and fourteenth amendments to the United States Constitution. First, if the ombudsman were to become personally involved in the prosecution of individual policemen, the problems resulting from the size of the population in the United States would be exacerbated.[18] Many more ombudsmen

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16. My observations suggest . . . that norms located within the police organization are more powerful than court decisions in shaping police behavior, and that actually the process of interaction between the two accounts ultimately for how police behave. This interpretation does not deny that legal rules have an effect, but it suggests that the language of courts is given meaning through a process mediated by the organizational structure and perspectives of the police.

J. SKOLNICK, JUSTICE WITHOUT TRIAL 219-20 (1966) (footnote omitted).

17. W. GELLHORN, OMBUDSMEN AND OTHERS 13, 64 n.34, 205 (1967).

18. It is assumed that if the ombudsman involved himself and his staff in litigation, the same sorts of problems would be produced that may be produced if the ombudsman attempts to resolve all factual disputes himself. In the latter instance such an attempt can produce pressures for increased size of the ombudsman establishment:

> If foreign experience be an indicator, external criticism could be accomplished without a giant establishment. Protracted fact gathering, as when the truth or falsity of contested assertions must be determined by evaluating "adjudicative evidence," infrequently burdens the external critic. Letters and official case files almost always provide the information needed. Criticism, unlike revisionism, does not require re-examining the particulars of a case, because the usual issue before the critic is not whether he shares the administrator's conclusion, but whether the administrator's methods were suitable.

W. GELLHORN, WHEN AMERICANS COMPLAIN 227 (1966).

would be required if the ombudsman were given this power than would be required if the ombudsman did not have it, since, to prosecute, the ombudsman would have to thoroughly investigate the case and spend a good deal of time in the actual process of litigation. There are some people who assert that, even under the best of circumstances, the United States is simply too large to permit the ombudsman system to work, since, it is argued, the ombudsman depends in part for his success upon a personalistic approach.[19] Other authorities deny this, asserting that an ombudsman can be a collegiate body so long as the objectivity[20] and identifiability[21] of the ombudsman are maintained. In any event, it is clear that the number of ombudsmen would have to be much greater if they were to be involved in actual litigation.

A second difficulty with the granting of this power regarding prosecution is that the ombudsman's position as an independent and neutral observer might be jeopardized. If the ombudsman were to directly intervene in the prosecution of a policeman, he would appear to be an adversary and not a detached third party.[22] For this reason, the ombudsman in Norway was not given the power to initiate prosecutions against public officials.[23] It may be answered that this problem apparently has not been an insuperable one, at least with respect to the operations of the ombudsmen in Sweden, Finland, and Denmark.[24] It should be noted, however, that this power has been exercised very infrequently in recent years in Sweden, for example.[25]

There is a possible solution to the dilemma created by the need to give the ombudsman power to do more than merely recommend—a solution which would permit the ombudsman to remain objective, while

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19. *See* Krislov, *A Restrained View*, in THE OMBUDSMAN 249-50 (2d ed. D. Rowat 1968).

20. Professor Donald Rowat has characterized as "a lot of sentimental twaddle" the emphasis placed by some writers on the Ombudsman's personal touch, which he believes to be far less important than the impartiality of the office. Gwyn, *Transferring the Ombudsman*, in OMBUDSMEN FOR AMERICAN GOVERNMENT? 48-49 (S. Anderson ed. 1968).

In a 1968 reorganization, a single institution of the ombudsman was created in Sweden, but with three separate ombudsmen, each responsible for a different sector of administration. Frank, *The Ombudsmen and Human Rights*, 22 AD. L. REV. 467, 468 (1970).

21. "From the public's point of view, personalism seems not so important as sheer identifiability. A grievance bureau will clearly be a failure if the public cannot find it when needed." W. GELLHORN, WHEN AMERICANS COMPLAIN 49-50 (1966).

22. "An ombudsman is not an advocate, in so far as advocacy is incompatible with impartiality, and entails taking sides in an adversary proceeding." Moore, *Ombudsmen and the Ghetto*, 1 CONN. L. REV. 244, 245 (1968).

23. *See* Os, *Norway's Ombudsmen*, in THE OMBUDSMAN 95, 105 (2d ed. D. Rowat 1968).

24. *See* W. GELLHORN, OMBUDSMAN AND OTHERS 5-87, 194-255 (1967).

25. "The ombudsmen may initiate a half-dozen prosecutions in the course of a year . . . ." *Id.* at 235.

limiting the number of ombudsmen required. This solution might take the form of a grant of power to the ombudsman to appoint private counsel at public expense to represent aggrieved individuals in civil suits when the ombudsman concluded that there was probable cause to believe that the aggrieved person's constitutional or other rights had been violated. The ombudsmen in Denmark and Sweden possess a similar power.[26]

Before proceeding on the assumption that an ombudsman would be a panacea with respect to the problem of police lawlessness in the United States, one ought to consider the rather sobering conclusion of one of the most knowledgeable and astute American students of the ombudsman, Professor Walter Gellhorn:

> In actuality, an ombudsman is not a countervailing power in society. His criticisms alone cannot remake or undo malfunctioning governmental machinery. He cannot impose his contrary will on resistant officials. He can be effective precisely to the extent that governmental organs share the values he seeks to nurture and precisely to the extent that they welcome having an impeccably objective eye peering over their shoulder at what they do. He is, in short, most useful in a society already so well run that it could get along happily without his services at all.[27]

Thus, the chief difficulty involved in an attempt to apply the ombudsman principle to the problem of police lawlessness in the United States today becomes clear: Some police administrators apparently do not share some of the values expressed in the Bill of Rights of the Federal Constitution. In this they seem to have the support of a substantial portion of the population.[28]

A related difficulty is the opposition of many law enforcement personnel to the sort of external control represented by civilian review boards, which have been widely discussed and which have operated in a few instances.[29] Such opposition has also received considerable public support. One writer has described the problem this way:

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26. *Id.* at 33 n.47; G. SAWER, OMBUDSMEN 9 (1964); Bexelius, *The Ombudsman for Civil Affairs*, in THE OMBUDSMAN 31 (2d ed. D. Rowat 1968). In addition, a similar power would be granted to the ombudsman under the Correctional Ombudsman Act, H.R. 14338, 92d Cong. 2nd Sess. (1972).

27. W. GELLHORN, OMBUDSMEN AND OTHERS 192 (1967). Also, Herman S. Doi, Ombudsman for Hawaii, has specifically questioned whether an ombudsman could be a substitute for the exclusionary rule. Letters from Herman S. Doi to Robert P. Davidow, October 6 and 27, 1972.

28. Gwyn, *Transferring the Ombudsman*, in OMBUDSMEN FOR AMERICAN GOVERNMENT? 66 (S. Anderson ed. 1968).

29. Discussions of the several civilian review boards which have functioned are found in PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK

> At the local level—and, as already indicated, with some spill-over at the state level—the most common argument against Ombudsman has been that it is a substitute civilian police review board. The major premise of this argument is that the police should be accountable to no one.[30]

Of course, this fear on the part of the police force may be unreasonable, in the sense that it is an expression of a desire to be independent in a way in which even the military establishment, after which many police seem to pattern their operations, is not independent. (After all, the armed services are under the command of the President of the United States and under the supervision of the civilian heads of the Defense Department and the several military departments.) Nevertheless, it is true that some police seem antithetical, not only to some of the values expressed in the Bill of Rights, but also to the notion of civilian control of the police forces. And this remains true even though authorities in the field have expressed the view that such an independent reviewing agency could be positively beneficial to the police, since the public could be assured that in a large number of cases the police have indeed obeyed the law.[31]

In view of these popularly supported attitudes of some police, is it useless to attempt to apply the ombudsman principle to the problem of police administration in the United States? Should the first effort be directed toward the changing of attitudes through education in the sec-

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FORCE REPORT: THE POLICE 200-02 (1967); Barton, *Civilian Review Boards and the Handling of Complaints Against the Police*, 20 U. TORONTO L.J. 448 (1970).

30. Anderson, *Proposals and Politics*, in OMBUDSMEN FOR AMERICAN GOVERNMENT? 149 (S. Anderson ed. 1968).

31. Maybe those of us who like Ombudsmenship have been a bit careless in presenting it as though we thought that the citizen—the customer, so to speak—is always right. Perhaps we have implied that the Ombudsmen is always going to side with the citizen against officials. Of course that isn't the way things have worked out in any degree. Wherever an Ombudsman has functioned, he has been purely and plainly an advocate of sound administration, not an advocate of the position of the complainant. In this respect he has differed from many legislators who tend, when a constituent complains, to become an advocate of the complainant's case without much consideration of its merit; they pushed the matter because of the source from which it comes, not because of its worth. The Ombudsman, on the other hand, is not a built-in critic of officials, whether elected or not. He is simply stationed at the margin, as it were, between the citizen and the official, and he must be concerned with seeing that justice is done to public servants as well as to the public whom they serve. Believe me, he does protect both groups. I have not the slightest doubt that if a free vote were taken among the police and other officials in any country in which the Ombudsman has functioned, a truly overwhelming majority of the participants in the election would favor the continuation of Ombudsmenship.

Gellhorn, *The Ombudsman Concept in the United States*, in OUR KIND OF OMBUDSMAN 13-14 (L. Levison ed. 1970).

ondary schools with respect to the values expressed in the Bill of Rights? Certainly this latter approach should not be ignored, and, indeed, the American Bar Association, through its Special Committee on Youth Education for Citizenship, is taking some steps in that direction.[32] Such educational efforts are, of course, long-term; immediate results cannot be expected. In the light of the generality and gravity of the problems presented by the exclusionary rule and the underlying conditions of the country which have given rise to an attempt to enforce that rule, perhaps we ought to proceed on the assumption that the application of the ombudsman principle will work. Indeed, Professor Gellhorn, whose remarks, quoted above, have shown some of the difficulties involved in the attempt to apply the ombudsman principle in the United States today, has also expressed views which are encouraging to anyone desirous of attempting to experiment with the ombudsman concept:

> If [police] superiors from the top of the chain of command to the bottom are determined to correct subordinates, if they themselves are held accountable for inexcusable failures to detect and discipline offenders, they can eliminate much of the behavior that now brings police establishments into disrepute.[33]

The Proposed Act of Congress

A Bill[34]

To create a criminal procedure ombudsman and to abrogate the exclusionary rule, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That this Act may be cited as the "Criminal Procedure Ombudsman Act of 197__."

Sec. 2. It is the sense of Congress, that since the exclusionary rule of criminal procedure (whereby evidence seized in violation of the fourth, fifth, sixth, and fourteenth amendments to the United States Constitution has been inadmissible in both state and federal criminal trials) has failed to protect the innocent, has sometimes permitted guilty persons to escape punishment, and generally has failed to deter some police lawlessness, these evils ought to be reduced as far as practicable (and within constitutional limitations) primarily through the creation of a criminal procedure ombudsman, and secondarily through the abrogation of the exclusionary rule.

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32. American Bar News, April, 1972, at 3, col. 1.
33. W. Gellhorn, When Americans Complain 182 (1966).
34. The bill is proposed by the author.

SEC. 3. As used in this statute, the following words or phrases have the following meanings:

(a) *Law violation* means any violation of the Federal Constitution, state constitutions, federal laws, state laws, local ordinances, and regulations of any administrative body (local, state, or federal, and including the police).

(b) *Ombudsman* means *the* Ombudsman if spelled with a capital "O"; if spelled with a lower case "o," it refers to both the Ombudsman and assistant ombudsmen.

(c) *Public official* means any official or employee of the federal government, the states, or any political subdivision of the states, but does not include state and federal judges.

SEC. 4. The Congress of the United States hereby establishes a Criminal Procedure Ombudsman (hereafter referred to as the Ombudsman).

SEC. 5. The Ombudsman shall be selected by the President of the United States from a list of three nominees submitted by a committee composed of the Speaker of the House of Representatives, the President Pro Tempore of the Senate, the House Minority Leader, and the Senate Minority Leader.

SEC. 6. The Ombudsman shall serve a term of 15 years unless: (a) on the fifth or 10th anniversary of his selection, the Congress, by majority vote of the total membership of each House thereof, shall remove him, or (b) at any time the Congress, by a two-thirds vote of the total membership of each House, shall remove him because of disability or conviction of a felony or other crime involving moral turpitude.

SEC. 7. No person shall serve as Ombudsman unless he has reached his 35th birthday, has been admitted to the practice of law in at least one state or the District of Columbia, and has not been involved in partisan affairs for five years immediately preceding his selection.

SEC. 8. The salary of the Ombudsman shall equal that of the Chief Justice of the United States Supreme Court.

SEC. 9. The Ombudsman shall have the power:

(a) To receive complaints, oral or written, from anyone regarding the actions of public officials relating to any type of detention (regardless of duration and regardless of whether it occurs in connection with criminal or civil commitment proceedings), interrogation, interference with the attorney-client relationship, searches, or other invasions of privacy;

(b) to investigate the complaints referred to in (a) or, on his own initiative, to investigate the matters described in (a);

(c) in the course of investigations referred to in (b), to have access to the internal files of any public official, to take the depositions of

pertinent witnesses, whose presence may be compelled by subpoena issued by the ombudsman (and enforceable in an appropriate federal district court), and to inspect the premises of public officials whose activities he may investigate;

(d) with respect to the matters described in (a), to make and publicize recommendations concerning that which the Ombudsman deems either (1) necessary to the avoidance of law violations, or (2) desirable, from a policy standpoint; however, publication shall occur only after any public officials whose actions are to be criticized are given an opportunity to respond to the criticisms, and the publication shall include the criticized officials' responses;

(e) to authorize payment of private counsel from appropriated funds for litigation, when the Ombudsman determines that there is probable cause to believe that an aggrieved person has a cause of action as described in section 12 of this statute;

(f) to appoint private counsel at government expense to sue in an appropriate federal district court for a declaratory judgment in those instances in which the Ombudsman decides that there is a need to determine whether there has been a law violation with respect to the matters described in subsection (a) and in which such determination has not been and is not likely to be made through litigation referred to in subsection (e);

(g) to appoint not more than 100 assistant ombudsmen who shall:

(1) Have all of the qualifications of the Ombudsman,

(2) be paid the same salary as that received by judges of the United States District Courts,

(3) exercise any of the powers of the Ombudsman which the Ombudsman, in his discretion, delegates to them (except that of delegation), and

(4) serve for a term of 15 years unless removed by Congress in accordance with the provisions of section 6; and

(h) to appoint such other staff members as may be necessary to effectuate this act.

SEC. 10. The Ombudsman may refuse to investigate a complaint if, on its face, it is obviously unmeritorious, or may require that a claimant of an apparently meritorious claim exhaust available administrative remedies, unless there is a danger of unreasonable delay or undue hardship. Following investigation of a facially meritorious claim, the Ombudsman may proceed no further if the facts found by him demonstrate that the claim is unmeritorious. The Ombudsman shall advise the claimant and the public official who is the object of the complaint of any action taken; the Ombudsman shall also advise the complainant of a decision to proceed no further and the reasons therefor.

SEC. 11. Subject to the limitations of section 9(d), the Ombudsman shall report annually to Congress regarding the work of his office.

SEC. 12. (a) Any person who is aggrieved because of a law violation by a public official may sue the offending official or officials (including a supervisory official where the supervisory official has materially contributed to the violation through willful misconduct or through negligence, including the failure to make or enforce reasonable regulations for the governance of the conduct of those working under him) in an appropriate United States District Court. Compensatory damages (not less than $50 for each violation), exemplary damages (in cases of willful misconduct), and costs may be recovered by the aggrieved person.

(b) In suits authorized under (a), if the fact finder (judge or jury) rules in favor of the defendant, the fact finder shall render a special verdict in which it shall indicate whether the basis of the verdict was (1) the absence of a law violation, (2) the inability of the fact finder to attribute blame to a specific defendant (despite a law violation), or (3) a reasonable, good faith effort on the part of the defendant to avoid a law violation.

(c) When the fact finder renders judgment for the defendant for reasons (2) or (3) set forth in subsection (b), the trial court shall render judgment against the United States for an amount determined according to the principles set forth in subsection (a).

(d) In suits under this section, the United States may intervene as a party defendant.

(e) No judgment against an individual official under this section shall be satisfied, directly or indirectly, with public funds (local, state, or federal).

SEC. 13. No letter addressed to the ombudsman from any person whose mail might otherwise be subject to censorship shall be opened prior to delivery to the ombudsman.

SEC. 14. The Ombudsman shall have authority to seek injunctive relief in an appropriate federal district court against efforts by individuals to obstruct the activities of the ombudsman or his staff.

SEC. 15. No activities of the ombudsman and staff with respect to the functions of the ombudsman shall be reviewed in any court.

SEC. 16. The ombudsman shall enjoy the same immunities from civil and criminal liability as are enjoyed by federal judges.

SEC. 17. No evidence obtained through a law violation shall be inadmissible in any federal court if that evidence is obtained subsequent to three years after the effective date of this statute.

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SEC. 18. It shall be the duty of every attorney involved in the trial (state or federal) of any case dealing with alleged criminal acts, civil commitment, or prison administration to report to the ombudsman every instance of apparent law violation by public officials.

SEC. 19. If section 17 is declared unconstitutional, the remainder of this act shall remain in effect, it being the sense of Congress that, even without formal abolition of the exclusionary rule, the ombudsman may reduce the need for the employment of the exclusionary rule.

COMMENTS

ENACTING CLAUSE: The problems associated with the exclusionary rule are national in scope; therefore, it seems appropriate to deal with them through an act of Congress rather than through the separate acts of the various state legislatures.[35]

SEC. 2: It is important to provide a statement of basic purpose so that courts faced with the problem of interpretation will have as little need as possible to resort to legislative history, which is often ambiguous. The statement regarding primary emphasis on the creation of the Criminal Procedure Ombudsman should be read in connection with section 19, the severability clause.

SEC. 3: (a) See discussion of section 9(d).
(b) See discussion of section 4.
(c) See discussion of section 9(a) and (d).

SEC. 4: The powers granted to the Ombudsman in this statute are sufficiently similar to those exercised by the ombudsman in Sweden to justify the use of the term "ombudsman." This is so despite Nebraska's use of the term "Public Counsel"[36] and Iowa's use of the term "Citizen's Aide."[37] (In Hawaii the term "ombudsman" is used.)[38]

SEC. 5: Although the Swedish ombudsman (the original ombudsman) is selected by a portion of the legislature,[39] it has been suggested that it is not so important that the legislature select the ombudsman as long as he is impartial.[40] Impartiality is, presumably, assured chiefly through independence; however, selection by the legislature is not indis-

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35. In the area of criminal law and procedure, I have a bias in favor of federal action. *See* Davidow, *One Justice For All: A Proposal to Establish, By Federal Constitutional Amendment, A National System of Criminal Justice*, 51 N.C.L. REV. 259 (1972).
No attempt has been made to set forth the required conforming amendments.
36. NEB. REV. STAT. § 81-8, 241 (1971).
37. IOWA CODE ANN. § 601G.2 (Supp. 1973).
38. HAWAII REV. STAT. § 96-2 (Supp. 1971).
39. W. GELLHORN, OMBUDSMEN AND OTHERS 202 (1967).
40. *See* note 20 *supra* and accompanying text.

pensable to independence. (Certainly we regard our federal judges as independent, even though they are appointed by the President with the advice and consent of the Senate.)

The kind of selection presented here is a variation of the "Missouri"[41] or "merit plan" of selection. Since the four members of the nominating committee would be equally divided in party affiliation, they would have to put aside partisan considerations to reach agreement.

SEC. 6: As in section 5, the "Missouri" or "merit plan" is relied upon as a guide in the determination of the procedure by which the Ombudsman might be removed. Instead of a limited, but renewable term of 5 years, there is provision for a term of 15 years, which can nevertheless be terminated at 5-year intervals if the Congress affirmatively acts to end it.

Since the Ombudsman is to be truly independent, it is desirable to limit Congress' removal power to a very narrow and precisely defined category of circumstances; hence, such phrases as "neglect of duty" or "misconduct"[42] are not used. The phrase "moral turpitude" has a reasonably well defined meaning,[43] and hence its use would not leave courts wholly at large in the interpreting process.

SEC. 7: The attitude and ability of the Ombudsman would affect greatly the successful implementation of the statute. Merit selection (sec. 5) is perhaps the best method by which to choose a person of ability who is sympathetic to the goals of the statute. Nevertheless, it is appropriate to indicate minimum standards for the position of Ombudsman. Legal training, a degree of maturity, and non-involvement in partisan politics[44] seem to be reasonable minimum requisites.

SEC. 8: Salary is one, although not the only, measure of prestige, and prestige is an important intangible, affecting not only the search for the most competent person for the job, but also the willingness of officials to follow the suggestions offered by the Ombudsman.

SEC. 9: Subsection (a): Resort to the Ombudsman should be made as simple as possible; therefore, it should be possible for the

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41. MO. CONST. art. 5, §§ 29(a)-(g), & 30, 31 (Supp. 1973).

42. A typical removal provision is as follows: "The legislature, by a two-thirds vote in each house, may remove or suspend the Ombudsman from office, but only for neglect of duty, misconduct, or disability." *A State Statute to Create the Office of Ombudsman*, 2 HARV. J. LEG. 213, 222 (1965).

43. *See, e.g.*, Tutrone v. Shaughanessy, 160 F. Supp. 433 (S.D.N.Y. 1958) (interpreting 8 U.S.C. § 1251(a)(4), dealing with deportation of aliens convicted of crimes "involving moral turpitude").

44. "The Ombudsman shall . . . not be actively involved in partisan affairs." Gellhorn, *Annotated Model Ombudsman Statute*, in OMBUDSMEN FOR AMERICAN GOVERNMENT? 162 (S. Anderson ed. 1968).

Ombudsman to receive complaints that are delivered orally as well as in writing.[45] Persons who may be most in need of the Ombudsman may be the persons with limited ability to express themselves in writing.

An exception to jurisdiction is made with respect to judges. (See sec. 3). There is precedent (particularly in the Scandinavian countries) for criticism of the judiciary by the ombudsman.[46] Also, in this country there are at least two state commissions which receive complaints about judicial misconduct.[47] Nevertheless, the tradition of judicial independence is so deeply engrained in this country that perhaps criticism of this judiciary ought to be excluded. On the other hand, if the Ombudsman is truly independent, there is no reason why he should not be able to criticize the Congress, a state legislature, or the Chief Executive of the United States or of a state, if the criticism is otherwise within the powers of the ombudsman.

The attempt here is to give the Ombudsman power to deal with any kind of detention regardless of duration and regardless of the label attached to it. Substance rather than form ought to be the guide here. Also, this somewhat broader jurisdiction may help to reduce some of the criticism that has been voiced with respect to civilian review boards; here persons other than the police would be subject to criticism by the Ombudsman, and perhaps the police would not feel that they were being singled out for special attention.[48]

Subsection (b): With the exception of the British Parliamentary Commissioner, who must receive complaints through members of Parliament,[49] almost all other ombudsmen have authority to act on their own initiative,[50] and it seems appropriate to give the Ombudsman here the same authority.

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45. Project officials decided not to impose rigid requirements of form in connection with the receipt of citizens' complaints. They did not insist that complaints be in writing or that they be signed or notorized. Complaints were taken by letter, by telephone, and in person.

INSTITUTE OF GOVERNMENTAL STUDIES, UNIVERSITY OF CALIFORNIA, BERKLEY, BUFFALO CITIZENS ADMINISTRATIVE SERVICE: AN OMBUDSMAN DEMONSTRATION PROJECT 14 (1970).

46. *E.g.*, W. GELLHORN, OMBUDSMEN AND OTHERS 202, 205 (1967).

47. *See* CALIF. CONST. art. 6, §§ 8 & 18; TEX. CONST. art. V, § 1-a; TEX. REV. CIV. STAT. ANN. art. 5966a (Supp. 1973).

48. In commenting on the advisibility of civilian review boards, Walter Gellhorn has stated: Singling out the police in this manner of course offends them; much more significantly, it ignores many other areas of governmental activity that equally concern civilians. One may safely guess, for example, that disadvantaged persons more frequently find themselves in controversy with welfare and educational authorities than with the police. Moreover, a single focus on the police department overlooks the existence of closely similar official activities.

W. GELLHORN, WHEN AMERICANS COMPLAIN 185 (1966).

49. The Parliamentary Commissioner Act 1967, c. 13, § 6.

50. *E.g.*, HAWAII REV. STAT. § 96-6(b) (1968).

Subsection (c): Access to the internal files of administrative agencies is absolutely essential if the Ombudsman is to accomplish his task. He should also be given the power to compel the attendance of witnesses, although this power may be exercised sparingly. Right of inspection has also been found to be important.[51]

Subsection (d): In the light of section 5 of the fourteenth amendment, there is little question of the power of Congress to pass legislation, such as the Ombudsman Act set forth above, providing for enforcement of the due process clause of the fourteenth amendment.[52] A question may be raised whether Congress has the power, in effect, to enforce compliance by state and local governments with their own constitutions, state laws, and local ordinances and regulations. However, if the phrase "due process of law" retains in part its original meaning, derived from Magna Carta—that is, "law of the land"[53]—then it seems that Congress has the power under section 5 of the fourteenth amendment to require the states and local governmental entities to conform to their own constitutions, laws, and regulations; these constitutions, laws, and regulations are indeed "the law of the land" within their respective

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51. *See, e.g.*, Gellhorn, *Appendix to* AMERICAN ASSEMBLY, COLUMBIA UNIVERSITY, *Annotated Model Ombudsman Statute*, in OMBUDSMEN FOR AMERICAN GOVERNMENT? 159, 165 (S. Anderson ed. 1968); *A State Statute to Create the Office of Ombudsman*, 2 HARV. J. LEG. 213, 234-35 (1965).

52. *See* Katzenbach v. Morgan, 384 U.S. 641 (1966). Although there is language in the opinion of Mr. Justice Black (announcing the judgment of the court) in Oregon v. Mitchell, 400 U.S. 112 (1970) which casts doubt on the breadth of the principle announced in *Morgan*, it would seem that a piece of legislation specifically designed to require the states to adhere to the restrictions of the due process clause of the fourteenth amendment would be directly within the power of Congress under section 5 of that amendment to "enforce, by appropriate legislation, the provisions of this article."

53. The origin of the Due Process Clause is Chapter 39 of Magna Carta which declares that "No free man shall be taken, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the *law of the land*." (emphasis added.) As early as 1354 the words "due process of law" were used in an English statute interpreting Magna Carta, and by the end of the 14th century "due process of law" and "law of the land" were interchangeable. Thus the origin of this clause was an attempt by those who wrote Magna Carta to do away with the so-called trials of that period where people were liable to sudden arrest and summary conviction in courts and by judicial commissions with no sure and definite procedural protections and under laws that might have been improvised to try their particular cases. Chapter 39 of Magna Carta was a guarantee that the government would take neither life, liberty, nor property without a trial in accord with the law of the land that already existed at the time the alleged offense was committed. This means that the Due Process Clause gives all Americans, whoever they are and wherever they happen to be, the right to be tried by independent and unprejudiced courts using established procedures in applying valid pre-existing laws . . . . The due process of law standard for trial is one in accordance with the Bill of Rights and laws passed pursuant to constitutional power, guaranteeing to all alike a trial under the general law of the land.
Duncan v. Louisiana, 391 U.S. 145, 169-70 (1968) (Black, J., concurring) (footnotes omitted).

jurisdictions.[54] In addition, there seems little constitutional doubt that the Ombudsman would be able to make and publicize recommendations; indeed, it might be argued that his power to do so would be at least consistent with the spirit of, if not specifically protected by, the first amendment.[55]

In some of the statutes dealing with ombudsman in other jurisdictions, there is an elaborate statement of the types of situations in which the ombudsman can offer criticism.[56] Here it is thought that a simple statement regarding lawfulness (or constitutionality) on the one side and policy on the other would suffice.[57] "Policy" presumably would include anything that did not involve a strict matter of legality or constitutionality. It is hoped that the Ombudsman would have the greatest flexibility in offering criticisms and suggestions. Since we are now concerned with merely criticisms and suggestions, it seems futile to try to restrict the Ombudsman to ostensibly, narrow (but inherently ambiguous) categories such as "maladministration."[58]

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54. An exercise of such a power by Congress would merely be an attempt on the part of Congress to prevent "a discrepancy between the law as declared and as actually administered" and thus to insure respect for the principle of "congruence between official action and the law." L. FULLER, THE MORALITY OF LAW 81 (rev. ed. 1969).

55. *Cf.* Pickering v. Board of Educ., 391 U.S. 563 (1968) (dismissal of school teacher violative of first and fourteenth amendments when based on writing of letter, without knowledge or reckless disregard of falsity of statements in letter, critical of board); Garrison v. Louisiana, 379 U.S. 64 (1964) (contempt conviction of district attorney violative of first and fourteenth amendments where basis of contempt was statements, made without knowledge or reckless disregard of falsity, critical of local criminal court judges); Wood v. Georgia, 370 U.S. 375 (1962) (sheriff's statements critical of judge regarding judge's instructions to grand jury not proper basis for contempt conviction in light of first and fourteenth amendments); Muller v. Conlisk, 429 F.2d 901 (7th Cir. 1970) (police department rule prohibiting criticism of department by its policemen violative of first and fourteenth amendments).

56. An appropriate subject for investigation is an administrative act of an agency which might be: (1) contrary to law; (2) unreasonable, unfair, oppressive, or unnecessarily discriminatory, even though in accordance with law; (3) based on a mistake of fact; (4) based on improper or irrelevant grounds; (5) unaccompanied by an adequate statement of reasons; (6) performed in an inefficient manner; or (7) otherwise erroneous. HAWAII REV. STAT. § 96-8 (1968).

57. This distinction between policy and legality is analogous to the distinction between "the morality of aspiration and the morality of duty" as described by Lon Fuller. L. FULLER, THE MORALITY OF LAW 5 (rev. ed. 1969). Professor Fuller's distinction is recognized in ABA CODE OF PROFESSIONAL RESPONSIBILITY AND CANONS OF JUDICIAL ETHICS, *Preliminary Statement* 1 (1969):

> The Ethical Considerations are aspirational in character and represent the objectives towards which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations.
>
> The disciplinary rules, unlike the ethical considerations, are mandatory in character. The disciplinary rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.

58. Parliamentary Commissioner Act 1967, c. 13, § 5(1)(a).

As in other ombudsman statutes, the Ombudsman would not be permitted to criticize an official without giving that official an opportunity to respond to the criticism; provision is also made for the inclusion of the official's response in the publicized version of the Ombudsman's treatment of the case.

Subsection (e): If the Ombudsman statute were merely designed to provide general improvement in the field of administration of criminal justice and in the field of civil commitment, there might be no need to give the Ombudsman more than the power to merely recommend and criticize. However, part of the goal of this statute is to make unnecessary the exclusionary rule; therefore, it is necessary to attempt to deal in some fashion with individual cases of police and other official misconduct. If the statute is to be a substitute for the exclusionary rule, it is necessary to give the aggrieved person some authority to effectively challenge the action of the offending official. It would be possible, as is true in Sweden, Finland, and Denmark, to give the Ombudsman the power to prosecute or order the prosecution of the offending official.[59] Or, perhaps the Ombudsman could be given the power to personally bring a civil suit against these individuals. However, it has been thought by some that the exercise of this power by the Ombudsman would compromise his apparent objectivity and neutrality.[60] He would become involved as an advocate, and his public image might become tarnished. Nevertheless, it does seem appropriate to permit the Ombudsman to authorize the retention of private counsel at public expense in those situations in which a cause of action for law violation may be deemed established on a prima facie basis. This would not require the Ombudsman to make any ultimate determinations of fact,[61] although his investigation might lead him to some fairly firm conclusions.

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59. *Supra* note 17.

60. *Supra* notes 22 & 23.

61. It has been suggested by some that an ombudsman is incapable of acting as a fact finder in a case involving disputed facts:

> First of all, an ombudsman does not function as a trial court. When contested issues of fact arise concerning episodes not reflected in paper files, an ombudsman will be unable in most instances to say where the truth lies. He can give advice about avoiding similar controversies in the future, but he cannot confidently re-create the past when the complainant's version of the facts and the complained against official's version are irreconcilable.

Gellhorn, *The Ombudsman's Relevance to American Municipal Affairs*, 54 A.B.A.J. 134, 138 (1968).

> As discussed earlier the Ombudsman is not a trier of facts. Complaints about a police officer's conduct in a dark alley in the early morning hours will not be resolved by the ombudsman. He will not be able to determine where the truth lies when the complaint comes down to complainaint's word against the word of one or more policemen.

Subsection (f): The Ombudsman might learn of pertinent law violations from persons other than aggrieved persons. No suit under section 12 would be possible. However, it is desirable to permit the Ombudsman to seek to bring about compliance with the apparent law through a suit for declaratory judgment. As one charged by law with the duty to attempt to seek compliance with the law, the Ombudsman would seem to have the personal stake in the outcome required for standing in a federal court suit.[62] To avoid undue expenditures of precious time and personal involvement, however, the Ombudsman would authorize private counsel to litigate in his behalf.

Subsection (g): Although there is no way of knowing in advance precisely how many assistant ombudsmen would be necessary to function throughout the country, it would seem that 100 would be enough in the light of an estimate that something over 100 ombudsmen could serve the whole nation despite their exercise of general jurisdiction with respect to activities of federal employees.[63] Here, although jurisdiction would not be limited to actions of federal officials, the subject matter jurisdiction would be limited to a fairly narrow range of cases.

Although chosen by the Ombudsman, the assistant ombudsmen should, as nearly as possible, have all of the qualifications of the Ombudsman, be entitled to the same privileges, and be subject to the same power of removal. Under this subsection the Ombudsman would have the power to delegate all of his authority (except the power to delegate), but he would not be required to do so.

Subsection (h): Here the Ombudsman would be given considerable discretion to staff his office as he saw fit.

SEC. 10: Since the Ombudsman statute is regarded here as a

Tibbles, *The Ombudsman: Who Needs Him?* 47 J. URBAN L. 1, 61 (1969).

On the other hand, the report of the New Zealand Ombudsman with respect to his investigation of complaints of police brutality growing out of the visit of the Vice President of the United States to Auckland, New Zealand, in 1970 suggests that perhaps the ombudsman is not as incapable of finding the facts as these writers have suggested. *See* SPECIAL REPORT OF THE OMBUDSMAN UPON COMPLAINTS AGAINST POLICE CONDUCT 4-21 (1970).

62. *Cf.* Civil Rights Act of 1968, 42 U.S.C. § 3613 (1970) (United States Attorney General has power, *inter alia*, to enforce fair housing provisions when there is "pattern or practice of resistance to the full enjoyment" of the fair housing rights). Apparently there has been no serious challenge to the standing of the Attorney General to bring such actions. *E.g.*, United States v. Hunter, 459 F.2d 205 (4th Cir. 1972), *petition for cert. filed*, 41 U.S.L.W. 3073 (U.S. July 25, 1972) (No. 72-146) (no issue of standing raised); United States v. Luebke, 345 F. Supp. 179 (D. Colo. 1972) (no merit in defendant's motion to dismiss based on allegation that Attorney General should have brought suit in behalf of the Secretary of Housing and Urban Development rather than in behalf of the United States). *Cf.* Trafficante v. Metropolitan Life Ins. Co., 93 S. Ct. 364 (1972); Board of Educ. v. Allen, 392 U.S. 236 (1968).

63. Green, *Socio-Physics of the Ombudsman Concept*, in OUR KIND OF OMBUDSMAN 50, 54 (L. Levison ed. 1970).

possible substitute for the exclusionary rule, the Ombudsman is to be given less discretion in deciding whether to investigate or proceed further with individual cases than he is given in other statutes.[64] Exhaustion of administrative remedies is desirable, but the Ombudsman is to be free to proceed despite a failure to exhaust such remedies. The provisions regarding the giving of advice to the claimant and to the suspected official are not very different, substantively, from provisions in other ombudsman statutes.[65]

SEC. 11: Given the importance of publicity to the functioning of the Ombudsman, the requirement of a report to Congress seems essential and is, of course, consistent with similar requirements found in other ombudsman statutes.

SEC. 12: Subsection (a): It seems appropriate to provide a specific cause of action in federal courts for law violations.[66] (The remarks set forth above with respect to section 9(d) demonstrate that under section 5 of the fourteenth amendment Congress would have the power to provide a cause of action for law violations by any governmental agency.) Certainly such a cause of action against the offending official would be essential if the goal of elimination of the exclusionary rule were to be achieved. Unfortunately, actions for damages against specific individuals could not escape the guarantee of jury trial, as set forth in the seventh amendment;[67] however, it seems more important to risk the inconveni-

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64. *E.g.*,

> He [the Public Counsel (ombudsman)] shall conduct a suitable investigation into the things complained of unless he believes that: (1) the complainant has available to him another remedy which he could reasonably be expected to use; (2) the grievance pertains to a matter outside his power; (3) the complainant's interest is insufficiently related to the subject matter; (4) the complaint is trivial, frivolous, vexatious, or not made in good faith; (5) other complaints are more worthy of attention; (6) his resources are insufficient for adequate investigation; or (7) the complaint has been too long delayed to justify present examination of its merit.

NEB. REV. STAT. § 81-8, 247 (1971).

65. *E.g.*, IOWA CODE ANN. § 601G.13 (Supp. 1973).

66. *Cf.* Civil Rights Act of 1968, 42 U.S.C. § 1983 (1970):

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the person injured in an action of law, suit in equity, or other proper proceedings for redress.

The difficulty with section 1983 is that it does not give a cause of action for failure of state or local officials to follow their own laws and regulations except perhaps where such a failure also violates the Federal Constitution or laws.

67. *Supra* note 8. Although the seventh amendment is not totally free from ambiguity, especially where a request for damages is combined with a request for injunctive relief—*compare* Rogers v. Loether, 312 F. Supp. 1008 (E.D. Wis. 1970), *with* Morgan v. Morgan *ex rel.* Morgan, 326 F. Supp. 1152 (M.D. Pa. 1971)—it is still true that "when a federal statute embraces a

ence of a jury trial than to forego the attempt to directly enforce obedience to law on the part of individual officials.

Some have argued that too great an imposition of individual liability will lead to undue caution on the part of law enforcement officials.[68] Of course this is a possibility, although lawyers and doctors have not been accused of faintheartedness despite their individual liability for malpractice. In any event, part of the problem is that the police have not been cautious enough.

It is important to set forth explicitly the liability of the superior police officer or official; particularly it is important to establish affirmatively a requirement that the official set forth regulations for the governance of the actions of his subordinates. Although the Ombudsman might in some instances be concerned with the substance of the regulations (as, for example, where they appeared to be unlawful or unconstitutional), the more important aspect of the problem seems to be the requirement that some kind of rules be established.[69] After all, as Professor Lon Fuller has struggled mightily to maintain, a legal system presupposes a set of rules[70] which the lawgiver, as well as the citizen, will obey.[71] The exercise of unlimited discretion by public officials is the antithesis of a legal system. I here accept Lon Fuller's assumption that if public officials are required to publicize their standards and policies, a better system of administration will result.[72]

With respect to damages, in addition to the traditional measure of damages, it is necessary to assure the recovery of something (here at least $50) by an aggrieved person. Again, this is essential if the Ombudsman system is to be a substitute for the exclusionary rule.

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common-law form of action, that action does not loose its identity merely because it finds itself enmeshed in a statute." United States v. Jepson, 90 F. Supp. 983, 986 (D.N.J. 1950). Surely a statutory cause of action for damages growing out of a violation of constitutional rights, without a request for injunctive relief, would seem to be an action covered by the seventh amendment. For the most recent extended discussion of the seventh amendment by the United States Supreme Court see Ross v. Barard, 396 U.S. 531 (1970).

68. *See* Barrett, *Exclusion of Evidence Obtained by Illegal Searches—A Comment on People v. Kahan*, 43 CALIF. L. REV. 566, 593 (1955).

69. The Ombudsman has also sought to improve the administrative process by encouraging the publication of general rules, even where these do not come within the categories of rules which the law requires to be published. In the course of time, he has been instrumental in prompting the publication of a number of standing orders of administrative tribunals.

Christensen, *The Danish Ombudsman*, 109 U. PA. L. REV. 1100, 1120-21 (1961).

70. L. FULLER, THE MORALITY OF LAW 46 (rev. ed. 1969).

71. *Id.* at 81.

72. "Even if a man is answerable only to his own conscience, he will answer more responsibly if he is compelled to articulate the principles on which he acts." *Id.* at 159. *See* LaFave & Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987, 1011 (1965).

Because of the imposition of personal liability on individual policemen, the Congress might want to appropriate funds to help pay for police legal advisors for all police departments. Such advisors would not only defend policemen in court, but would also keep the police advised of legal restrictions and thus, hopefully, reduce the number of lawsuits filed against the police.

Subsections (b), (c), and (d): Although the delay and expense of a jury trial cannot be escaped if individual offending officials are to be required to respond in damages for law violations,[73] it is possible at least to assure recovery of something in a single proceeding. Thus provision is made for those situations in which there has been a law violation but in which individual responsibility cannot be assigned. For example, individual policemen would still be permitted the defense of good faith and probable cause.[74] Also in some instances it would not be possible to determine precisely which individual or individuals had been responsible for a law violation. In these latter two situations a special verdict would make possible some recovery from the Federal Government so that the victim would at least be compensated for the official violation. Recovery from the Federal Government rather than from the states would avoid problems created by state governmental immunity protected by the eleventh amendment.[75]

Subsection (e): If individual officials are reimbursed out of public funds, they are not likely to be deterred by the threat of a lawsuit.

SEC. 13: This provision is deemed essential if incarcerated persons are to be permitted to take advantage of the services of the Ombudsman.

SEC. 14: Although in some ombudsman statutes obstruction is made a criminal offense, I believe that we ought to go slowly before adding new criminal laws. It may be that the present federal criminal law dealing with obstruction of proceedings before agencies of the United States[76] is sufficient to deal with the present problem. Perhaps

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73. *Supra* note 66.

74. Pierson v. Ray, 386 U.S. 547 (1967) (dictum) (police officers immune from suit under 42 U.S.C. § 1983 if their arrest of petitioners was based on probable cause to believe that petitioners had violated a statute subsequently found to be unconstitutional).

75. The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. CONST. amend. XI. For a general discussion of the eleventh amendment, including the extension of state sovereign immunity to cases brought against a state by citizens of that state, see Cullison, *Interpretation of the Eleventh Amendment*, 5 HOUS. L. REV. 1 (1967).

76. Obstruction of Justice Act, 18 U.S.C. § 1505 (1970). In addition, consider S. 1, 93d Cong. 1st Sess. § 2-6B1 (1973).

the goal of protecting the Ombudsman can be achieved through the availability of injunctive relief.

SEC. 15: This provision is similar to that contained in several other ombudsman statutes and is merely designed to protect the independence of the Ombudsman.

SEC. 16: The remarks set forth under section 15 above are pertinent here.

SEC. 17: As it may take a while for the existence of the Ombudsman to have some effect on the enforcement of the constitutional and other restrictions on criminal procedure and detention generally, it seems desirable to postpone the effective date of the elimination of the exclusionary rule for a period of three years.

SEC. 18: This is designed merely to create a greater likelihood that the Ombudsman would receive information regarding possible law violations. This, in effect, would also help to publicize the existence of the remedy.

SEC. 19: This severability clause expresses an underlying assumption: Even if the Ombudsman cannot be a substitute for the exclusionary rule, his existence and his activities will substantially reduce the instances in which it will be necessary to make use of the exclusionary rule. Therefore, it is desirable to permit the Ombudsman to function even though the courts should find that section 17 is unconstitutional.

CONCLUSION

Many writers have emphasized that an ombudsman is not a panecea. Given the pervasiveness and seriousness of the problems which have given rise to the exclusionary rule and which also have been created by that rule, the risks involved in the adoption of a statute such as the one proposed in this article seem slight in comparison with the potential benefit.

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ONE JUSTICE FOR ALL: A PROPOSAL TO ESTABLISH, BY FEDERAL CONSTITUTIONAL AMENDMENT, A NATIONAL SYSTEM OF CRIMINAL JUSTICE

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ONE JUSTICE FOR ALL: A PROPOSAL TO ESTABLISH, BY FEDERAL CONSTITUTIONAL AMENDMENT, A NATIONAL SYSTEM OF CRIMINAL JUSTICE

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I. INTRODUCTION

At a time when most people are talking about revenue sharing[1] and other schemes by which the administration of government in the United States can be decentralized, it may seem strange even to suggest the possibility of a uniform system of administration of criminal justice by the federal courts.[2] Nevertheless, the time has come to look beyond mere tradition and to ask some pertinent questions, the answers to which logically suggest the desirability of an exclusive, uniform system

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[1]*See, e.g.*, 117 CONG. REC. 167 (1971) (State of the Union Address by President Nixon).

[2]Many persons will not, of course, be sympathetic to the general proposition that the federal government ought to be strengthened in any way. A common attitude has been expressed as follows: "We believe that strong state and local governments are essential to the effective functioning of the American system of federal government; that they should not be sacrificed needlessly to leveling, and sometimes deadening, uniformity . . . ." Conference of Chief Justices, *Report of the Committee on Federal-State Relationships as Affected by Judicial Decisions*, in WE THE STATES 367, 399 (Va. Comm'n on Constitutional Gov't 1964). *See* Liebmann, *Chartering a National Police Force*, 56 A.B.A.J. 1176, 1180 (1970), in which the author concludes his criticism of the study draft of the proposed new federal criminal code by saying in part: "It cannot be said that the Bar and the public have not been warned. This study draft, if enacted, will be the charter of a national police force, with all that this implies. Members of the Bar, state and local officials and the public cannot make known their views about its provisions too soon." In addition, *see* Armstrong, *The Proposed National Court Assistance Act*, 56 A.B.A.J. 755, 759 (1970), in which Judge Armstrong states:

> I am confident that from a lack of knowledge of our dual system of courts many persons do not realize that the Tydings bill is another step—and a long one—toward a unitary judicial system in America. If that is the ultimate objective, it should be approached openly and constitutionally. The architects of our system of courts were judiciously and bitterly opposed to a unitary system for the same reasons that it should be rejected today. The concentration of excessive power invites corruption and collapse.

If the proposals for recodification of the federal criminal code and for a court assistance act elicit these kinds of responses from Mr. Liebmann and Judge Armstrong, it may be anticipated that the proposal contained in this article will elicit similar but perhaps more vigorous responses.

of federal criminal justice in the United States. While I have no illusions about the force of logic in the development of the law,[3] and, while I realize that as a practical matter there is little likelihood that the proposal contained in this article will have any immediate impact on the administration of justice in the United States, I nonetheless proceed in the hope that some serious consideration will be given to issues that have long been ignored.[4]

At the outset the reader may be tempted to criticize the scope of the proposal. He may find it under-inclusive since most of the civil law is excluded from consideration, or he may find it over-inclusive since the proposal deals with all forms of civil commitment as well as with incarceration under the criminal law.

My response to the criticism of under-inclusiveness is, first, that in some non-criminal areas there is already a measure of uniformity among the states. For example, the Uniform Commercial Code has been enacted in all states except Louisiana.[5] Second, the criminal law and other forms of civil commitment are more important in my estimation than other areas of the civil law because the former endanger the lives and liberty of people.

In response to the criticism of over-inclusiveness, I would point to the interrelationship between the criminal law and civil commitment. Both may result in the deprivation of liberty. Also, persons who have committed criminally proscribed acts may be civilly committed initially through the exercise of discretion by the police or prosecutor,[6] or they may be so committed after an acquittal by reason of insanity.[7] Finally,

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[3]One need only recall the following passage from THE COMMON LAW:

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.

O. W. HOLMES, THE COMMON LAW 1 (1881).

[4]The possibility of central administration of the criminal law has not been totally ignored. *See, e.g.*, R. TUGWELL, MODEL FOR A NEW CONSTITUTION (1970).This proposed comprehensive revision of the Constitution of the United States would create a judicial council at the national level, which "shall examine, and from time to time cause to be revised, civil and criminal codes; these, when approved by the Judicial Assembly, and if not rejected by the Senate, shall be in effect throughout the United Republics." *Id.* at 76.

[5]1 ANDERSON ON THE UNIFORM COMMERCIAL CODE iv (2d ed. 1970).

[6]*See* A. GOLDSTEIN, THE INSANITY DEFENSE 175 (1967).

[7]In some jurisdictions, commitment automatically follows acquittal by reason of insanity. *E.g.*,

juvenile delinquency proceedings are often described as "civil"[8] in spite of their similarity to criminal proceedings.

Conceptually, the criminal law and civil commitment are potentially related because of proposals, offered primarily by those sympathetic to a virtually deterministic view of human behavior, that the criminal law be eliminated as such and replaced by a system of incarceration of dangerous persons.[9] I do not now subscribe to such proposals, but any proposed amendment to the United States Constitution that seeks to transfer the administration of the criminal law to the federal government must take into account the possibility that some states will seek to implement such proposals in the future.

II. Justification for Change

There are many ways in which one might approach the problem of administration of justice in the United States today. I prefer to approach it from the standpoint of one who is newly arrived in this country and is unfamiliar with its historical developments. Such an individual observes the administration of justice among the several states and the rather substantial disparities both in the substantive criminal law and

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Ga. Code Ann. § 27-1503 (1953); Kan. Stat. Ann. § 62-1532 (1964). Of course, such provisions for automatic commitment following acquittal by reason of insanity may be constitutionally suspect to the extent that they do not provide the person committed with the same guarantees that are provided to one who is otherwise civilly committed. *See* United States v. Marcey, 440 F.2d 281 (D.C. Cir. 1971); Bolton v. Harris, 395 F.2d 642 (D.C. Cir. 1968). *Cf.* McNeil v. Director, Patuxent Institution, 92 S.Ct. 2083 (1972); Jackson v. Indiana, 92 S.Ct. 1845 (1972); Baxstrom v. Herold, 383 U.S. 107 (1966).

[8]For example, in Texas the Statutory provisions dealing with juvenile delinquency are found in the civil statutes. Tex. Rev. Civ. Stat. Ann. art. 2338—1 (1971). Moreover, appeals from decisions of the courts in juvenile delinquency proceedings are taken to a Court of Civil Appeals, rather than to the Court of Criminal Appeals. *Id.* art. 2338—1, § § 21 (1971).

[9]*See* Katz, *Dangerousness: A Theoretical Reconstruction of the Criminal Law*, 19 Buffalo L. Rev. 1 (1969). In Seney, *The Sibyl at Cumae—Our Criminal Law's Moral Obsolescence*, 17 Wayne L. Rev. 777 (1971), the author rejects both the concept of moral blameworthiness and the concept of mental illness; instead "[w]hat is relevant is identifying those institutions, groups and individuals with strategically placed power to affect the major factors contributing to any identified harm, and the allocation of responsibility to reduce such harm, not only future similar harms but also the current harms." *Id.* at 821 (footnote omitted). Unfortunately the author, though stressing group responsibility, never seems to deal with the problem of the individual who may indeed be a threat to society and whose incarceration may seem imperative. *See also* Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 470-471 (1897).

in criminal procedure.[10] He observes also the ease of travel from one state to another and, with the help of a friend learned in the law, discovers the constitutional right to travel freely without interference by the states.[11] Such an individual undoubtedly finds it difficult to understand why the several states should be permitted to enforce their own codes of criminal law and procedure. He finds it difficult to understand why, for example, it is lawful to gamble in Nevada[12] but unlawful to do the same thing in the neighboring state of California[13] or why a first-time possessor of one ounce of marijuana can be imprisoned for life in Texas[14] but only jailed for fifteen days in New Mexico.[15] Can the system be adequately explained to this stranger? Suppose, for example, that the stranger is one who is unimpressed with the force of tradition. Are there other persuasive arguments which can be advanced in support of the present system? As the following discussion indicates, I believe that the answer is "no."

One argument that is sometimes heard in support of the present system is that the criminal law is and should remain a matter of local concern[16]—that is, that the people of any given region know best what

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[10]Regarding the substantive criminal law, *compare, e.g.*, N.H. REV. STAT. ANN. § 583-A:2 (Supp. 1971) (no burglary where actor has permission to enter), *with* ARIZ. REV. STAT. ANN. § 13-302 (Supp. 1971-1972), *construed in* McCreary v. State, 25 Ariz. 1, 212 P. 336 (1923) (burglary conviction proper where actor had permission to enter).

With regard to criminal procedure, *compare, e.g.*, TEX. CODE CRIM. PROC. ANN. art. 1.05 (1966) (accused entitled to indictment in all felony cases), with FLA. R. CRIM. P. 3.140(a)(1), (2) (accused entitled to indictment only in capital cases).

[11]Dunn v. Blumstein, 92 S.Ct. 995 (1972) (alternative holding); Griffin v. Breckenridge, 403 U.S. 88 (1971) (alternative holding); Shapiro v. Thompson, 394 U.S. 618 (1969); United States v. Guest, 383 U.S. 745 (1966); Edwards v. California, 314 U.S. 160, 177, 181 (1941) (Douglas, Black, Murphy & Jackson, JJ., concurring).

[12]NEV. REV. STAT. § 463.010-.670 (1967).

[13]CAL. PENAL CODE § 330 (West 1970).

[14]TEX. PENAL CODE ANN. art. 725b § 1(14), 2(a), 23(a) (Supp. 1972).

[15]N.M. STAT. ANN. § 54-11-23B(1) (Supp. 1972).

[16]This argument is implicit in much recent discussion of problems of federalism. *See, e.g.*, Bell, *Federalism in Current Perspective*, 1 GA. L. REV. 586 (1967); Clark, *Criminal Justice in America*, 46 TEXAS L. REV. 742 (1968).

It is also interesting to note that many criminal law reformers assume that the criminal law is primarily a matter for the states and that diverse local attitudes should be reflected in the criminal law: "It should be noted, however, that it was not the purpose of the Institute to achieve uniformity in penal law throughout the nation, since it was deemed inevitable that substantial differences of social situation or of point of view among the states should be reflected in substantial variation in their penal laws." Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425, 1427 (1968).

the content of the criminal law should be. The difficulty with this argument is that it presupposes *both* that there are substantial disagreements about the substantive criminal law *and* that these are organized along state lines. Although much remains to be learned about the attitudes of people across the country regarding crime,[17] the empirical data that are available suggest that the second assumption is not justified. Across the nation, the differences in attitude with respect to some of the traditional common law crimes are apparently not very great.[18] With regard to such controversial issues as the proposal to legalize the use of marijuana, there are significant differences in attitides, but, to the extent that these differences are related to geographical distributions of the population,

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> The new Code will scarcely be considered worthwhile if its enactment requires any place or region unnecessarily to conform to national standards not their own. Recall, too, that experience with the Carolina [*sic*] shows that a humanitarian rule in one region may be baneful in another. To be sure we cannot remain a single nation unless we give due regard, in all places and in all regions, to the fundamental human rights possessed by all our citizens. But standards of personal conduct do vary from region to region. Due attention, therefore, must be given in the process of codification to the legitimate demands of our nation's diversity.

McClellan, *Codification, Reform, and Revision: The Challenge of a Modern Federal Criminal Code*, 1971 DUKE L.J. 663, 711-12 (1971) (footnotes omitted).

[17]Apparently, no one has attempted to conduct a state-by-state survey of attitudes towards the substantive criminal law. The reason may be the expense; one estimate, made in 1969 by Professor Lloyd Ohlin of the Harvard Law School, was that such a survey would cost about $400,000.

One is left with a number of nationwide surveys that permit only regional comparisons and with a few individual state surveys. These surveys tend to deal with specific, narrow issues, and since they were conducted at different times, using different sampling techniques, and asking questions in different forms, it is difficult to compare the results of one survey with another.

Portions of five public opinion surveys were analyzed statistically in connection with the writing of this article. The responses to four questions relating to unlawful homicide, larceny of five dollars, larceny of fifty dollars, and racial discrimination in the sale of a home were taken from National Opinion Research Center, Victimization Study, summer 1966 (unpublished data at Univ. of Chicago). The responses to a question relating to the possible legalization of the use of marijuana were taken from Gallup International, Inc., Poll on Legalization of Marijuana Use, November 1969 (unpublished data in Roper Public Opinion Research Center, Williamston, Mass.). The responses to a question regarding legal penalties for possession of marijuana were in a telephone conversation with Robert D. Coursen, Research Manager, *Minneapolis Tribune*, Feb. 1972. The responses to a question regarding penalties for possession and use of marijuana were taken from Belden Associates, Report No. 784, Nov. 23, 1969 (unpublished material on file at Belden Associates, Dallas, Tex.). Finally, the responses to a question relating to possible penalties for the possession and use of marijuana were taken from Field Research Corp., California Poll, January, 1971 (unpublished data at Institute of Governmental Studies, Univ. of California at Berkeley).

[18]An analysis of the 1966 Victimization Study, *supra* note 17, shows no statistically significant differences, either within regions or among regions, regarding attitudes towards the seriousness of an unlawful homicide.

the most significant common factor seems to be the size of the community rather than state boundaries. In other words, persons who live in large urban areas in one part of the country seem to have more in common with urban dwellers in other parts of the country regarding attitudes toward the criminal law than they have with people in the rural areas of the states in which they live.[19] The majority of the inhabitants of Minneapolis, St. Paul, and Duluth, Minnesota, for example, seem to have attitudes toward the legal status of marijuana which are more similar to the attitudes of most persons in other large cities than to the attitudes of most persons in rural Minnesota.[20]

Opposition to the centralization of the control of the criminal law based on a desire to protect local interests thus makes little sense. Even under the present system of criminal justice there are many local com-

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[19]With the exception of the California Poll (Field Research Corp., *supra* note 17), all of the surveys analyzed show differences in attitudes, to the extent that differences exist, according to size of community. This is most pronounced with regard to large cities. For example, an analysis of the responses to the four questions from the 1966 Victimization Study, *supra* note 17, shows no statistically significant differences in attitudes of persons in the ten largest Standard Metropolitan Statistical Areas. Also, the analysis of the 1969 Gallup Poll (Gallup International, Inc., *supra* note 17) regarding legalization of marijuana shows no significant differences in attitudes among inhabitants of cities over 500,000 population.

[20]An analysis of the Minnesota Poll of January 1972 (Minneapolis Tribune, *supra* note 17) regarding attitudes toward penalties for possession of marijuana shows a highly significant difference among the attitudes of persons in communities of three different sizes in Minnesota. Similarly, an analysis of the 1969 Texas Poll (Belden Associates, *supra* note 17) regarding attitudes towards legalization of marijuana shows a highly significant difference among the attitudes of persons in communities of four different sizes. The Gallup Poll analysis (Gallup International, Inc., *supra* note 17) shows a significant difference in attitudes among different-size communities in the East, Mid-West, and South. No such difference appears in the West.

Ignoring for the moment the results of the California Poll (Field Research Corp., *supra* note 17), one may try to explain this apparent discrepancy between the West and the rest of the country in the Gallup Poll by reference to the greater net migration to the West. Between 1960 and 1970 the West had a net gain in population by migration of 10.2%, whereas the Northeast gained only 0.7%, the North Central lost 1.5%, and the South gained 1.1%. UNITED STATES DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 35 (1971). In other words, the migration to the West may have led to greater mixing of persons with different attitudes and backgrounds in many communities, regardless of size. Moreover, if the West provides a clue to the general effect of migration on distribution of attitudes, it would seem that as more and more people in our society migrate to other parts of the country, regional differences in attitude will become even smaller. Increased travel and the mass media may also contribute to a lessening of regional differences in attitudes.

The results of the analysis of the California Poll are inconsistent with the results of the other four analyses and are difficult to summarize. There is no discernible pattern in the results. However, there are significant differences among regions and counties within California, and therefore there is nothing in the California results that is inconsistent with the proposition that differences in attitudes towards crime do not follow state boundaries.

munities in which most of the adults have attitudes towards the criminal law that are probably not going to be reflected in the laws of the states in which they live, because persons in other communities (larger and smaller) have different views which claim the support of a majority of the adults in the state.[21] This situation is no different from that which would prevail if a uniform, exclusive federal criminal code were adopted. The views of a majority in some communities would be reflected in the federal law and, of necessity, the views of a majority in some other communities would not be so reflected.

Another argument that has been raised in support of the present system is the desirability of experimentation by the states. It is true that the states have experimented not only in the field of the substantive criminal law, but also in the area of criminal procedure, but whether these experiments on balance have been helpful rather than harmful is debatable. For example, some persons may applaud experiments in the area of abortion laws,[22] but these same persons may not be thrilled at the prospect of the imposition of capital punishment for the offense of rape.[23] In the field of criminal procedure, some persons may be impressed with the state experimentation that led to the adoption of prosecution by information,[24] but they may not be happy with the extension of that system in Florida. (In Florida not only has the grand jury indictment become unnecessary in non-capital cases, but also the process of information has made it possible for the state attorney to bring a case to trial without the intervention of anyone—grand jury, magistrate, or anyone else.[25] Whether this Florida procedure represents true improvement is questionable.)

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[21]This presupposes that community attitudes will be reflected in the actions of those who represent these communities in the state legislatures. Some contend that this is not what happens—that special interest groups actually determine the actions of representatives in the legislature. *See Quinney, The Social Reality of Crime*, in CRIME AND JUSTICE IN AMERICAN SOCIETY 119, 135 (J. Douglas ed. 1971). Even if the latter contention is correct, the situation is not likely to be worse under a federal system of criminal law. At the national level public attention may be focused on the actions of special interest groups, and those seeking to minimize the influence of such groups may be able more effectively to organize opposition.

[22]*E.g.*, N.Y. PENAL LAW § 125.05(3) (McKinney Supp. 1971).

[23]*E.g.*, FLA. STAT. ANN. § 794.01 (Supp. 1972). *But see* Furman v. Georgia, 92 S. Ct. 2726 (1972).

[24]California's system of prosecution by information was upheld against constitutional attack in Hurtado v. California, 110 U.S. 516 (1884).

[25]Under Florida statutes an arresting officer must bring the arrested person before a magistrate without unnecessary delay. FLA. STAT. ANN. §§ 901.06, .23 (Supp. 1972). Under FLA. R.

In addition, it is possible to argue that experiments by the federal government on the national level are likely to be superior in operation to state experiments. If an experiment is a success at the national level, the whole country can benefit from it immediately. However, if the experiment turns out to be an unhappy one, this fact will be forcefully brought home to all in the country, and the likelihood is that remedial legislation will be enacted speedily.

Even if it were decided that some form of local experimentation were still necessary in the context of the uniform federal system, it would still be possible for the federal government to experiment. An appropriate place, for example, would be in the District of Columbia. Such experimentation would be subject to the scrutiny of Congress and could be controlled rather closely by that body.

On the other hand, experiments within a state, even if successful, will not immediately affect jurisdictions in which the experiments are not tried. If the experiment turns out to be unwise, however, it is possible that little pressure will be applied to the state legislators to remedy the situation because of the inability of the voters to focus their attention on numerous governmental units at the same time. Thus it is possible that the experiment in one state may be ignored because of more pressing difficulties at the national level and elsewhere. Unfortunately legislation, such as the Texas peace bond,[26] may remain on the books for some time.

CRIM. P. 3.122 the magistrate before whom an arrested person is brought must advise the arrested person of his right to a preliminary hearing; the arrested person may waive the preliminary hearing in writing. It would thus seem that an arrested person in Florida has a right to a preliminary hearing. However, in the case of Palmieri v. State, 198 So. 2d 633 (Fla. 1967), the Supreme Court of Florida affirmed a conviction despite the failure of the police to take the defendant before a magistrate. In affirming the conviction the court said:

> It (the preliminary hearing) is not an indispensable prerequisite to the filing of an information . . . and is not a necessary step in criminal proceedings . . . . "A prosecution may be instituted and maintained regardless of whether such a hearing is or is not held, and regardless of whether probable cause to hold the accused for trial is or is not found."

198 So. 2d at 634-35 (citations omitted).

[26]TEX. CODE CRIM. PROC. ANN. art. 7.01-.17 (1966). For a discussion of the constitutionality of the Texas peace bond procedure see Davidow, *The Texas Peace Bond—Can It Withstand Constitutional Attack?*, 3 TEX. TECH. L. REV. 265 (1972).

Another example of a questionable state procedure which has remained on the statute books for years is the Michigan "one-man grand jury." MICH. STAT. ANN. § 28.943-.946(2) (Supp. 1972). For a discussion of this "one-man grand jury," see R. Davidow, Exclusive, Uniform Federal Justice 39, April, 1969 (unpublished paper in Harvard Law School Library).

Still another argument that may be advanced in support of the present system of state administration of criminal justice is the fear that concentration of power over the criminal law in the federal government will result in tyranny.[27] However, the fear of federal tyranny is not a sufficient reason for avoidance of a uniform system of federal criminal law. First, there is the historical question whether the United States Government has been more guilty of tyranny than the individual states. One cannot answer this question without making certain assumptions about what constitutes tyranny in the context of the criminal law, but if one accepts John Stuart Mill's thesis,[28] the enforcement of laws against prostitution,[29] possession and use of marijuana,[30] and vagrancy[31] are examples of state action that may be characterized as tyrannous. Although there have been similar instances of enforcement of questionable laws by the federal government,[32] it is still difficult to say that the federal government has been worse than the states.

There is perhaps a more fundamental question with respect to the fear of federal tyranny; this relates to the question of checks and bal-

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[27]Fear of concentration of power in the federal government goes back, of course, to the original debates over ratification of the Constitution. For example, during the debates, some persons expressed fear that the federal courts would entirely supplant the state courts. *See* Mason, *Objections*, in THE FEDERALIST AND OTHER CONSTITUTIONAL PAPERS 882 (S. Scott ed. 1898); Letter by James Winthrop, Dec. 11, 1787, in *id.* at 518.

[28]J.S. MILL, ON LIBERTY 23 (2d ed. 1863). Mill's thesis was essentially that the government should not interfere with the individual unless the individual's conduct is likely to harm the rest of society.

[29]*E.g.*, N.Y. PENAL LAW § 230.00 (McKinney Supp. 1971).

[30]*E.g.*, FLA. STAT. ANN. §§ 398.02(12) (1960); *id.* § 398.22 (Supp. 1972).

[31]*E.g.*, *id.* § 856.02 (1965), which was, in effect, declared unconstitutional by the United States Supreme Court in Smith v. Florida, 92 S. Ct. 848 (1972). The decision of the Florida Supreme Court was vacated and remanded in the light of Papachristou v. City of Jacksonville, 92 S. Ct. 839 (1972), in which the Supreme Court declared unconstitutional, on grounds of vagueness, a Jacksonville city ordinance which was very similar to the Florida statute. It is interesting to note that in *Smith*, the Florida Supreme Court had chosen to ignore a finding of unconstitutionality by a United States district court in Lazarus v. Faircloth, 301 F. Supp. 266 (S.D. Fla. 1969), *vacated on other grounds sub nom.* Shevin v. Lazarus, 401 U.S. 987 (1971).

[32]The Smith Act, 18 U.S.C. § 2385 (1970), is an example of an act of Congress which interferes with the rights of individual citizens—in this case the right of free speech under the first amendment. Another federal statute which intrudes upon the rights of individuals is Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934 (1970), which criminally proscribes "all disorders and neglects to the prejudice of good order and discipline in the armed forces." Apart from questions of vagueness, this section may be construed to reach conduct which, under Mill's thesis, should remain free of governmental control. *E.g.*, United States v. Mueller, 40 C.M.R. 862 (1969) (possession and transfer of marijuana, off post, off duty).

ances.[33] The argument in the context of the criminal law is that since neither the federal government nor the states have total control over the criminal law, each may exercise a check upon the other. It is true that the federal government has exercised some control over the states in the area of the criminal law. The fourteenth amendment of the United States Constitution has restrained the states in the development of criminal procedure[34] and, through the first amendment rights of free speech,[35] press,[36] and association,[37] has limited the enforcement of their substantive criminal laws. The presumption that the field of criminal law is primarily within the states' domain has served as a restraining influence upon the exercise of federal power in the area of substantive criminal law.[38] However, if it is assumed that there is a need to provide a system of checks and balances in the field of criminal law, it does not follow that the present system should be maintained. It is possible to conceive of a federal system of criminal law in which checks and balances are maintained—checks and balances in addition to those which

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[33]The theory of separation of powers—or checks and balances—was certainly thought to be incorporated into the Constitution by those who argued for its ratification. *See* THE FEDERALIST No. 57, at 299 (H. Lodge ed. 1899) (J. Madison).

[34]A majority of the United States Supreme Court has apparently adopted the "selective incorporation" theory of interpretation of the fourteenth amendment and has in effect applied most of the restrictions found in the Bill of Rights to the states through the due process clause of the fourteenth amendment. *See* Benton v. Maryland, 395 U.S. 784 (1969) (double jeopardy); Duncan v. Louisiana, 391 U.S. 145 (1968) (jury trial); Washington v. Texas, 388 U.S. 14 (1967) (compulsory process for the production of witnesses for the defendant); Klopfer v. North Carolina, 386 U.S. 213 (1967) (speedy trial); Pointer v. Texas, 380 U.S. 400 (1965) (confrontation of witnesses); Malloy v. Hogan, 378 U.S. 1 (1964) (freedom from self-incrimination); Gideon v. Wainwright, 372 U.S. 335 (1963) (assistance of counsel); Robinson v. California, 370 U.S. 660 (1962) (proscription of cruel and unusual punishments); Mapp v. Ohio, 367 U.S. 643 (1961) (exclusion of evidence obtained in violation of the fourth amendment); Wolf v. Colorado, 338 U.S. 25 (1949) (dictum) (prohibition of unreasonable searches and seizures); In re Oliver, 333 U.S. 257 (1948) (alternative holding) (public trial and notice of charges); Tumey v. Ohio, 273 U.S. 510 (1927) (impartial tribunal). That the "selective incorporation" theory still commands the support of a majority of the members of the United States Supreme Court in spite of four new justices is illustrated by the concurring opinion of Justice Powell in Johnson v. Louisiana, 92 S. Ct. 1620, 1635 (1972).

[35]*E.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969) (Ohio Criminal Syndicalism Act unconstitutional because in conflict with first amendment, as made applicable to states through fourteenth amendment).

[36]*E.g.*, Wood v. Georgia, 370 U.S. 375 (1962) (contempt conviction of sheriff for issuing news release critical of judge's action regarding grand jury unconstitutional).

[37]*E.g.*, Bates v. City of Little Rock, 361 U.S. 516 (1960) (municipal ordinance requiring organizations in city to file list of names of members unconstitutional).

[38]*See* H. Hart & A. Sacks, The Legal Process 1241, 1958 (unpublished materials, in Harvard Law School Library).

exist by virtue of a tripartite government consisting of the executive, the legislature, and the judiciary. For example, it would be possible to provide a council of representatives whose sole responsibility would be the criminal law. Such a council might make recommendations to the Congress concerning the need for amendments in the fields of criminal law, criminal procedure, and civil commitment and might also be given the authority to veto the criminal laws passed by Congress if the vast majority of council members were convinced of the desirability of the veto. It might also be given the power to require the Congress to vote on a proposal if a great majority of the council members believed that Congress was not properly taking the initiative in bringing about needed reforms of the law in this area.

Another aspect of the fear of federal tyranny is the fear that extension of the exercise of federal power in the criminal law field would produce a national police force[39] that would endanger the freedom of all. Even if it is assumed that a national police force would pose a serious threat to individual liberty, the creation of an exclusive, uniform system of criminal justice would not necessarily lead to the creation of a national police force, since the enforcement of the federal law could be accomplished by an act of Congress authorizing and requiring local police to enforce it. A federal ombudsman might be created to insure compliance by the local police.

Thus far it appears that there are many logical reasons for the adoption of a uniform system of federal criminal justice, whereas mere tradition is the primary basis of the present system.[40] However, I believe that there is another important reason for the adoption of a federal system: the discrepancy between theory and practice in the present system of criminal justice. While there has always been, and always will be, some difference between practice and theory, there is considerable room for improvement. For example, although the presumption that everyone knows the law is necessary to avoid encouraging people to be ignorant of the law,[41] it is an extremely unrealistic presumption when

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[39]*See* Liebmann, *supra* note 2, at 1180.

[40]One should keep in mind Holmes' famous statement regarding the limitations of history in the development of judge-made law: "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." Holmes, *supra* note 9, at 469. If this is true of judicial action, it is even more true of legislatures, which have a greater duty to keep abreast of current needs.

[41]R. PERKINS, CRIMINAL LAW 925 (2d ed. 1969).

there are some fifty-one different codes of criminal law and procedure. The presumption would be much more realistic if there were only one system of criminal law and procedure. Moreover, it would be somewhat easier for the Supreme Court to bring about uniformity in the interpretation of the law if it were dealing with a single jurisdiction over which it could exercise its supervisory powers.[42]

This is not to suggest that establishment of an exclusive, uniform system of criminal justice at the national level would be a panacea. In particular, such a system would be no better than the persons entrusted with the responsibility of making it work. Perhaps, therefore, attention should also be given to the possibility of change in the mode of selection (and perhaps training) of federal judges. In any event, recognition that perfection is not likely to result from implementation of this proposal should not lead to its rejection.

III. Some Specifics of Change

Thus far an attempt has been made to show, in a general way, the desirability of a uniform system of criminal justice at the federal level. There cannot be a complete discussion of the broad issue of the desirability of such a system, however, without some consideration of what such a system might look like. What follows, therefore, is an example of the kind of constitutional amendment that could bring about the change discussed above. Although it is merely illustrative, it does deal with some specific issues; hence it is necessary to state here the assumptions on which this particular proposal is based.

Assumptions

One assumption is that the criminal law is distinguished from other forms of social control by the moral condemnation of society that accompanies conviction and by the notion that the criminal law ought not

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[42] *See, e.g.*, Mallory v. United States, 354 U.S. 449 (1957); McNabb v. United States, 318 U.S. 332 (1943). Both of these decisions have been modified by 18 U.S.C. § 3501(c) (1970).

Of course the fact that the Supreme Court exercises supervisory jurisdiction over the federal courts does not mean that there is total uniformity. For example, in the area of the insanity "defense" the circuits have indeed developed their own tests. Compare, *e.g.*, United States v. Currens, 290 F.2d 751 (3d Cir. 1961) (modified Model Penal Code), *with* United States v. Brawner, ___ F.2d ___ (D.C. Cir. 1972) (Model Penal Code,) *and* Pope v. United States, 372 F.2d 710 (8th Cir. 1967) (M'Naghten and "irresistible impulse" tests), *vacated on other grounds*, 392 U.S. 651 (1968).

to be applied to one who is not morally blameworthy.[43] Another assumption is that one of the highest values that a society can protect is freedom from unwarranted conviction of crime and its concomitant stigmatization. It is also assumed that deprivation of physical liberty —whether it be in the form of incarceration in a prison, hospital, training school, or other confinement facility (however euphemistically described)—is as serious a consequence for the individual as incarceration based on conviction of crime and that the same standards of due process that protect the individual when the government seeks to convict him ought to apply when an attempt is made to incarcerate him civilly.[44]

Some of the implications of these assumptions will now be explored. The criminal law would have no reason to exist if man did not have, *to some extent,* the capacity to make choices and to act upon them. Extreme determinism would remove any notion of moral blameworthiness and would make the criminal law obsolete. I do not subscribe to that theory, believing, as others have suggested,[45] that one can accept the findings of modern psychiatry, psychology, and sociology without giving up the notion that man can control his actions to some degree. Even if evidence is some day gathered to show that the determinists are right, there will still be a need to incarcerate some very dangerous persons even if the process is described as "civil."[46] Therefore, the proposal relates to civil commitment as well as to conviction of crime. Indeed the problems of lack of uniformity discussed above would be

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[43]*See* Hart, *The Aims of the Criminal Law,* 23 LAW & CONTEMP. PROB. 401, 404-05 (1958). In addition, *see* P. BRETT, AN INQUIRY INTO CRIMINAL GUILT (1963), in which the author states: "In support of my view I urge that crime and punishment are concepts which in our ordinary thinking are inextricably intertwined with the notion of guilt or blame." *Id.* at 70.

[44]*See* Davidow, *supra* note 26.

[45]*E.g.*, S. GLUECK, LAW AND PSYCHIATRY—COLD WAR OR ENTENTE CORDIALE? 14-15 (1962). In addition, *see* P. BRETT, AN INQUIRY INTO CRIMINAL GUILT 62 (1963):

> Yet the reverse side of the coin of guilt is that of merit. And it is a curious fact that the psychiatrists who preach so loudly that there is no such thing as guilt are not heard to say that there is no such thing as merit. Rather do they seek and enjoy recognition of their special insights. I am not criticising them for this. But I urge that such an attitude is quite inconsistent with a genuine belief that all mental processes are the product of inescapable and inexorable forces. The same attitude is reflected in the more technical psychiatric writings. Here eminent psychiatrists discuss their cases and develop their reasons for preferring one mode of diagnosis and treatment to another. They explain why they made a particular choice, but they never offer an explanation suggesting that they were driven to the choice by a combination of their own hereditary and environmental influences.

[46]*See* Katz, *supra* note 9.

reproduced in a much worse form (despite uniformity of the criminal law) if some but not all states decided to process through the civil courts those who are now prosecuted criminally.

Moreover, while the criminal law continues to exist there will continue to be a need for the civil commitment of some persons acquitted on the ground of insanity. Indeed, the jury's assumptions regarding initiation of civil commitment proceedings upon acquittal by reason of insanity may affect the jury's decision to acquit a defendant in a case in which the defendant obviously has substantial problems of control and in which the jury believes that the defendant is a danger to society.[47] Thus the problems of conviction and civil commitment are very substantially intertwined, and any scheme that alters the allocation of powers in the federal system with respect to one but not the other is bound to create great difficulties.

Another assumption relates to the matter of distribution of powers within the federal system and the need for checks and balances. Those who assembled in Philadelphia in 1787 to draft the Constitution assumed that Montesquieu was correct in suggesting a division of powers within the government.[48] They believed that unrestrained power could lead to tyranny. (They also probably assumed that the general government would not become involved in providing an exclusive, uniform criminal code.[49] This was very likely the product of another assumption, that the criminal law was a matter of purely local concern. That latter assumption may no longer be valid.) Like the Founding Fathers, I assume that the exercise of unrestrained power will lead to tyranny; this assumption explains in part the restrictions placed upon the Congress in the proposed constitutional amendment.[50]

Another assumption is that an exclusive, uniform federal criminal and civil commitment code would work. (The question of political acceptability is another matter.) Some assurance of the feasibility of the proposal is provided by the successful Canadian experience. The British

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[47]*See* R. Simon, The Jury and The Defense of Insanity 94 (1967).

[48]*See* The Federalist No. 57, at 299 (H. Lodge ed. 1899) (J. Madison).

[49]*See id.* No. 82, at 512 (A. Hamilton).

[50]Although I would thus continue and perhaps extend the system of checks and balances, I nevertheless believe that the policy decisions regarding the criminal law and incarceration generally ought to be made by a publicly elected body. I therefore disagree with the basic approach taken in R. Tugwell, *supra* note 4, which provides for enactment of criminal codes by a Judicial Council appointed by the Principal Justice of the United Republics.

North America Act of 1867[51] gives the Canadian government the power to provide a criminal code for the entire dominion;[52] that government also has the power to appoint and to pay the salaries of some of the judges who try cases under the code.[53] Certain difficulties have arisen, but they can be traced to the failure to give to the central government the entire power over criminal law.[54] The Canadian experience thus reinforces the arguments for uniformity.

A final assumption relates to the method of change. Although a strong argument can be made that Congress now possesses the power to create a uniform system of criminal justice at the national level,[55]

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[51]30 & 31 Vict., c. 3.

[52]The central government has the power to make laws with respect to "Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters." *Id.* § 91(27).

[53]"The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick." *Id.* § 96. "The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada." *Id.* § 100.

[54]*See* Leigh, The *Criminal Law Power: A Move Towards Functional Concurrency*?, 5 ALBERTA L. REV. 237 (1967).

The provinces have the power to deal, for example, with problems of property and civil rights (30-31 Vict., c. 3, § 92(13)), and more specifically, highways (O'Brien v. Allen, 30 Can. S. Ct. 340, 342-43 (1900) (dictum); *see* Mann v. The Queen, 56 D.L.R.2d 1 (1966); O'Grady v. Sparling, 25 D.L.R.2d 145 (1960)), they also have the power to enforce their legislation in these areas with fines and imprisonment. 30-31 Vict., c. 3, § 92(15). The result is that the provinces have involved themselves to some extent in the criminal law through the exercise of this regulatory power and, of course, diversity among the provinces has developed. Melnik, *Provincial 'Supplementary' Legislation*, 15 FAC. L. REV. 48, 53 (1957). Moreover, the Supreme Court of Canada has been forced to devote some of its time to such nice questions of constitutional interpretation as whether the central government, in enacting some obstensibly criminal statute, is really trying to usurp the power of the provinces over property. *See* Murray, *Economic Activity Under Criminal Law*, 15 FAC. L. REV. 25 (1957).

[55]The argument that Congress now possesses the power to provide a uniform system of criminal justice to be administered at the national level is presumably based on the commerce clause, U.S. CONST. art. I, § 8, and the fourteenth amendment. U.S. CONST. amend. XIV, § 5.

The arguments based on the commerce clause are best summarized in the recent case of Perez v. United States, 402 U.S. 146 (1971). In *Perez* the Court, with only Justice Stewart dissenting, held that Title II of the Consumer Credit Protection Act, 18 U.S.C. § 891-96 (1970), is constitutional. The Court concluded that petitioner's "loan sharking" activities could be criminally proscribed by Congress because Congress had found that such activities affected interstate commerce, even though there was apparently no evidence that the activities of petitioner in this particular case affected commerce. The Court stated that "[w]here the *class of activities* is regulated and that *class* is within the reach of federal power, the courts have no power to 'excise, as trivial, individual instances' of the class." 402 U.S. at 154 (emphasis in original). Awareness of the implications of the decision is illustrated by the Court's inclusion of a statement made during the debates over the

there are at least two reasons for preferring a constitutional amendment. First, a constitutional amendment could institutionalize an additional check on congressional authority in this area and thus provide protection against federal tyranny. Second, unlike a mere act of Congress, a proposed amendment would not be subject to the criticism that it is inconsistent with the "intent" of the Founding Fathers (unless one assumes, as a matter of policy, that what occurred in 1787 is incapable of improvement and ought never to be changed—an assumption upon which the Founding Fathers themselves did not proceed).[56] In other words, potential adversaries of the proposed amendment could not simply rely on the similar criticism that has been often leveled at the Supreme Court—that the Court has engaged in "judicial legislation" when it has upheld acts of Congress that arguably exceed Congress'

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bill: 'Should it become law, the amendment would take a long stride by the Federal Government toward occupying the field of general criminal law and toward exercising a general Federal police power; and it would permit prosecution in Federal as well as State courts of a typically State offense.' *Id.* at 149. In addition, *see* the dissenting opinion of Justice Stewart:

> But under the statute before us a man can be convicted without any proof of interstate movement, of the use of facilities in interstate commerce, or of facts showing that his conduct affected interstate commerce. I think the Framers of the Constitution never intended that the National Government might define as a crime and prosecute such wholly local activity through the enactment of federal criminal laws.
>
> In order to sustain this law we would, in my view, have to be able at the least to say that Congress could rationally have concluded that loan sharking is an activity with interstate attributes which distinguish it in some substantial respect from other local crime. But it is not enough to say that loan sharking is a national problem, for all crime is a national problem. It is not enough to say that some loan sharking has interstate characteristics, for any crime may have an interstate setting.

Id. at 157. If Congress has the power under the commerce clause to provide a uniform substantive criminal code, it must also have the power to provide a code of criminal procedure. *See* U.S. CONST. art. I § 8, cl. 18.

Principal support for the argument that section 5 of the fourteenth amendment authorizes Congress to enact a uniform criminal code, or at least a uniform code of criminal procedure, is found in Katzenbach v. Morgan, 384 U.S. 641 (1966), in which the Supreme Court upheld a federal statute that invalidated a New York statute that had required persons to be literate in English before they were entitled to vote. The Court upheld the act of Congress without a finding that the New York act was itself violative of the equal protection clause. In doing so, the Court deferred to the judgment of Congress that this was essential to the enforcement of the equal protection clause. Immediately after the case was decided, a leading scholar suggested that "[l]ogical pursuit of the reasoning in *Morgan v. Katzenbach* leads to the conclusion that Congress can constitutionally adopt a comprehensive code of criminal procedure applicable to prosecutions in state courts." Cox, *The Supreme Court, 1965 Term, Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 108 (1966) (footnote omitted).

However, the recent case of Oregon v. Mitchell, 400 U.S. 112 (1970), may cast some doubt on the breadth of the principle ennunciated in *Katzenbach v. Morgan.*

[56]M. FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 207-08 (1913).

constitutional powers.[57] A constitutional amendment is, by definition, legislation by the ultimate authority, the people.

Proposed Constitutional Amendment

> *Section 1.* Congress shall have the power to provide a uniform code for criminal law, all forms of incarceration (however denominated), and for the procedures relating thereto, for the United States. [However, Congress may, in its discretion, apply special criminal law, criminal procedure, and incarceration provisions to the District of Columbia, so long as such special provisions do not make possible longer incarceration or otherwise more severe punishment than would be possible under the laws applying generally to the United States.] No law enacted pursuant to this section shall create criminal liability without fault.

The portion of the section enclosed in brackets is thought to be optional. My personal view is that it would be unnecessary since Congress would be able to experiment without it, and any serious mistakes would become quickly evident because of the wide geographical application of the federal code. Nevertheless, if it is concluded that some method of experimentation is needed that does not affect the entire United States, then this bracketed material would be useful. The District of Columbia seems an appropriate place to experiment because any experiments could be closely scrutinized by Congress and because it would be relatively easy to publicize the differences between the law applicable to the District of Columbia and that applicable to the rest of the United States.

The last sentence of this section incorporates the moral blameworthiness theory of criminal law and thus would prohibit conviction where there is no element of fault. This does not mean that ignorance of the criminal law would be excused, since persons would still be expected to inform themselves of the content of the law through the exercise of due diligence. Presumably Congress would be required to take reasonable steps to publicize the content of this law.[58]

> *Section 2.* All criminal law and incarceration proceedings shall be in the courts of the United States.

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[57] *See* Katzenbach v. Morgan, 384 U.S. 641 (1966).

[58] *See* Lambert v. California, 355 U.S. 225 (1957).

This section would insure application of uniform criminal and incarceration procedures and would result in a uniform method for the selection of the judges who would try criminal and incarceration cases.

> *Section 3.* Review of all criminal law and incarceration proceedings shall include review by a United States Court of Criminal Appeals of questions of constitutional law and, if Congress so provides, of statutory interpretation. The Court shall be constituted by the Congress. There shall be discretionary review of the decisions of the Court of Criminal Appeals by the United States Supreme Court in cases involving questions of constitutional law and, if Congress so provides, of statutory interpretation.

A major shift in the responsibilities of the states and the federal government in the area of criminal law and civil commitment would require an increase in the number of federal judges. It would seem desirable not only to increase the total number of judges, but also to add a new appellate court that could devote its entire attention to the criminal law and civil commitment. This section is merely illustrative of the manner in which this might be done and hopefully is flexible enough to satisfy those interested in reform of the appellate process.[59]

> *Section 4.* (A) There is hereby created a National Criminal Law Council composed of one hundred members. Each member shall be elected from a separate district inhabited by approximately 1/100 of the population of the United States. The boundaries of each district shall be determined by the Congress.
>
> Members shall serve a term of eight years and shall be eligible for re-election. Their salaries shall equal those of the members of the United States House of Representatives and shall be paid by the United States Government.
>
> (B) The National Criminal Law Council shall provide the Congress of the United States with advice and proposals regarding the criminal law, all forms of incarceration (however denominated), and the procedures relating thereto.
>
> (C) No bill relating to the subjects referred to in subsection (B) shall become law unless it satisfies the requirements of article I, § 7 of the Constitution and is not disapproved by two-thirds of the Criminal Law Council within ten days after it is passed by the Congress.

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[59] *See* Hufstedler, *New Blocks for Old Pyramids: Reshaping the Judicial System*, 44 So. Cal. L. Rev. 901 (1971); Strong, *The Time Has Come to Talk of Major Curtailment in the Supreme Court's Jurisdiction*, 48 N.C.L. Rev. 1 (1968).

(D) The National Criminal Law Council shall have the power, with the concurrence of two-thirds of its members, to require the Congress to vote on any proposal relating to the subjects referred to in subsection (B). Such vote shall be taken no later than sixty days after the members of the Council have concurred in the proposal.

The National Criminal Law Council would lighten the additional burden placed on Congress by providing recommendations and serving as a source of information. However, in the context of a constitutional amendment the Council could be much more. It could be the means by which the power of Congress could be formally restrained. Much of this section is merely illustrative of the restraints that might be imposed on Congress if it were given the power to enact an exclusive criminal-incarceration code.

There is nothing sacrosanct about the provisions of subsection (A) relating to the selection and composition of the Council; these provisions are merely designed to create a relatively simple method for the selection of members of the Council, embodying the one-man-one-vote principle.

The provisions of subsection (B) delineate the duties of the Council. It is intended that the Council become the primary forum for the development of the uniform code and that the role of Congress be that of ratifying the decisions of the Council.

The provisions of subsection (C) give the Council the power to veto those acts of Congress that are considered not to be in the national interest. Because a large number of votes are necessary for an exercise of such power, it is unlikely that the Council would act except under extreme circumstances. Consequently, the veto of the Council is final.

The language of this subsection is designed to make clear that a bill must not only have the approval of the President, but also not be disproved by the Criminal Law Council. At first the language referring to Article 1, § 7 of the Constitution may seem superfluous; however without such language it would not be clear whether a bill that was immediately signed by the President but vetoed by the Council within, for example, five days after the President's approval was law during the five days between the President's action and the Council's veto. To avoid unnecessary confusion such a bill would not become law until the ten days had passed during which the Council had an opportunity to decide whether to veto the bill.

It would not be enough to give the Council power to prevent the passage of unwise legislation, however. Such prevention would not pro-

vide a remedy if the law remaining after the exercise of a Council veto were obsolete. Therefore, subsection (D) would permit the Council to force Congress to act on a specific proposal.

> *Section 5.* Two years after the effective date of this constitutional amendment, no state, except as it acts as agent for the United States Government or punishes for contempt committed in open court in the presence of the presiding judge, shall incarcerate any individual in any facility, whether the facility be described as a jail, prison, hospital, training school, or otherwise.

The prohibition contained in this section reflects my presumptions regarding the importance of personal liberty and the freedom from the stigmatization associated with criminal incarceration. To protect both values it is necessary specifically to proscribe all types of incarceration by the states, however euphemistically described. To those who object that this prohibition would preclude the enforcement of many regulatory laws, such as liquor laws, my reply is that this result might not be as bad as imagined.[60] The proposed amendment would not preclude fines for the violation of state regulations. Certainly if one accepts the proposition that the criminal law should be a means of imposing social controls only with respect to morally condemnable conduct, it becomes questionable whether many of such basically regulatory laws ought to be enforced through the criminal law.

There are two exceptions to the prohibition against incarceration explicitly provided for in Section 5. The first would permit the states to incarcerate individuals if the states acted as agents of the federal government. As a matter of convenience, the federal government might want the states to continue to operate some or all of the correctional facilities which the states now operate; this might be particularly true in the transitional period during which the federal government would have to adjust to its new responsibilities. The United States Government would still be able to set standards for the states in the administration of such facilities.

The second exception relates to the maintenance of order in, and respect for, the state courts. Contempts committed in open court require immediate attention if order is to be preserved;[61] therefore the state courts would be permitted to continue to exercise this aspect of con-

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[60] *See* U.S. President's Comm'n on Law Enforcement and the Administration of Justice, Task Force Report: The Courts 107 (1967).

[61] Johnson v. Mississippi, 403 U.S. 212, 214 (1971) (dictum); *see* Illinois v. Allen, 397 U.S. 337 (1970).

tempt power. Federal writs of habeas corpus would still be available to persons incarcerated in this fashion to protect against abuse of this power.

> *Section 6.* Nothing contained in this constitutional amendment shall be construed to deprive the states of their power to levy reasonable fines against individuals or other legal entities for the violation of regulatory statutes not superceded by the uniform code, so long as there is no concomitant deprivation of any civil right or liberty, including but not limited to the right to vote, the right to hold public office, and the liberty to hold private office. In any action to collect a fine permitted by this section, if lack of knowledge of the regulation allegedly violated is reasonably raised by the evidence, the state must assume the burden of persuasion with respect to that issue.

This section would insure that the states have sufficient power to enforce their regulatory statutes through the levying of fines. However, to insure that the states would not attempt indirectly to punish individuals other than by way of fine, it would be necessary to attempt to place some additional restrictions on the states. The states would not be allowed to attach employment disqualifications to the violations of their laws, since such disqualifications so frequently amount to serious punishment. If a person is to be denied a means of livelihood, the matter is sufficiently serious to be adjudicated by the government which has the responsibility for enforcement of the criminal laws—the federal government.

The states would also not be permitted to determine the circumstances under which a person could lose the right to vote, the right to hold public office, or other civil rights or liberties. It is hoped that the language employed here would be sufficiently flexible to permit the courts to deal with ingenious devices intended to subvert the principle announced in this section.

The last sentence of this section draws a distinction which initially may seem hard to justify. It would permit, in effect, the defense of lack of knowledge of state law, but would not permit the defendant to escape the payment of a fine if he knew the law but was nevertheless unable to adhere to it. Such a distinction is justified because defense of lack of knowledge is necessary if transients are to be protected against laws which they could not reasonably be expected to know.[62] However, since

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[62] *See* Lambert v. California, 355 U.S. 225 (1957).

imprisonment would not be involved, it might be desirable to permit the states to encourage the greatest degree of care in certain areas by imposing a form of strict liability on those who have advance warning of the regulations to which they are expected to adhere. This is analogous to the imposition of fines on railroads under the Federal Safety Appliance Acts.[63]

One may ask whether a requirement that the state prove knowledge of the regulations allegedly violated when lack of knowledge is raised imposes too great a burden on the state. Here it is necessary to balance the additional burden placed on the states with the lack of fairness to the defendant that would result from the imposition of monetary penalties without knowledge of a regulation. Knowledge could be established, in the absence of an admission by the defendant, by adducing evidence from which one could reasonably infer such knowledge. The extent of the burden on the state would depend on the degree to which the state had publicized the regulations which people were expected to observe. For example, in the area of traffic regulations, if such regulations were posted on traffic signs, published in books widely distributed, published in newspapers, or publicized on television, the burden on the state would not be great. Lack of knowledge would always be available as a defense, but a jury or judge would not readily accept a defendant's denial of knowledge in the face of evidence of such wide publication. Nevertheless, the existence of such a defense would serve as substantial encouragement to the states to publicize widely laws that differed from those enforced in other states.

Section 7. [Insert here a provision incorporating some form of merit system for the selection of all federal judges.]

The problem of judicial selection and training deserves fuller consideration than can be given in this article. Perhaps it is sufficient here to raise the issue and to suggest consideration of some form of merit selection—perhaps patterned after the "Missouri Plan"[64]—for the federal system.

Section 8. Two years after the effective date of this constitutional amendment, if Congress shall have failed to adopt a uniform code for criminal law, all forms of incarceration (however denominated), and

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[63]45 U.S.C. § 18 (1970).

[64]Mo. Const. art. 5, §§ 29(a)-(g), 30, 31; *see* Allard, *Application of the Missouri Court Plan to Judicial Selection and Tenure in America Today*, 15 Buffalo L. Rev. 378 (1965).

for procedures relating thereto, the law of the District of Columbia dealing with these matters shall become operative throughout the United States and shall remain so operative until Congress shall adopt such a uniform code.

Since it is possible that Congress would not succeed in enacting a federal code during the two-year interval between adoption of the amendment and the effective date of the prohibitions of state action contained in Section 5, some provision would have to be made for this contingency. The simplest method seems to be to provide for the application of the relevant laws of the District of Columbia to the rest of the country until such laws were amended or repealed by the Congress.

Section 9. Congress shall have the power to enforce this amendment by appropriate legislation.

Although one can argue that this section would be unnecessary in the light of the necessary and proper clause of article one, section eight of the Constitution, it might be wise to include this express grant of power; otherwise, someone might maintain that since such language has been used in other amendments, the failure to use such language is legally significant.

IV. Conclusion

If one looks to the current literature dealing with problems of federalism, he may gain the impression that despite the effects of travel, migration, and the mass media on the American people, the criminal law is the last area in which many persons would advocate enforced uniformity among the states; the predominant feeling still seems to be that the criminal law is largely a matter of local concern, despite the apparent absence of significant relationship between attitudes towards crime and state boundaries. Nevertheless, as one who values physical liberty as well as freedom from unwarranted moral condemnation by society and would place those liberties toward the top of any hierarchy of values, I believe that uniformity in the laws dealing with crime and incarceration must be achieved. Only through uniformity of such laws can the evils of lack of fair notice of the criminal laws and arbitrary application of different criminal and civil commitment laws be eliminated.

I believe also that the attempt to bring about uniformity should be made only through a constitutional amendment and not through an act

of Congress. Even though the idea of uniformity may not be popular now, I believe that people will respond more favorably to it if the attempt to change the system is made forthrightly in the manner constitutionally prescribed for constitutional change.

The problem is one of convincing most Americans of the validity of the conclusions set forth above regarding the need for uniformity. In view of present attitudes, the possibility that most Americans will be thus convinced in the near future seems slight. But if this proposal has merit, if it or a more refined one would make possible a better system of criminal law, then I believe that eventually it will be possible to persuade the American people that such changes ought to be made. The American system of government is based on the assumption that such changes are possible.

Mr. Davidow. In my letter of March 13, I covered several points, somewhat unrelated, and in the interest of saving time, I would like to address myself to one particular point, that is one particular section of S. 1 and some ramifications leading from that, and I refer to section 3–11A4 which, of course, as in the case of the act of 1968, purports to—well, I guess you can't say technically it overrules Miranda, because Miranda was decided in the context of a State case, but I think we all assume that the court in Miranda was deciding on the basis of the sixth amendment, and hence presumably the same rule there is applicable to the Federal Government.

And in fact section 3–11A4 purports to overrule Miranda by introducing a concept of voluntariness in the production of confessions, and overruling the principle that a statement can be admissible only if certain warnings are given. It seems to me that we are almost at a crisis state with respect to the exclusionary rule. And of course, this particular provision is directed at the exclusionary rule. Unfortunately, it deals only with a symptom of the problem and indeed a very small part, only one of many symptoms of the problem.

And in my article, in the Texas Tech Law Review, I have set forth what that problem is. And I think that it is well known to all of those familiar with the administration of criminal justice today.

We all are aware, of course, that some guilty persons escape, because of the enforcement of the exclusionary rule. We understand, of course, we believe that the rule has been ineffective in deterring police lawlessness or some police lawlessness. We know that innocent persons are not protected by the rule, because of course if they are indeed innocent, they will not be brought to trial, and hopefully they will not be brought to trial; and hence now, they don't have an opportunity to invoke the exclusionary rule.

So we know there is a problem, and indeed, of course, the court has been aware of this. Congress has been aware of this. It's a little like the weather. Everybody talks about it but no one seems to do anything about it.

In my article I referred to Mr. Justice Burger's dissent in *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*,[1] in which he set forth a proposal in which he invited the Congress to act. And I, too, would urge the Congress to act, because indeed if there is going to be a solution, or a substantial solution to the problem of the exclusionary rule, it's going to have to come from Congress.

And I believe that we are almost at a crisis stage today. This is so in part because of a recent decision of the Supreme Court—and I'm not sure I have the pronunciation—*Schneckloth* v. *Bustamonte* case,[2] decided this spring, in which the Supreme Court dealt with the question of a consent search, ruling that in order for there to be a consent search there need be no showing by the Government that the person searched knew of his right to refuse. That's an interesting case.

But my concern here is the fact that three Justices on the Court, the new Justices, indicated that they were willing at this point to overrule

[1] *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).
[2] *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973) (Doc. No. 71–732, decided May 29, 1973).

the *Kaufman* v. *United States*[1] case, and in effect, go back to the era in which, under collateral relief, there was no possibility of raising a fourth amendment isue.

And I believe Mr. Justice Blackmun indicated that he agreed with the view of Mr. Justice Powell in that regard, but since it wasn't necessary to the decision of the case, he didn't finally express the view that he would go along. Mr. Justice Stewart, who wrote the majority opinion, was one who dissented in *Kaufman*, and if you count noses, that is five there. But we don't know for sure how they would go.

It seems as though there is a possibility, perhaps, even a probability that some time in the foreseeable future, the court will go back to a time when there was no collateral relief in the fourth amendment area; and indeed, the unfortunate effect of this will be, I am afraid, that the police will get the idea that there is kind of open season.

Now, it is true these issues can be raised on direct review, but my understanding is that a great number of the recent decisions in the criminal law field, the criminal procedure field, have arisen collaterally, not on direct review. And to the extent that there is less of a likelihood that these issues will reach the Supreme Court, it seems to me that the effect of that decision will be to encourage the police to disregard the Supreme Court decisions on the theory that the case will never get reversed, certainly, in the Federal courts, anyway.

And therefore, it seems to me more imperative than ever, more imperative than it was in 1971, that Congress act to deal with the problem.

Now, as I have indicated in my article, I'm a little unhappy with Mr. Chief Justice Burger's proposal, because I think it is deficient in in a number of respects. His proposal essentially was that Congress create a quasi-administrative body to handle suits on the part of aggrieved persons, and that Congress on behalf of the United States waive the United States' sovereign immunity, to permit individuals to sue the Federal Government in this quasi-administrative, or before this quasi-administrative tribunal.

There are a number of problems with it. Well, first I mentioned, of course, that it does eliminate some problems that had been associated with traditional remedies against police abuse. It eliminates the problems associated with jury trial: The delay, the expense, the likelihood, or perhaps the lack of likelihood that jurors would sympathize with the person who perhaps has been guilty of an offense.

So it eliminates that problem, but it creates other problems. First of all, it isn't at all applicable to State officials, and after all this is a national problem. This is not a problem simply of the Federal Government. This is a national problem, and since most of our criminal law is prosecuted in the States, application of the exclusionary rule is felt perhaps most, at least numerically, by the States; hence it doesn't touch that issue at all.

Secondly, it does not purport to deal with the Fifth and Sixth Amendments, even though it seems to me these are involved in the exclusionary rule to the extent that, for example, *Miranda* is based upon Fifth and Sixth Amendment considerations. This is, if you will, part of the exclusionary rule problem in the sense that evidence that

[1] *Kaufman* v. *United States*, 394 U.S. 217 (1969).

is perhaps otherwise thought to be trustworthy is excluded from trial. And so it doesn't deal with that either.

Also, it doesn't do what Mr. Chief Justice Burger said, in his dissenting opinion, that the present exclusionary does not do; namely, his proposal would not deal with the individual policemen. And it seems to me that the rule—that any substitute for the exclusionary rule is not going to work unless you deal with the individual policemen.

Now, as I understand it, and certainly the experts in the field have expressed the view that the individual policemen acts, not because of necessarily what the Supreme Court or what the prosecuting attorney says; he acts because of the way people around him, i.e., his colleagues in the police force and his superiors on the police force, act; and unless these individuals can be affected, there isn't going to be any change in the present system of occasional police lawlessness.

Finally, the provision of Mr. Chief Justice Burger is defective in my view because there is no provision for the appointment of counsel, because actually if an individual were on his own to proceed before a quasi-administrative tribunal, he would be in the same position in which the individual aggrieved person is now if he wants to sue a policeman in court; he has to know first that he has a right to sue; and he has to get someone who can help him with his legal problem. He has to get a lawyer to help him.

And unless we provide counsel, the remedy simply is not going to be effective. So these are the deficiencies that I see in the Chief Justice's proposal. And in my particular proposal, I have sought to deal with these particular problems.

Now, of course, as you know, or perhaps you may not have had a chance to look at my article, but in my article I have submitted a specific proposal, proposed act of Congress, in which I have tried to deal with these problems, and I've tried to do so in the context of the ombudsmen principle—that is, the procedure established first in Sweden in the early 19th Century, by which an independent governmental official receives complaints, makes investigations, and makes and publicizes recommendations.

It seems to me that this is a valuable approach that can be taken to deal with the problem. However, in my view, in the light of the fact that police seem to act the way they do because of their peer group pressure, it would not be sufficient merely to give the ombudsman power to recommend and publicize. He would have to be given greater power than that.

And so I have suggested that he be given the power, not to bring suit himself or to order the prosecution of offending officials (which some of the Scandanavian ombudsmen can do), but rather when he finds probable cause to believe that there has been a violation on the part of some official, to appoint private counsel to represent an aggrieved person in court.

All he would need to do would be to establish probable cause, and he would at that stage drop out of the picture. For a time, at least, he might follow it, but he would drop out for a time and appoint a counsel in the individual proceeding in his behalf. I believe that this is an approach that could work. I think it has sufficient flexibility to meet the problem.

Now, there are other problems involved here of a constitutional nature. In my proposal, I have suggested that Congress deal not simply with violations by Federal employees, but by State employees, and furthermore that the ombudsman be given power not only to deal with violations of the law as such—that is. Federal law and the Federal constitution—but also to take actions in those instances in which individual members of the local police fail to obey their own local laws.

And this does raise a constitutional question. Does Congress have the power to do this?

And I have argued in my article that, indeed, Congress does; under section 5 of the 14th amendment, Congress has the power to enforce the due process clause; and one of the means of due process, as the late Justice Black argued in *Duncan* v. *Louisiana*,[1] is the concept of the law of the land.

In other words, due process originated in Magna Carta, in the phrase "law of the land," and it meant at that time decisions in accordance with the established rules at the time. In other words, it was a guarantee against ad hoc decisions, against decision without prior rules.

If this is the basis of the due process clause, then it seems to me that one can make a good argument that a State, when it does not obey its own previously established rules, is, indeed, violating the due process clause, because it has not decided a case or handled a matter in accordance with the law of the land, the law of that jurisdiction.

And if that is an appropriate interpretation of the concept of due process, then it seems to me that, clearly, Congress under the due process clause does have the power to enforce it by empowering the ombudsman to act in those cases in which local police have not adhered to their own rules. Furthermore, the ombudsman could—and this, from other instances in which ombudsman have acted in other areas, we do know—require the local administrators to adopt rules.

And we have a number of experts in the field of criminal procedure saying that what is needed above all is for local police, local police chiefs, to adopt rules and regulations and to require their people to adhere to them. And one thing an ombudsman would do would be to require local police chiefs and supervisors to adopt rules and regulations governing their subordinates and adhere to them.

And the cause of action which, under my proposed act, would be created would give an individual aggrieved person the right to sue not only an individual official who had specifically violated his constitutional rights, but also to sue a supervisor for—among other causes—the failure of a supervisor to adopt reasonable rules and regulations to govern his subordinates.

Well, that is my proposal in a nutshell. Of course, there are specific provisions. I would be happy to try to answer any questions that you might have regarding them.

Senator HRUSKA. Well, you have suggested, Professor, that it is a national problem. I think we can grant that. But, of course, the powers of the Federal Government to deal with it as a national problem are somewhat limited, are they not?

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[1] *Duncan* v. *Louisiana*, 391 U.S. 145 (1968).

Mr. DAVIDOW. I believe that, traditionally, they have been limited. Certainly, there is precedent. The *Katzenbach* v. *Morgan* case [1] suggests that Congress does have substantial powers to enforce the 14th amendment, and this is essentially what we are dealing with.

We are dealing with the enforcement of the 14th amendment. Of course, in the case of the Federal Government, there is no problem, because we have specific restrictions upon the Federal Government, and, of course, Congress has the power under the necessary and proper clause to enforce those restrictions. In the case of the States, we have the due process clause; we have section 5 which gives Congress the power to enact legislation that is necessary to the enforcement of it.

Now, I do not say that it is self-evident that Congress has this power, but I think that it certainly would not be an undue stretch of present precedents to say that Congress has the power to act in this area.

Senator HRUSKA. Well, any dealing with this subject on the basis of the due process clause of the 14th amendment, would have to be at the hands of the courts. We could not very well prescribe for the State courts Federal legislation, could we?

Mr. DAVIDOW. My theory is that the ombudsman, number one, could act in those instances in which, now, for example, evidence is excluded because of violation of the 14th amendment. Clearly the ombudsman could do now what the courts are doing in excluding evidence; so clearly, he could deal with violations of the Federal Constitution by State authority. There certainly is no question about that.

The question relates, then, to whether he could go beyond that and require the local police chiefs, for example, to adopt rules and adhere to them. And I grant you that there is a question there. Certainly, the court has never dealt with this problem.

However, even if the ombudsman could only enforce the 14th amendment, it would be doing what the exclusionary rule, theoretically, is doing now. And it would, to that extent certainly, make unnecessary the exclusionary rule. It could do as much as the present exclusionary rule.

Senator HRUSKA. That would be a Federal ombudsman?

Mr. DAVIDOW. A Federal ombudsman.

Senator HRUSKA. I think you might have the Council of State Governments fill this room if anything like that were to appear imminent.

Mr. DAVIDOW. I suspect that. But the point is, it is being done now anyway.

Senator HRUSKA. But not by a Federal ombudsman.

Mr. DAVIDOW. But by the Federal courts. And I suspect that the Federal ombudsman——

Senator HRUSKA. That would be possible but I think it would be very severely criticized and resisted.

If the courts get into that area, it is because of proceedings that start within their own States and that they recognize as legitimate and traditional. But to have somebody walking up and down the highways and byways of the 50 States, looking out for somebody on a Federal basis would be unacceptable.

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[1] *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966).

Mr. Davidow. Well, I think there would be resistance. However, it seems to me—and this is a basic problem, as in my article, I discussed the basic problem of attitudes—it seems to me the police cannot have it both ways. They cannot criticize the exclusionary rule because it lets the guilty go free, and then turn around and say, well, if we don't let the guilty go free, we still should be subject to no review at all.

It seems to me that there has to be a quid pro quo here.

Senator Hruska. Well, there would be. There would not be any question but what there would be a quid pro quo.

The question is, however, who raises the issue. Up until now, we have had no scarcity of appeals in criminal cases. But they do not come from the hands of a specially designated agent of the successor of King George III, in America.

Mr. Davidow. Except that if our present system of tort law worked, it would be the same, would it not—if individual, presumably innocent, persons who are victims of police lawlessness sue in the courts? And if this were an effective device, we would have the same thing—individuals would be bringing actions against State officials. They might even be doing it now under 42 U.S.C. 1983. Indeed, if that tort remedy were effective, that would be the situation now.

And the fact is, it is not an effective remedy for a number of reasons, including the fact that counsel is not available and people probably do not know that they have these rights. So I do not think that the interference would be as substantial as, perhaps, you think.

Now, I could be wrong on that. I do feel this: Although I personally believe that it would be best for all parties concerned if the local police were required to adopt their own rules and to adhere to them, even if the ombudsman did not have the power, if he had the power only to enforce the 14th amendment, that that still would be a step ahead of the present situation.

And certainly, for those interested in not permitting the guilty to go free, this, it seems to me, ought to be an attractive device, because the guilty would not, under this proposal, go free. But nevertheless, they would have a cause of action and they would have an effective method of seeing to it that the individual policeman who has wronged him at least has to respond in damages.

Senator Hruska. Well, thank you very much.

And if you would hold yourself available in the event that we would like to get further comment from you, we would appreciate it.

Mr. Davidow. Thank you, Senator.

Could I make one other comment of a somewhat unrelated nature?

It is related, but it does tie in with my predecessors, and it deals with the concept of unequal application of the law, geographically speaking. Because my other article, which is a little broader in scope, deals with a proposal for a national system of criminal justice. And I suspect that this would not be a very popular proposal among a number of people.

But there is one specific thing in the article that I would like to point out, and it specifically relates to the question of local interests and the question of diversity based upon local attitudes toward crime. Beginning at footnote 17 of my article, I have set forth a description of statistical analyses which I conducted with the help of some people in

the mathematics department at Texas Tech, statistical analyses of portions of five public opinion surveys. Two of them were national in scope; three of them were of States: the States of Minnesota, Texas, and California.

And even though these surveys were not designed to do what I wanted to do—that is, test differences, State by State, in attitudes toward criminal law generally—I think they are sufficiently similar to what I wanted to do to indicate in a very general way what I believe to be the fact; namely, that although there obviously are differences across the country with respect to the criminal law—differences in attitude toward criminal law—these do not break down along States lines.

They do not break down along State lines, and thus such differences do not support maintenance of the present system, which cannot be supported, apart from tradition—which, of course, is a very important factor to some people. The maintenance of the present system is, in part, based on the assumption that we have to protect local interests.

With all due respect to Senator McClellan, I disagree with the statement he made in the 1971 Duke Law Review article,[1] in which he again reiterated this point that we have to protect local interests. With all respect, the present system does not protect local interests because, for example, the survey in California showed that there is no California attitude toward legalization of marihuana.

The survey in California showed that there are significant, statistically significant, differences in attitudes toward marihuana. But these break down according to county and region within California; there is no one California attitude toward marihuana. And, hence, if you talk about protection of local interests in Orange County, Calif.——

Mr. Blakey. How about the attitude reflected in the California statutes as a product of the political process in California?

Mr. Davidow. Well, historically, this is a fact. If you say that that is a protection of the local people in Orange County, that may or may not be true. And all I am saying is——

Mr. Blakey. It is a collective protection of all the people in California.

Mr. Davidow. Well, you are starting from a historical fact and assuming that this must continue. What I am saying is this——

Mr. Blakey. The people of California can change it whenever they want to.

Mr. Davidow. And I am proposing, as a matter of fact, in my article, that the people of the United States through a constitutional amendment do precisely that—change the system. And I suspect that this is a long-term problem.

But what I am saying is, the people in Orange County, Calif., have no greater assurance that their local interest—assuming they have an attitude toward marihuana, for example, different from others—they have no greater assurance that their particular attitude toward marihuana is going to be enacted in law than they would if there were a national system. Because it may be that the rest of the people in California have views that are different from theirs, and that will be reflected in the laws of the State of California.

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[1] McClellan, John L., "Codification, Reform, and Revision: The Challenge of a Modern Federal Criminal Code," 1971 Duke Law Journal, No. 4, September 1971.

So when we talk about local interest, protection of local interest, I think we have to be very careful. The present system does not protect local interests. It protects a State, but the State is made up of various views. And to the extent that we can generalize and say what these differences in attitude are, these differences tend—and I can only say tend on the basis of these statistical analyses—they tend to break down along the lines of the size of the cities.

I said in my article the people in the larger cities in Minnesota seem to have more in common with the people in Houston, for example, and San Antonio and Dallas, regarding marihuana than they do with the people of rural Minnesota. So if we talk about protection of local interests, I think we are deceiving ourselves by thinking that we are doing so under the present system.

Senator HRUSKA. We thank you very much.

Mr. DAVIDOW. Thank you very much.

Senator HRUSKA. We stand in adjournment until tomorrow morning at 11 o'clock.

[Whereupon, at 12:10 p.m., the hearing in the above-entitled matter was recessed, to reconvene Friday, July 27, 1973, at 11 a.m.]

REFORM OF FEDERAL CRIMINAL LAWS

THURSDAY, JULY 26, 1973

U.S. SENATE,
SUBCOMMITTEE ON CRIMINAL LAWS AND PROCEDURES
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 11:30 a.m. in room 2228, Dirksen Senate Office Building, Senator Roman Hruska presiding.

Present: Senators Hruska and Kennedy.

Also present: G. Robert Blakey, chief counsel; Paul C. Summitt, deputy chief counsel; Kenneth A. Lazarus, minority counsel; Dennis C. Thelen, assistant counsel; and Mabel A. Downey, clerk.

Senator HRUSKA. The subcommittee will come to order.

We will resume hearings on S. 1 and S. 1400. We have a very fine list of witnesses this morning. It will be headed by the former Governor of Ohio, Michael V. DiSalle, who will testify on the subject of the death penalty.

Governor, through the years you have always extended your courtesy when we visited your State. We are very happy to have you here this morning.

You have submitted a statement and it will be printed in the record in its totality. You may proceed to testify as you wish.

I will be able to stay here until 1 o'clock.

You may proceed.

[The prepared statement of Mr. DiSalle follows:]

STATEMENT OF HON. MICHAEL V. DISALLE

DEATH PENALTY

Mr. Chairman and distinguished members of the committee, permit me first to express my appreciation for the opportunity to appear before you on the important subject of the death penalty. The President, in his message of March 14, 1973, has recommended the use of the death penalty in connection with certain crimes. This recommendation comes at a time when he also claims that crime has been substantially reduced since 1969. It might be well to note that this is also a period in which the death penalty has not been used in the United States. In view of this paradox, it might be well to examine the history of capital punishment, its use and disuse, its results, its deterrent value and its value as a tool in the protection of a civilized society.

During my term as Governor of Ohio, the Executive Mansion at Columbus was staffed by convicted killers, all of whom were under life sentence. My wife and I, our children and grandchildren, lived under the same roof with these men twenty-four hours a day. Our association was not that of keeper and prisoner but that of fellow human beings. I shared their joys and sorrows, their strengths and weaknesses, their hopes and fears.

During the same period I acted on appeals for executive clemency from eleven men and one woman who had been sentenced to death. I also passed upon the

cases of some one hundred fifty lifers eligible for parole after having served the Ohio legal minimum of twenty years. Whenever I extended mercy to a prisoner, elements of the press and my political enemies, knowing I had long been opposed to capital punishment would accuse me of encouraging crime by coddling criminals. Their conclusions were generally that the Governor is a sentamentalist whose heart is bigger than, though not as soft as, his brain, who weeps for the poor murderer but is coldbloodedly unconcerned about the murderer's victim.

I hope to convince this committee that the time to show concern for the victims of crime is long before the shot is fired or the blow struck—by seeking a sensible way of eliminating the causes of crime rather than by trying as we now do, futilely and after the fact, to eradicate crime by punishing the perpetrator. Punishment is too often a matter of emotion rather than of cold logic. Under a system of justice not free of inequities, the question of who should be put to death in the name of the law and who should live is often decided by men influenced more by public climate and public clamor than by abstract justice. He who is to die is too frequently a man who has committed a crime at the wrong time in the wrong place under the wrong circumstances. A different combination of the same factors could well produce a more temperate verdict.

It would be well for us to examine the emotions which push a peaceable, kind, and just individual to the front rank of a lynch mob, clamoring for the life of a person he has never known, on the basis of facts which he has heard only at second or third hand. Must a man die to atone for a crime, the evidence of which has been viewed only through the blood-red spectacles of outrage and anger?

No one who has never watched the hands of a clock marking the last minutes of a condemned man's existence, knowing that he alone has the temporary God-like power to stop the clock, can realize the agony of deciding an appeal for executive clemency.

During my term as governor, I came to dread the days leading to an execution. In those four years, six men died in the electric chair. Despite my opposition to the death penalty as a futile barbaric relic, my oath of office required me to execute the laws of the state, some of which call for capital punishment. True, my power of clemency was limited only by the exclusion of treason and impeachment cases, but for the six who died I could find no extenuating circumstances, no unequal justice, no questionable legal procedure, no reasonable doubt, to justfy my reversing the sentence of the courts.

Even when I was convinced of the man's guilt, doubt haunted my unconscious long after the warden had notified me that the prisoner was dead. I remembered the narrow escape of many innocent people and wondered how many innocents had actually died at the hands of the state. The death penalty is so horribly final. Once it has been carried out, mistakes cannot be corrected, and what human does not make mistakes? I thought of Clarence McKinney, convicted of first-degree murder in my own state in the 1920's, on the basis of circumstantial evidence, mistaken identity, and, apparently, his previous police record. While he was in prison awaiting an appeal, another man confessed to the crime. What if McKinney had been executed?

And Ed Larkman in New York, condemned to death in 1925. Larkman's sentence was commuted by Governor Alfred E. Smith in 1927, and he was pardoned by Governor Lehman in 1929—After the real culprit confessed.

And Tommy Bambrick, whose case is discussed today in muted tones. Bambrick was already in the death house at Sing Sing when new evidence came to light which convinced Warden Thomas Mott Osborne that another man had committed the murder for which Bambrick had been convicted. Last-minute efforts to reach the governor were unsuccessful, however, and Bambrick went to his death still protesting his innocence.

This possibility of an irrevocable error was so vivid to me that on several occasions I made last-minute visits to the grim, antiquated Ohio State Penitentiary, not far from downtown Columbus, across the street from a casket factory, for a final interview with the condemned man. With death only a few hours away, it seemed to me that I might expect a moment of truth.

The tragic impossibility of correcting an error is, however, only one of the reasons for my opposition to capital punishment. First of all, I believe that taking a human life, even to pay for a life already taken, is immoral. I am not speaking of morality in an abstract, theological sense—some professional theo-

logians have sought to debate with me on that basis—but in a personal sense, according to my own conscience. Society, echoing the Ten Commandments, says: Thou shalt not kill. Then society illogically continues: Killing is wrong, and in order to prove it is wrong, we will kill you if you kill.

I believe human life is a divine gift and deliberately to destroy it is as much a crime for the state as for the individual. Israel, the land where the "eye for an eye * * * life for a life" idea of punishment originated more than two thousand years ago, has now abolished capital punishment except for crimes against the state—which means, in effect, collaboration with the Nazis in their program to exterminate the Jews.

Second, I believe the death penalty serves no purpose. Its champions argue that it is a deterrent to murder and the police lobby and its spokesmen agree, but statistics and history show that it has no deterrent effect. The shots fired by a misfit named Lee Harvey Oswald in Dallas on November 22, 1963, demonstrated the fallacy of this favorite argument of the champions of the death penalty.

Three Presidents of the United States had been assassinated before John Fitzgerald Kennedy was struck down in Dallas. All of their assassins died. Booth, who shot Lincoln, was killed while trying to escape his pursuers; his accomplices were hanged. Garfield's assassin, a disappointed office seeker, was executed. So was the anarchist who shot McKinley. Did this deter the men who took pot shots at Theodore Roosevelt, Franklin Roosevelt, or Harry S Truman (even there one of those would-be assassins was killed by guards)? It did not deter Oswald.

The murder of Oswald by Jack Ruby produced intense indignation for a number of reasons. That Oswald was thereby denied a trial is of course basically opposed to our whole system. So is the persistence of a lynch attitude in a democracy that prides itself on its system of calm, considered justice. Further, Oswald's premature death prevented us all from ever learning more about his motives and of any possible accomplices. But I think the most interesting reason for the outraged reaction to Ruby's exhibitionistic act of retaliation is an implicit rejection of the whole idea of capital punishment.

If we believe that the murder of President Kennedy should be avenged and that the killing of Oswald could serve this purpose, then we ought to find some satisfaction in Ruby's one-man vigilante action. But if we say that Ruby as an individual should not seek revenge, should we as a people seek it collectively?

The Dallas jurors brought in a curiously contradictory verdict. By condemning Ruby to death they decided that avenging the killing of the President by another killing was wrong. Then they went on to say that this wrong should be corrected by another killing, in effect, three wrongs making a right.

Ruby's trial was conducted in an emotion-charged atmosphere of exhibitionism, questionable civic pride, and political ambition. The prosecutor went into the Dallas courtroom like a heavyweight champion entering the ring to preserve his unblemished record. A record of one-hundred-percent convictions in capital cases does not necessarily mean that a prosecutor is achieving the prime objective of his office, the administration of justice. A prosecuting attorney has the responsibility of determining the guilt or innocence of a person charged with a crime. Even if he determines that the defendant is guilty, he has the further responsibility of determining what would best serve the ultimate cause of justice. Should he close the door to any mitigating information regarding the defendant, he is not filling his essential role in our system of jurisprudence.

The Dallas verdict was no surprise. Ruby's unsavory background, his associations, his career as a strip-tease impresario, all helped make him a likely candidate to pay with his life for a crime for which he may not have been emotionally or mentally responsible. I do not know what motivated him, but I would prefer to keep him alive as long as possible in order to achieve the broader service to society which will be accomplished only by establishing the complete truth.

To those who argue that political assassination cannot be considered in the same class with common-law murder in discussing capital punishment as a deterrent, I offer statistics. At present, fourteen American states and two dependencies have abolished the death penalty as punishment for first-degree murder: Alaska, Hawaii, Iowa, Maine, Michigan, Minnesota, New Mexico, New York, North Dakota, Oregon, Rhode Island, Vermont, West Virginia, Wisconsin, Puerto Rico, and the Virgin Islands. States retaining capital punishment have failed to give greater pause to the prospective murderer than those that have abolished it: according to F.B.I. statistics, there is no appreciable difference in

the homicide rate. Most European countries that have abolished capital punishment have a much lower murder rate than American states which still hang, electrocute, or gas their homocidal criminals.

As for the increased mortality rate among police officers—the police lobby is most vociferous in its claim that abolition of capital punishment will make the policeman's lot much more dangerous—F.B.I. figures again contradict the claim. A thirty-five-year record compiled by the Department of Justice does indicate a slight difference. In the capital punishment states a law enforcement officer's chance of being shot down in the performance of his duty is 1.3 per 100,000. In the abolitionist states the rate is 1.2.

More eloquent than statistics are the graphic examples from my own State of Ohio. During the reign of terror of the infamous Licavoli gang in Toledo, the gang killers could have driven just five miles to the Michigan line in order to do away with their victims in a state which does not execute for murder. They didn't bother. They were so confident of their own position that they did not even consider the fact that Ohio killed its killers, in certain cases.

Even more striking is the case of Charles Justice. Justice, a broommaker who was sentenced in 1902 to twenty years in the Ohio State Penitentiary after a cutting scrape—a third offense—was a trustee assigned to the housekeeping duties of the death house. He fould the electric chair—an angular, ungainly contraption of polished golden oak—far from efficient. While obviously not designed for comfort, the chair was too big for the small, nervous type of prisoner, who would squirm in his seat and cause the electrodes to make imperfect contact. As a result, the powerful current would arc between the electrodes and the doomed man's body, causing flesh burns and an unpleasant odor which discommoded the witnesses and officiating representatives of the state. Justice corrected this deficiency by designing iron clamps—which are still in use—to immobilize the limbs of the condemned man during his death reflexes and thus make for a neater execution.

For his exemplary service to the State, Charles Justice was granted extra time off and was paroled in April, 1910. He was well aware of the fate reserved for murderers, a more efficient operation, thanks to him. This awareness, vivid though it must have been, was not the deterrent it is supposed to be. In November of the same year, Justice returned to the penitentiary as Number 40,103. The charge: murder in the first degree. On October 27, 1911, undeterred Charles Justice died in the electric chair he had helped make more lethal, immobilized by the clamps he had invented. As a contemporary cynic remarked, it was poetic justice for Justice.

Let me sum up briefly the remaining reasons for my opposition to capital punishment, which I will develop in detail as I describe specific cases. The men who occupied death row in the Ohio State Penitentiary during my administration had one thing in common: they were penniless. They had other common denominators—low mental capacity, little or no education, few friends, broken homes—but the fact that they had no money was a prime factor in their being condemned to death. I have never seen a person of means go to the chair. It is the well-heeled gangster, the professional killer who can afford the best legal talent to defend him, who gets off with a lesser sentence. It is the poor, the illiterate, the underprivileged, the member of the minority group—the man who because he is without means is defended by a court-appointed attorney—who becomes society's blood sacrifice.

The court-appointed defender, diligent though he may be, is always handicapped. Sometimes he is inept—there is no criterion of experience in criminal law to guide a court appointment—and always he lacks the staff and funds available to the prosecution. Without funds and personnel to investigate the background of jurors and witnesses, to check alibis and examine the evidence before trial, the court-appointed attorney and his client have two strikes against them before they even enter a plea. When, if they run up against a politically ambitious prosecutor, an emotional jury, and a biased politically conscious judge, they are truly in a bad way.

No, the death penalty solves nothing. It treats symptoms, ignoring the disease, the primary causes of crime. It eliminates the possibility of rehabilitation, thus denying a second chance to a potentially useful citizen. Capital punishment becomes merely a communal expression of vengeance—a debasing passion in any society that calls itself civilized.

I know of few governors who are not sorely troubled by the question of capital punishment. I have discussed the subject with many of them and have found that

most of them agree in opposing the death penalty. Some tolerate the practice because it accords with the climate of their own bailiwicks, but I have found none who is passionately in favor of it.

The world's first recorded homicide was not punished by death. When Cain killed his brother Abel and lied about it, the Lord did not see fit to take Cain's life in return. Instead, He marked Cain as a fratricide and exiled him for life.

In the half-dozen millenia since the murder of Abel, the Lord's idea of punishment by exile has had some advocates. The French used to send their felons to New Caledonia and Devil's Island, and the Russians still consider exile to Siberia a fate worse than death. But capital punishment has been by far the most popular form of retribution not only for murder but also for misdemeanors corresponding to no more than double parking today. In 1780 there were three hundred crimes punishable by death in England, including consorting with gypsies and defacing Westminster Bridge. Where the supreme penalty is retained today, it is generally reserved for such crimes as murder, treason, armed robbery, and rape, particularly—in some of our states—what amounts to integrated rape.

Some of the most ingenious and revolting forms of killing criminals originated in the Orient, where the act of retribution seems to have developed into something of a spectator sport. The Mosaic ratio of an eye for an eye became more accurately an eye for an eyelash, a life for an eye. For relatively minor offenses, the Chinese used to boil unfortunate transgressors in oil, dissect them gradually by a process known as the One Hundred Slices, or bury them alive. In Thailand, the iniquitous were thrown to the crocodiles.

In India during the rule of the Great Moguls (the era which also produced the Taj Mahal), impalement was in great favor. The executioner carefully sharpened a bamboo stake stout enough to support the weight of a man, yet thin enough so that its upward course through the body would not kill before the tip had reached the heart.

The prisoner was lifted, his naked buttocks parted so that the point of the stake could enter the anus, and his body was brought down firmly. He would scream as the bamboo lance pierced his bowels. Then the executioners would step back, satisfied that they had prepared a spectacle as well as an object lesson for the assempled onlookers.

The howling victim stood on tiptoe in an effort to halt the excruciating upward progress of the stake. As he writhed in pain he appeared to be doing a grotesque toe dance—but there was blood streaming down his legs. His strength ebbed and his heels came down. Then his knees buckled and the stake pierced his heart. Justice had been satisfied. The thief had paid the penalty for stealing a cup of rice and a handful of buffalo-milk curds from the kitchen of the palace of Emperor Shah Jahan.

The Malayan sultans had a variation on the Mogul impalement which delighted the amateurs of suffering. Impalement, after all, was over in a matter of minutes or, at most, hours. In Malaya there was a species of bamboo which, in the steamy tropical climate, grew several inches a day. By seating the condemned man on a newly sprouted bamboo shoot and immobilizing him, the sultan could have his sentence carried out and prolong the pleasure of his friends for several days as the avenging plant grew inexorably and agonizingly into the victim's vitals to destroy him.

As civilization moved westward, Oriental ingenuity in exterminating undesirables came with it. The Greeks clung to the cup of hemlock, a quiet, unobtrusive way of wiping out the nonconformist. The Romans, on the other hand, combined the death penalty with the circus. They threw the miserable creatures to the lions. They staged historic crucifixions in lands where the pre-Roman method of capital punishment was lapidation—stoning to death—and no questions asked about who was to throw the first stone.

During the Middle Ages there was considerable burning at the stake, breaking on the wheel, flaying alive, and drawing and quartering. There were two versions of this last form of capital punishment. The first was to attach four spirited steeds to the arms and legs of the victim and drive the horses off in four directions. The other is well described in the sentence pronounced on eight men convicted of high treason in England in 1780:

"That you be hanged by the neck, but not till you be dead. For you must be cut down alive. Then your bowels must be taken out and burned before your face. Then your head must be severed from your body divided into four quarters, and these must be at the disposal of the supreme authority of the state."

Spain, which pioneered several of the more artistic forms of extermination, still hopefully uses one of them after nearly five hundred years of nondeterrence. Garroting is still the capital punishment of choice in Franco's Spain. As recently as August 17, 1963, two men charged with terrorist bombings were led out into the cold light of a Madrid dawn and fitted with iron collars. The collars were tightened until eyes bulged and faces purpled. The screws at the back were tightened still more, closing the windpipe, crushing the thyroid cartilage. The points of the screws emerged from the inside of the iron collars to pierce the vertebrae and sever the spinal cord. The faces were dark with the lividity of death by strangulation.

Capital punishment by decapitation has been widely used over the years and over the world. As a rule it has been done by hand—with an axe in the Tower of London, with a scimitar in the Near East, with a cleaver in the Far East. Beheading entered the preliminary stages of automation early in the sixteenth century in the Mediterranean countries, but the head-chopping machine did not reach perfection until the French Revolution. The Year 1792 saw the adoption of the guillotine, a slanting one-hundred-thirty-pound knife that drops ten feet between guide rails to shear off the prone victim's head while the neck is held firmly in a stocks-like clamp. The head falls into a container and the body is rolled into a waiting basket.

The device was named for Dr. Joseph Guillotin, though he did not invent it and protested indignantly against the use of his name in connection with it. The first guillotine was designed by Dr. Antoine Louis and was called a louisette by contemporaries. Dr. Guillotin was a professor of anatomy who carried on a campaign for a humane method of capital punishment. He did believe the guillotine knife fell with such speed that the victim would feel nothing except a brief sensation of cold at the back of his neck.

Some eyewitness accounts cast doubt on the good doctor's belief. The late Albert Camus quotes the chaplain of La Santé prison, in Paris, where executions now take place:

"When he was executed . . . his head fell into the trough in front of the guillotine, and the body was immediately put in the basket. But contrary to custom, the basket was closed before the head could be put in. The assistant carrying the head had to wait a moment until the basket was opened again. And during that brief space of time, we were able to see the two eyes of the condemned man fixed on us in a gaze of supplication, as if to ask our forgiveness. Instinctively we traced the sign of the cross in order to bless the head, and then the eyelids blinked, the look in the eyes became gentle again, and then the gaze, which had remained expressive, was gone."

Regardless of whether the priest's account was subjective or even hallucinatory, Camus calls decapitation "a crude surgery practiced in conditions that deprive it of any edifying character whatsoever." If it is to have a deterrent effect, why is it performed in secret, behind the walls of La Santé prison? Why not expose all potential murderers to the horrid details of what awaits them—the blood spurting from the sliced carotid arteries, the grimace of the severed head, the frantic reflex twitching of the headless body. But there have been no public executions in France since 1939.

England abolished public executions in 1868. At that time only a dozen crimes were cause for capital punishment, as against two hundred in 1810 (and four today), but the spectacle was still eagerly awaited by the public. And the crimes, though fewer, still varied as widely as before—from picking pockets to begging in the streets (by soldiers and sailors without passes) and stealing sixpence (by an apprentice from his master).

As early as 1748 the Lord Chief Justice hesitated about requiring the death penalty for one William York, convicted of murder. The hanging judge demurred, arguing that "this boy's punishment may be a means of deterring other children from the life offense and, as sparing this boy on account of age will have a quite contrary tendency, in justice to the public the law ought to take its course." The law took its course. William York was hanged. He was ten years old.

Child killings were not unusual during the heyday of England's public executions. There are records of eight-year-olds taking giant strides to climb the thirteen steps to the scaffold—for such capital crimes as the theft of a loaf of bread or a shilling. On one occasion an undernourished twelve-year-old criminal dropped through the trap and just dangled there, wide-eyed with fright, because she was not heavy enough either for the drop to break her neck or for the noose to tighten and strangle her. The executioner had to climb down from the scaffold and hang from her legs to carry out the sentence.

Such divertissments attracted huge crowds to the hangings, and the huge crowds attracted the pickpockets in droves—even when pickpockets were being hanged for picking pockets. In fact, the idea that capital punishment was a deterrent to crime became such a joke by mid-nineteenth century that when a Royal Commission reported that of the 167 persons executed in 1866, 164 had previously witnessed an execution, legislative machinery was set in motion that did away with public hangings two years later. But not with capital punishment. And when another Royal Commission on Capital Punishment was created in Britain in 1949, it was expressly forbidden to consider abolition.

It was not until the Winter Solstice of 1964 that the House of Commons, by a vote of 355 to 170, passed on its second reading a bill to abolish the death penalty in Britain. The bill was introduced as a "private member's motion," freeing each M.P. to vote according to the dictates of his conscience rather than along party lines.

Apparently it is extremely difficult for the retentionists to give up the idea that capital punishment is a deterrent. During my term as governor, whenever a particularly atrocious murder made the front pages of the newspapers, the volume of my mail would be appreciably increased by nasty, vilifying letters demanding to know how I could justify my opposition to the death penalty in view of the brutal crime that had just been committed. I answered all these letters, patiently pointing out that despite my personal disagreement with the principle of taking a life for a life, the death penalty was still in effect in Ohio, and yet it had failed to save the victim of this latest bloody crime.

In all this mail, only one letter gave an example of how capital punishment had succeeded as a deterrent: a man wrote that he had led the life of a good, law-abiding citizen since he was eight years old, when his father had taken him by the hand and walked him to the courthouse square to watch a hanging.

The history of those countries that have done away with capital punishment is a strong argument for its abolition. In Denmark, the death penalty disappeared by disuse in 1802; it was formally abolished in 1830. Finland has had no execution since 1828. Norway has not practiced capital punishment since 1875, although it was not legally abolished there until 1905. The Netherlands wiped the death penalty off the books in 1870 after it had gone unused for twenty years. Capital punishment disappeared from Belgium in 1863 ("We have learned that the best means to teach respect for human life," declared the Belgian Minister of Justice in 1930, "is to refuse to take life in the name of the law."), Portugal in 1867, Switzerland in 1874 (local option was accorded cantons in 1879, but revoked again in 1942), Sweden in 1921, Ireland in 1944, Turkey in 1950. Italy abolished the death sentence in 1890, Mussolini restored it in 1931, and it disappeared again with the disappearance of Mussolini and the monarchy in 1944. The Nazis probably made greater use of the death sentence than any regime in history—for political and economic reasons, for no reason, to wipe out an ethnic minority group, to eliminate the aged and infirm, or out of sheer sadism; but West Germany abolished capital punishment in 1949. In none of these countries do we find an increase in the murder rate since the killing of homicidal criminals was abandoned.

As the list of abolitionist countries grows, I think more and more people will share my doubt that a society which depends for the good behavior of its members solely upon the fear of punishment can possibly be a decent, honest society, or that in the long run it can provide a sound basis for a lasting civilization.

The history of capital punishment in the United States is a reflection of developments in the Western world, with two exceptions. Technologically, we Americans are far advanced; our executions are the most modern that science can provide in the way of swift, sure, and—it is hoped—painless death. But in our moral and sociological attitudes toward the death penalty we are far behind.

Even before the Bill of Rights in 1791 prohibited "cruel and unusual punishments," the more barbaric forms of execution were never widely used in America. A few fugitive slaves were burned at the stake in colonial days.

In 1692, a man named Giles Cory was "pressed to death" in Salem, Massachusetts, for refusing to admit to the crime of witchcraft. However, all the rest of the convicted Salem witches were spared the stake. They were decently hanged.

The criminal codes of the American colonies, while less severe than that of the mother country, still listed more capital offenses than do the states today. The 1636 code of the Massachusetts Bay Colony prescribed the death penalty for idolatry, witchcraft, blasphemy, murder, assault in anger, sodomy, buggery, statutory rape, forcible rape, death penalty (optional), man stealing, perjury (in a capital case), and rebellion. Virginia listed seventy capital crimes for

Negro slaves, five for whites. North Carolina had an equally harsh code, perhaps because there was no penitentiary to house malefactors in the early days, and it was more convenient to do away with them. North Carolina followed the example of most of the colonies in not permitting the benefit of clergy for those sentenced to death for all capital crimes, except highway robbery and bigamy, in which cases the culprit was entitled to religious solace before mounting the scaffold to be hanged.

In 1880 the New York state legislature decreed that its gallows should be torn down and that an "electric chair" should be constructed as a far superior and humane means of dispatching an antisocial wretch. Thirteen years later, after his lawyer had vainly sought to have the sentence set aside on the grounds that it was "unusual" under the Eighth Amendment, one William Kemmler became the first convict to be legally electrocuted.

Contemporary reports do not bear out the blurb for the newfangled killing machine. Apparently it was faulty in construction and clumsy in operation, but a sensational novelty had been launched. Kemmler died in agony, but science and American technical proficiency triumphed. Electrocution is today the treatment of choice in most American states that still kill their criminals.

Pathologists differ as to just how electrocution kills. Some believe the heart muscles are paralyzed. Most are convinced that death is caused by paralysis of the respiratory centers—in effect, by asphyxiation. Almost all agree that unconsciousness is practically instantaneous. The high-voltage current raises the temperature of the body and the brain so high that all awareness and feeling are extinguished within a fraction of a second. The straining and twitching of the body in what looks to the spectators like a desperate death struggle are purely muscular reflexes, not unlike the jerking of the detached legs of Galvini's frog when an electric current was applied.

While the electric chair gained popularity, Utah retained hanging as the preferred treatment but was the first state to offer an alternate method. The condemned man has the option of facing a firing squad—a soldier's death and a quick one. It is usual in execution by shooting to load one of the five rifles with a blank, so that each marksman can sleep soundly in the belief that he had drawn the blank. No allowance, however, is made for bad marksmanship. In 1951, Eliseo Mares, condemned to death, chose the firing squad.

They strapped him to a straight-backed chair just twenty-five feet from the riflemen and pinned a heart-shaped target to his chest. "Fire!" ordered the commander of the firing squad. The condemned man's body jerked as the four bullets tore through him. For some reason—the unconscious reluctance of the executioners to kill a man?—not one of the slugs struck the heart-shaped target. Eliseo Mares bled to death.

The next innovation in the art and science of snuffing out human life painlessly in legal retaliation for wrongs done to society was contributed by the state of Nevada. In 1921 the Nevada legislature voted to execute capital criminals by introducing poisonous gas into their cells while they were asleep. There would be no warning; the condemned man would be spared the torture of apprehension. Governor Emmet Boyle, like so many other governors an outspoken enemy of capital punishment, signed the bill in the belief that all courts would find it violated the constitutional guarantee against "cruel and unusual punishments." For several years no candidate for the death penalty appeared available to test the constitutionality of the new law. In 1924, when a convicted murderer named Gee Jon was sentenced to death, the Nevada Supreme Court found that lethal gas was neither cruel nor unusual, but the plan to poison the sleeping Gee Jon quietly in his cell ran into technical difficulties. The danger of the lethal gas's seeping into other cells and wiping out half the prison population was deemed too great to risk, and a special gas chamber had to be constructed before Gee Jon could become the historic first to be executed by breathing hydrogen cyanide.

Nine states have since joined Nevada in the march of progress: Arizona, California, Colorado, Maryland, Mississippi, Missouri, New Mexico, Oregon (until the death penalty was abolished in 1964), and Wyoming.

Gas has now passed hanging as runner-up in the race for the favorite American death penalty, ten states to seven. In first place, of course, is still the electric chair, with twenty states. Only thirteen states have abolished capital punishment although in some states it is practically inoperative.

The abolitionist movement in the United States can be said to have started in 1788, when Dr. Benjamin Rush, a physician and signer of the Declaration of

Independence, wrote an essay called "Inquiry into the Justice and Policy of Punishing Murder by Death." His followers included Benjamin Franklin and U.S. Attorney General William Bradford, and their influence secured the abolition of the death penalty in Pennsylvania (1794) "for all crimes except first-degree murder." Thomas Jefferson was also an abolitionist.

In the 1840s an important convert to the cause was Horace Greeley, founder-editor of the New York Tribune. In 1846 Michigan, then a territory, abolished the death penalty for all crimes except treason, and has remained true to the principle since attaining statehood. Rhode Island followed in 1852, Wisconsin in 1853, and Maine in 1876 (Maine revoked the action in 1883 but returned to her original decision in 1887). Minnesota saw the light in 1911, North Dakota in 1915, Alaska and Hawaii in 1957, Oregon in 1964, Iowa, New York, Vermont, and West Virginia in 1965.

The police lobby succeeded in having police killers excepted from the Vermont and New York abolition bills. Governor Rockefeller pointed out the "moral inconsistency" involved but signed the New York bill anyway, as a long step in the right direction. A number of states have experimented with abolition but reinstated the gallows or the electric chair after some particularly horrendous local crime, a local political situation, or pressure from the ever-vigilant police lobby. Delaware is a typical example.

The Delaware legislature outlawed the death penalty in 1958. In 1960, on the second anniversary of abolition, Delaware Attorney General Januar D. Bove, Jr., during a panel discussion of capital punishment at the Overseas Press Club in New York, said:

"We in Delaware are proud that our state has . . . taken this forward step in the field of criminology. We do have need for many other laws to aid law enforcement and probation and parole officers in their work. . . . There is no evidence whatsoever that attacks on police or prison guards or threats to public safety have increased. . . ."

In 1961 a succession of four murders aroused emotions again. An eighty-nine-year-old woman was beaten and stabbed to death in rural southern Delaware, a prominent matron was felled by a shotgun blast in her kitchen, and an elderly couple was killed with a shotgun by a young Negro on their farm. The relatives of the victims and the police lobby went into action. One of the loudest voices in favor of restoring the death penalty was that of Detective Sgt. William J. Mulrine III of the Wilmington police department, who insisted that capital punishment was a deterrent, a necessary protection for law officers, and a just punishment for murderers.

On December 18, 1961, by a margin of one vote, the Delaware legislature restored the death penalty over the veto of Governor Elbert N. Carvel.

On December 28, just ten days later, Detective Sgt. William J. Mulrine III shot and killed his wife with a revolver.

Sgt. Mulrine, however, escaped the "just punishment" he had so strongly recommended. On the third day of his trial he pleaded guilty to manslaughter, received a five-year sentence which was later reduced to four, and became eligible for parole after serving two years.

Has abolition caused an upsurge of homicide and rape in the states that have discarded the death penalty? Comparisons cannot be made on a broad basis, because urban areas have a murder rate which is normally higher than that of rural areas, and states with the lowest standards of living and literacy have the highest average murder rates. However, comparing contiguous states with similar living standards, we find no appreciable difference between the retentionist and abolitionist states, except for a few percentage points in favor of those without the death penalty. Michigan, without a hangman for more than a hundred years, had fewer homicides per one hundred thousand population from 1920 to 1958 than did neighboring Ohio and Indiana, which have kept the electric chair. In New England, Maine and Rhode Island, with no death penalty, compare favorably with Connecticut and Massachusetts which still have the electric chair and New Hampshire with its hangman. The same holds for Minnesota, Wisconsin, and North Dakota, as compared with their Middle Western neighbors.

A British Royal Commission studying capital punishment in the years 1949 to 1953 visited America to study the effects of abolition and concluded "that there is no clear evidence in any of the figures we have examined that the abolition of capital punishment has led to an increase of the homicide rate or that its re-introduction has led to a fall."

The Massachusetts legislature has periodically rejected attempts to abolish the death penalty, but the question always pops up again. A Massachusetts commission study of the question found that "capital punishment does more social harm than good. . . . Capital punishment is not a better protection against murder than a sentence of life imprisonment. Its deterrent effect is slight and is offset by its encouragement to unstable individuals to commit murder. . . . It is the swiftness and certainty of punishment and not its severity that deters. There is no reason to believe that trials would be shorter and conviction more swift and certain if life imprisonment rather than death were the maximum penalty."

It was, and is a matter of principle, but my approach to the problems of crime and punishment is not based on theory alone. I visited every industrial school, reformatory, honor camp, juvenile center, and mental hospital in Ohio—and I was appalled. I saw our aged citizens lying in bed in mental institutions, scarcely more than vegetables, long forgotten by the outside. I saw the emotionally disturbed, the psychotic, the retarded children in our industrial schools, without the attention and care that would help them to lead useful lives. I saw the products of these industrial schools graduate to reformatories, the penitentiary, and finally death row. I saw the dependent child trying to become a mature adult on the meager allowance provided by society. I saw the shiny new psychiatric hospital for children—with no personnel to staff it.

It is in the correction of these problems that we will find an answer to the problem of crime and punishment. Our present system of correction is obviously wrong, because it does not correct. Our crime rate continues to rise, despite the threat and fact of prison, or the threat and fact of electric chair and gas chamber. For thousands of years we have thought only of punishment in connection with crime. Should we not, after thousands of years of failure, substitute, for the principle of punishment, the goals of crime prevention and rehabilitation of criminals?

Some criminologists believe that the state's responsibiilty begins after a man has committed his first offense. I believe the state has a responsibiilty *before* the fact—a responsibility to remove those sociological factors which breed crime. Few will challenge the statement that poverty ranks high among these factors, or that it is closely related to other factors. Inadequate education, for instance, is both the cause and result of poverty—a vicious circle, self-perpetuating. For years the number of registered unemployed job-seekers in Ohio who never finished high school and reached as high as sixty-one percent of the total; thirty percent did not go beyond the eighth grade. Juvenile delinquency feeds on poverty.

Most institutions throughout the country are overcrowded, understaffed, and underequipped. It is obviously impossible to care for offenders properly under these circumstances. Some of them have physical problems. Many are emotionally disturbed. Some are retarded. If we do not have the facilities to provide the special attention required by each case, we render no service beyond removing a problem child from a noxious environment for a very brief period. The length of this period is more often determined by the need for space and the number of cases waiting to be admitted to the school than by the child's needs. If we return him to his old environment without having better prepared him physically, mentally, and psychologically to meet the problems which caused his original difficulty, we have not only wasted the taxpayers' money but increased our chances of meeting the boy again at the reformatory, the next step on the road to the penitentiary.

A contribution to the prevention of juvenile delinquency would be to improve the psychological and counseling service in our system of education and to expand facilities for the diagnosis and treatment of the emotionally disturbed child. When this approach fails, the state must be ready with staff and facilities to care for the child at the institution of commitment—a regional school, by preference, where he could be treated as an individual and where the length of confinement would be decided not by the demand for space but by his own needs. When the youngster is returned to society, efforts should be made to avoid sending him back to the environment which contributed to his original delinquency. This, too, would require trained staff to appraise the child and the situation, and to seek placement in a foster home.

If the need to expand state services to disturbed and deprived children is ignored, our correctional institutions will continue to be merely stopping places on the road to major crime. The juvenile delinquent goes through his apprentice-

ship at the industrial school and the reformatory, and he gives up the kid stuff—petty larceny, purse snatching, car stealing. He has learned nothing except how to take advantage of loopholes and cheat on the authorities without getting caught. He has lost whatever friends he had outside, and he is released with a police record that will be of no help when he tries to get a job. He is on parole and he is on relief. He gets little enough money—perhaps sixty percent of subsistence. To get money to buy a new suit he needs to look for a job, he teams up with a fellow alumnus of the reform school to rob a liquor store—and gets caught. He is sent to the penitentiary for five or six or seven years.

The Ohio penitentiary was a monument to archaic architecture and penal thinking, but is no worse than most other state penitentiaries. Built during the last century to house 2,200 convicts, it was jammed with 4,400. Our freshman convict would share a cell with three other men. Who they were depended upon the warden's judgment of his character after studying the record. If he was a rebel, a fighter, and a sworn enemy of society, he would share a cell with three tame, resigned prisoners. The warden cannot risk two firebrands in the same cell. The overcrowded prison is always a powder keg.

There is no staff to classify the prisoners and no space to group them according to age, background, or potential. The young first-offender is bunked with the hardened repeater, the high school graduate with the illiterate, the sex deviate, the emotionally unstable, the mentally ill, and the retarded.

Our freshman convict will find very little in the way of educational programs inside the walls. He will get no organized training in skills that will help earn a living if he is ever released. Whatever vocational training he gets is incidental to his assignment to one of the prison workshops or the hospital. If he is eager to rejoin society when he has served his sentence, he may take a correspondence course or teach himself some trade or dexterity. Or he may become merely "prison smart" and learn the most painless way to make time pass, deteriorating steadily until he is returned to society less fit for it than he was when he was convicted. He may well develop into one of those inmates described as "serving life on the installment plan."

If his friends and family are in a different part of the state, his only contact with the outside world may well be an underpaid, poorly educated, perhaps venal guard. Some guards no doubt need the extra quarters or dollars they receive for running errands—some illicit—for the prisoner. And if the prisoner happens to be a plutocrat of organized crime whose well-paid battery of legal talent has kept him from the chair, the underpaid guard can do quite well by keeping the big shot in luxuries. I doubt that the state will ever be able to introduce a wage scale that will compete with the bribes of professional criminals, but at least we can try to pay enough to attract men with sufficient moral stamina to realize their responsibility toward their charges—that they must represent decently the society that has incarcerated these men.

We need more chaplains. Three men of God are hardly enough to illuminate life's spiritual values for more than four thousand prisoners who for the most part have been cynically living by the most materialistic standards. Three are perhaps enough to help men to die on the electrical altar of a vengeful society, but many more are needed to bring the sound of a friendly human voice to men who have for months heard only the voices of fellow convicts.

We need more psychiatrists and psychologists, too, to sort out the sick from the misguided, the mentally incompetent from the educable dropout, the pathological offender from the immature but salvageable. Some men should never be released from custody. They are beyond education, training, and psychotherapy. Just as some patients are chronic invalids and must always receive medical care, so some criminals will never be able to live unsupervised. We give life sentences to pathological offenders such as pyromaniacs, embezzlers, and forgers, who find it impossible to resist the crime which originally sent them to prison. If their quirk of mind could be discovered at its first outbreak, the state would be saved great expense by committing them to a light-security institution where they would be kept indefinitely and released only upon satisfactory psychiatric evaluation.

In fact, the whole concept of an arbitrary sentence of so many years for such-and-such a crime is outmoded. Some states have already adopted the indeterminate sentence, with a minimum term, and the ultimate date of release determined, on the basis of prospects of future conduct, by a board of experts. This conclusion could be reached only after extensive study of the offender's aptitude and degree of education, mental and physical condition, and personality—of his liabilities as well as his favorable potential. Experts must make the evaluation.

If the prisoner is physically ill or undernourished, his condition must be corrected to the best of our ability. If he is mentally ill, he must receive treatment. If he is mentally retarded, he must be given the best training we can provide. If he is going to be our ward for life, he must be treated as a human being and a creature of God, not as a wild animal. And I say "wild" advisedly, for I have seen pets and farm animals better treated than criminals and the mentally ill. If he has the intelligence to be trained, he should be given a skill to help him find a way of life. If he can be educated, he should not be released as an illiterate or semiliterate. Above all, he must be made to feel that we care what happens to him and that life can be better than he has found it so far.

Before he is paroled, he and his plan must be thoroughly investigated by competent experts. Some states have made progress in reducing the average case load of the parole officer. But more progress is needed. We must employ more and better-trained probation officers to obviate repetition of errors. To do this, we will have to abandon more false economies. We cannot attract enough good men unless we pay them enough.

During my administration I asked that the Ohio Bureau of Probation and Parole be transferred from the Department of Mental Hygiene and Corrections to the Commission of Pardon and Parole, where it properly belongs. Parole after all is not a part of our prison system but a matter of adjustment to the non-prison world after release. I see in the Pardon and Parole Commission, and in similar bodies in other states, a possible solution to the problem of removing the power of executive clemency from politics.

I repeat, however, that we can more easily prevent the making of a criminal than we can correct the already committed violator. We have the responsibility of helping to eradicate poverty by affording opportunity to those capable of escaping from the rut. It is easy for orators to say that this is a responsibility of the home and church, but experience demonstrates that the vast majority of our offenders have no home and do not go to church. We reach our children in our schools. There we must seek out the causes of emotional problems, slow learning, and truancy, and strike the most telling blow against incipient criminality.

But if we fail, as we must for years to come, what of those unfortunates who reach the brink of darkness—the capital crime? I have already made my plea. They should not be put to death, because it is not our privilege to play God; because death is no deterrent; because death makes an error horribly irrevocable; because vengeance is no substitute for justice; because man is not merely an entity that is three fourths water and the rest mineral and organic products worth somewhat less than three dollars.

I believe that in every man there is some spark of the infinite, some fragment, however deeply submerged, of the universal good. If we can salvage the spark, we must fan it carefully until it flames into usefulness. I admit that this is not always possible. I have said many times that there are pathological incorrigibles who must be permanently separated from society. But they must not be separated by killing them in cold blood.

Dr. Karl Menninger, the distinguished psychiatrist, has said:

"To a physician discussing the wiser treatment of our fellow men, it seems hardly necessary to add that under no circumstances should we kill them. It was never considered right for doctors to kill their patients, no matter how helpless their condition. Similarly, capital punishment is in my opinion morally wrong. Punishing and even killing criminals may yield a grim kind of gratification; let us all admit that there are times when we are so shocked at the depredations of an offender that we persuade ourselves that this is a man the Creator didn't intend to create, and that we had better help correct the mistake. But playing God in this way has no conceivable moral or scientific justification."

It is with the deep feeling that society will continue to improve and that we will find better solutions to our problems that I make a plea to this committee that we not retrogress to a practice that has failed. I represent no clients, I receive no compensation in appearing here today. I do so because I believe that a civilized society can best serve by setting a better example for its constituent citizens.

STATEMENT OF HON. MICHAEL V. DiSALLE, ATTORNEY AT LAW, WASHINGTON, D.C.

Mr. DiSalle. Thank you very much, Senator. I want to thank the committee for this opportunity of appearing before it.

I felt it necessary. I am not here representing a client. I am not receiving a fee. I am doing it because I am earnestly and sincerely concerned about the possible restoration of the death penalty at any level or for any crime. The President, in his message of March 14, 1973, has recommended the use of the death penalty in connection with certain crimes. This recommendation comes at a time when he also claims that crime has been substantially reduced since 1969. It might be well to note that this is also a period in which the death penalty has not been used in the United States. In view of this paradox, it might be well to examine the history of capital punishment, its use and disuse, its results, it deterrent value and its value as a tool in the protection of a civilized society.

During my term as Governor of Ohio, the executive mansion at Columbus was staffed by convicted killers, all of whom were under life sentence. My wife and I, our children and grandchildren, lived under the same roof with these men 24 hours a day. Our association was not that of keeper and prisoner but that of fellow human beings. I shared their joys and sorrows, their strengths and weaknesses, their hopes and fears.

During the same period I acted on appeals for executive clemency from 11 men and 1 woman who had been sentenced to death. I also passed upon the cases of some 150 lifers eligible for parole after having served the Ohio legal minimum of 20 years. Whenever I extended mercy to a prisoner, elements of the press and my political enemies, knowing I had long been opposed to capital punishment would accuse me of enouraging crime by coddling criminals. Their conclusions were generally that the Governor is a sentimentalist whose heart is bigger than, thought not as soft as, his brain, who weeps for the poor murderer but is coldbloodedly unconcerned about the murderer's victim.

I hope to convince this committee that the time to show concern for the victims of crime is long before the shot is fired or the blow struck—by seeking a sensible way of eliminating the causes of crime rather than by trying as we now do, futilely and after the fact, to eradicate crime by punishing the perpetrator. Punishment is too often a matter of emotion rather than of cold logic. Under a system of justice not free of inequities, the question of who should be put to death in the name of the law and who should live is often decided by men influenced more by public climate and public clamor than by abstract justice. He who is to die is too frequently a man who has committed a crime at the wrong time in the wrong place under the wrong circumstances. A different combination of the same factors could well produce a more temperate verdict.

It would be well for us to examine the emotions which push a peaceable, kind, and just individual to the front rank of a lynch mob, clamoring for the life of a person he has never known, on the basis of facts which he has heard only at second or third hand. Must a man die to atone for a crime, the evidence of which has been viewed only through the blood-red spectacles of outrage and anger?

No one who has never watched the hands of a clock marking the last minutes of a condemned man's existence, knowing that he alone has the temporary godlike power to stop the clock can realize the agony of deciding an appeal for executive clemency.

During my term as Governor, I came to dread the days leading to an execution. In those 4 years, six men died in the electric chair. Despite my opposition to the death penalty as a futile, barbaric relic, my oath of office required me to execute the laws of the State, some of which call for capital punishment. True, my powers of clemency was limited only by the exclusion of treason and impeachment cases, but for the six who died I could find no extenuating circumstances, no unequal justice, no questionable legal procedure, no reasonable doubt, to justify my reversing the sentence of the courts.

Even when I was convinced of the man's guilt, doubt haunted my unconscious long after the warden had notified me that the prisoner was dead. I remembered the narrow escapes of many innocent people and wondered how many innocents had actually died at the hands of the State. The death penalty is so horribly final. Once it has been carried out mistakes cannot be corrected, and what human does not make mistakes? I thought of Clarence McKinney, convicted of first-degree murder in my own State in the 1920's, on the basis of circumstantial evidences, mistaken identity, and, apparently, his previous police record. While he was in prison awaiting an appeal, another man confessed to the crime. What if McKinney had been executed?

And Ed Larkman in New York, condemned to death in 1925. Larkman's sentence was commuted by Gov. Alfred E. Smith in 1927, and he was pardoned by Governor Lehmann in 1929—after the real culprit confessed.

And Tommy Bambrick, whose case is discussed today in muted tones. Bambrick was already in the death house at Sing Sing when new evidence came to light which convinced Warden Thomas Mott Osborne that another man had committed the murder for which Bambrick had been convicted. Last-minute efforts to reach the Governor were unsuccessful, however, and Bambrick went to his death still protesting his innocence.

This possibility of an irrevocable error was so vivid to me that on several occasions I made last-minute visits to the grim, antiquated Ohio State Penitentiary, not far from downtown Columbus, across the street from a casket factory, for a final interview with the condemned man. With death only a few hours away, it seemed to me that I might expect a moment of truth.

The tragic impossibility of correcting an error is, however, only one of the reasons for my opposition to capital punishment. First of all, I believe that taking a human life, even to pay for a life already taken, is immoral. I am not speaking of morality in an abstract, theological sense—some professional theologians have sought to debate with me on that basis—but in a personal sense, according to my own conscience.

Society, echoing the Ten Commandments, says: Thou shalt not kill. Then society illogically continues: Killing is wrong, and in order to prove it is wrong, we will kill you if you kill.

I believe human life is a divine gift and deliberately to destroy it is as much of a crime for the State as for the individual. Israel, the land where the "eye for an eye, life for a life" idea of punishment originated more than 2,000 years ago, has now abolished capital punishment except for crimes against the state, which means, in effect, collaboration with the Nazis in their program to exterminate the Jews.

Second, I believe the death penalty serves no purpose. Its champions argue that it is a deterrent to murder and the police lobby and its spokesmen agree, but statistics and history show that it has no deterrent effect. The shots fired by a misfit named Lee Harvey Oswald in Dallas on November 12, 1963, demonstrated the fallacy of this favorite argument of the champions of the death penalty.

Three Presidents of the United States had been assassinated before John Fitzgerald Kennedy was struck down in Dallas. All of their assassins died. Booth, who shot Lincoln, was killed while trying to escape his pursuers; his accomplices were hanged. Garfield's assassin, a disappointed officeseeker, was executed. So was the anarchist who shot McKinley. Did this deter the men who took potshots at Theodore Roosevelt, Franklin Roosevelt, or Harry S. Truman, even there one of those would-be assassins was killed by guards? It did not deter Oswald.

The murder of Oswald by Jack Ruby produced an intense indignation for a number of reasons. That Oswald was thereby denied a trial is of course basically opposed to our whole system. So is the persistence of a lynch attitude in a democracy that prides itself on its system of calm, considered justice. Further, Oswald's premature death prevented us all from ever learning more about his motives and of any possible accomplices. But I think the most interesting reason for the outraged reaction to Ruby's exhibitionistic of retaliation is an implicit rejection of the whole idea of capital punishment.

If we believe that the murder of President Kennedy should be avenged and that the killing of Oswald could serve this purpose, then we ought to find some satisfaction in Ruby's one-man vigilante action. But if we say that Ruby as an individual should not seek revenge, should we as a people seek it collectively?

The Dallas jurors brought in a curiously contradictory verdict. By condemning Ruby to death they decided that avenging the killing of the President by another killing was wrong. Then they went on to say that this wrong should be corrected by another killing. In effect, three wrongs make a right.

Ruby's trial was conducted in an emotion-charged atmosphere of exhibitionism, questionable civic pride, and political ambition. The prosecutor went into the Dallas courtroom like a heavyweight champion entering the right to preserve his unblemished record. A record of 100 percent convictions in capital cases does not necessarily mean that a prosecutor is achieving the prime objective of his office, the administration of justice. A prosecuting attorney has the responsibility of determining the guilt or innocence of a person charged with a crime. Even if he determines that the defendant is guilty, he has the further responsibility of determining what would best serve the ultimate cause

of justice. Should he close the door to any mitigating information regarding the defendant, he is not filling his essential role in our system of jurisprudence.

The Dallas verdict was no surprise. Ruby's unsavory background, his associations, his career as a strip-tease impresario, all helped make him a likely candidate to pay with his life for a crime for which he may not have been emotionally or mentally responsible. I do not know what motivated him, but I would prefer to keep him alive as long as possible in order to achieve the broader service to society which will be accomplished only by establishing the complete truth.

To those who argue that political assassination cannot be considered in the same class with common law murder in discussing capital punishment as a deterrent, I offer statistics. At present, 14 American States and 2 dependencies have abolished the death penalty as punishment for first degree murder. States retaining capital punishment have failed to give greater pause to the prospective murderer than those that have abolished it: according to FBI statistics, there is no appreciable difference in the homicide rate. Most European countries that have abolished capital punishment have a much lower murder rate than American States which still hang, electrocute, or gas their homicidal criminals.

As for the increased mortality rate among police officers—the police lobby is most vociferous in its claim that abolition of capital punishment will make the policeman's lot much more dangerous—FBI figures again contradict the claim. A 35-year record compiled by the Department of Justice does indicate a slight difference, and that in favor of the abolitionist States.

More eloquent than statistics are the graphic examples from my own State of Ohio. During the reign of terror of the infamous Licavoli gang in Toledo, the gang killers could have driven just 5 miles to the Michigan line in order to do away with their victims in a State which does not execute for murder. They did not bother. They were so confident of their own position that they did not even consider the fact that Ohio killed its killers, in certain cases.

Even more striking is the case of Charles Justice. And this I would summarize for the committee. Justice was serving a term for burglary at the Ohio State Penitentiary. He was put in charge of the operation of the then-new electric chair. The electric chair was not functioning very well. It burned its victims. It created an odor. It was really discomforting to the official witnesses and those who presided at executions.

So, Justice designed a new clamp which kept the burning down to a minimum. He had it patented, and as a result of his service to the State, his sentence was commuted as it might have been. A few years later, Justice returned to the State penitentiary, found guilty of murder, and was executed in the electric chair which he had helped to perfect.

Now, no one knew more about the electric chair than Charles Justice, but it certainly did not serve to deter him from committing another crime.

The court-appointed defender, one of the principal reasons for my opposition to capital punishment was the fact that all of those whose cases I reviewed during my time had certain common denominators,

low mental capacity, little or no education, few friends, broken homes, but the fact that they had no money was a prime factor in their being condemned to death. I have never seen a person of means go to the chair. It is the well-heeled gangster, the professional killer who can afford the best legal talent to defend him, who gets off with a lesser sentence. It is the poor, illiterate, the underprivileged, the member of the minority group, the man who because he is without means is defended by a court-appointed attorney, who becomes society's blood sacrifice.

The court-appointed defender, diligent though he may be, is always handicapped. Sometimes he is inept—there is no criterion of experience in criminal law to guide a court appointment—and always he lacks the staff and funds available to the prosecution. Without funds and personnel to investigate the background of jurors and witnesses, to check alibis and examine the evidence before trial, the court-appointed attorney and his client have two strikes against them before they even enter a plea. When, if they run up against a politically ambitious prosecutor, an emotional jury, and a biased, politically conscious judge, they are truly in a bad way.

I am going to skip over the various types of punishment which have been used during the history of civilization and their failures. I might just call your attention to a sentence pronounced on eight men convicted of high treason in England in 1780. There the judge said "That you be hanged by the neck, but not till you be dead. For you must be cut down alive. Then your bowels must be taken out and burned before your face. Then your head must be severed from your body divided into four quarters, and these must be at the disposal of the supreme authority of the state."

In Ohio, the judge also intones the fact that in sentencing a man to death, that he also be sentenced to pay the cost of the execution.

Apparently it is extremely difficult for the retentionists to give up the idea that capital punishment is a deterrent. During my term as Governor, whenever a particularly atrocious murder made the front pages of the newspapers, the volume of my mail would be appreciably increased by nasty, vilifying letters demanding to know how I could justify my opposition to the death penalty in view of the brutal crime that had just been committed. I answered all these letters, patiently pointing out that despite my personal disagreement with the principle of taking a life for a life, the death penalty was still in effect in Ohio, and yet it had failed to save the victim of the latest bloody crime.

In all this mail, only one letter gave an example of how capital punishment had succeeded as a deterrent: a man wrote that he had led the life of a good, law-abiding citizen since he was 8 years old, when his father had taken him by the hand and walked him to the courthouse square to watch a hanging.

The history of those countries that have done away with capital punishment is a strong argument for its abolition. In Denmark, the death penalty disappeared by disuse in 1802; it was formally abolished in 1830. Finland has had no execution since 1828. Norway has not practiced capital punishment since 1875, although it was not legally abolished there until 1905. The Netherlands wiped the death penalty off the books in 1870 after it had gone unused for 20 years. Capital

punishment disappeared from Belgium in 1863, and the Belgian Minister of Justice in 1930 said, "We have learned that the best means to teach respect for human life is to refuse to take life in the name of the law."

Portugal in 1867, Switzerland in 1874, Sweden in 1921, Ireland in 1944, Turkey in 1950. Italy abolished the death sentence in 1890, Mussolini restored it in 1931, and it disappeared again with the disappearance of Mussolini in 1944. The Nazis probably made greater use of the death sentence than any regime in history, for political and economic reasons, for no reason, to wipe out an ethnic minority group, to eliminate the aged and infirm, or out of sheer sadism; but West Germany abolished capital punishment in 1949. In none of these countries do we find an increase in the murder rate since the killing of homicidal criminals was abandoned.

As the list of abolitionist countries grows, I think more and more people will share my doubt that a society which depends for the good behavior of its members solely upon the fear of punishment can possibly be a decent, honest society, or that in the long run it can provide a sound basis for a lasting civilization.

The history of capital punishment in the United States is a reflection of developments in the Western World, with two exceptions. Technologically, we Americans are far advanced; our executions are the most modern that science can provide in the way of swift, sure, and it is hoped, painless death. But in our moral and sociological attitudes toward the death penalty we are far behind.

Even before the Bill of Rights in 1791 prohibited "cruel and unusual punishments," the more barbaric forms of execution were never widely used in America. A few fugitive slaves were burned at the stake in colonial days.

In 1762 a man named Giles Cory was pressed to death in Salem, Mass. for refusing to admit to the crime of witchcraft. However, all the rest of the convicted Salem witches were spared the stake. They were decently hanged.

I am not going to take the committee's time analyzing the various types of punishments that we have used in the United States. We now use the electric chair in most States, we use gas, we use hanging, and in Utah you have your choice between being hanged or being shot by a firing squad.

Senator HRUSKA. Would the witness suspend for just a moment.

Senator KENNEDY. Well, I will ask him to continue.

Senator HRUSKA. Senator Kennedy will take over. You are in much better hands.

Mr. DISALLE. Thank you.

Governor Boggs is here, and we talked a little bit before about the experience in Delaware. In Delaware the legislature outlawed the death penalty in 1958. In 1960, on the second anniversary of abolition, Delaware Attorney General Januar D. Bove, Jr., during a panel discussion of capital punishment at the Overseas Press Club in New York said:

> We in Delaware are proud that our State has taken this forward step in the field of criminology. We do have need for many other laws to aid law enforcement and probation and parole officers in their work. There is no evidence whatsoever that attacks on police or prison guards or threats to public safety have increased.

In 1961 a succession of four murders aroused emotions again. An 89-year-old woman was beaten and stabbed to death in rural southern Delaware, a prominent matron was felled by a shotgun blast in her kitchen, and an elderly couple was killed with a shotgun by a young Negro on their farm. The relatives of the victims and the police lobby went into action. One of the loudest voices in favor of restoring the death penalty was that of Detective Sergeant William J. Mulrine III of the Wilmington Police Department, who insisted that capital punishment was a deterrent, a necessary protection for law officers, and a just punishment for murderers.

On December 18, 1961, by a margin of one vote, the Delaware Legislature restored the death penalty over the veto of Gov. Elbert N. Carvel.

On December 28, just 10 days later, Detective Sergeant William J. Mulrine III shot and killed his wife with a revolver.

Sergeant Mulrine, however, escaped the just punishment he had so strongly recommended. On the third day of his trial he pleaded guilty to manslaughter, received a 5-year sentence which was later reduced to 4, and became eligible for parole after serving 2 years.

Has abolition caused an upsurge of homicide and rape in the States that have discarded the death penalty? Comparisons cannot be made on a broad basis, because urban areas have a murder rate which is normally higher than that of rural areas, and States with the lowest standards of living and literacy have the highest average murder rates. However, comparing contiguous States with similar living standards, we find no appreciable difference between the retentionist and abolitionist States, except for a few percentage points in favor of those without the death penalty. Michigan, without a hangman for more than 100 years, had fewer homicides per 100,000 population from 1920 to 1958, than did neighboring Ohio and Indiana, which have kept the electric chair. New England, Maine, and Rhode Island, with no death penalty, compare favorably with Connecticut and Massachusetts which still have the electric chair and New Hampshire with its hangman. The same holds for Minnesota, Wisconsin, and North Dakota, as compared with their Middle Western neighbors.

A British royal commission studying capital punishment in the years 1949 to 1953 visited America to study the effects of abolition and concluded:

> That there is no clear evidence in any of the figures we have examined that the abolition of capital punishment has lead to an increase of the homicide rate or that its reintroduction has led to a fall.

The Massachusetts Legislature has periodically rejected attempts to abolish the death penalty, but the question always pops up again. A Massachusetts commission studying the question found that:

> Capital punishment does more social harm than good. Capital punishment is not a better protection against murder than a sentence of life imprisonment. Its deterrent effect is slight and is offset by its encouragement to unstable individuals to commit murder. It is the swiftness and certainty of punishment and not its severity that deters. There is no reason to believe that trials would be shorter and conviction more swift and certain if life imprisonment rather than death were the maximum penalty.

It was, and is a matter of principle, but my approach to the problems of crime and punishment is not based on theory alone. I visited every industrial school, reformatory, honor camp, juvenile center, and men-

tal hospital in Ohio—and I was appalled. I saw our aged citizens lying in bed in mental institutions, scarcely more than vegetables, long forgotten by the outside. I saw the emotionally disturbed, the psychotic, the retarded children in our industrial schools, without the attention and care that would help them to lead useful lives. I saw the products of these industrial schools graduate to reformatories, the penitentiary, and finally death row. I saw the dependent child trying to become a mature adult on the meager allowance provided by society. I saw the shiny new psychiatric hospital for children, with no personnel to staff it.

It is in the correction of these problems that we will find an answer to the problem of crime and punishment. Our present system of correction is obviously wrong, because it does not correct. Our crime rate continues to rise, despite the threat and fact of prison, or the threat and fact of electric chair and gas chamber. For thousands of years we have thought only of punishment in connection with crime. Should we not, after thousands of years of failure, substitute, for the principle of punishment, the goals of crime prevention and rehabilitation of criminals?

Some criminologists believe that the State's responsibility begins after a man has committed his first offense. I believe the State has a responsibility before the fact, a responsibility to remove those sociological factors which breed crime. Few will challenge the statement that poverty ranks high among these factors, or that it is closely related to other factors. Inadequate education, for instance, is both the cause and result of poverty, a vicious circle, selfperpetuating. For years the number of registered unemployed jobseekers in Ohio who never finished high school had reached as high as 61 percent of the total. 30 percent did not go beyond the eighth grade. Juvenile delinquency feeds on poverty.

Most institutions throughout the country are overcrowded, understaffed, and underequipped. It is obviously impossible to care for offenders properly under these circumstances. Some of them have physical problems. Many are emotionally disturbed. Some are retarded. If we do not have the facilities to provide the special attention required by each case, we render no service beyond removing the problem child from a noxious environment for a very brief period. The length of this period is more often determined by the need for space and the number of cases waiting to be admitted to the school than by the child's needs. If we return him to his old environment without having better prepared him physically, mentally and psychologically to meet the problems which caused his original difficulty, we have not only wasted the taxpayers' money but increased our chances of meeting the boy again at the reformatory, the next step on the road to the penitentiary.

A contribution to the prevention of juvenile delinquency would be to improve the psychological and counseling service in our system of education and to expand facilities for the diagnosis and treatment of the emotionally disturbed child. When this approach fails, the State must be ready with staff and facilities to care for the child at the institution of commitment, a regional school by preference, where he could be treated as an individual and where the length of confinement would be decided not by the demand for space but by his own needs.

When the youngster is returned to society, efforts should be made to avoid sending him back to the environment which contributed to his original delinquency. This, too, would require trained staff to appraise the child and the situation, and to seek placement in a foster home.

If the need to expand State services to disturbed and deprived children is ignored, our correctional institutions will continue to be merely stopping places on the road to major crime. The juvenile delinquent goes through his apprenticeship at the industrial school and the reformatory, and he gives up the kid stuff, petty larceny, purse snatching, car stealing. He has learned nothing except how to take advantage of loopholes and cheat on the authorities without getting caught. He has lost whatever friends he had outside, and he is released with a police record that will be of no help when he tries to get a job. He is on parole and he is on relief. He gets a little enough money—perhaps 60 percent of subsistence. To get money to buy a new suit he needs to look for a job, he teams up with a fellow alumnus of the reform school to rob a liquor store, and gets caught. He is sent to the penitentiary for 5 or 6 or 7 years.

The Ohio Penitentiary was a monument to archiac architecture and penal thinking, but is no worse than most other State penitentiaries. Built during the last century to house 2,200 convicts, it was jammed with 4,400. Our freshman convict would share a cell with three other men. Who they were depended upon the warden's judgment of his character after studying the record. If he was a rebel, a fighter, and a sworn enemy of society, he would share a cell with three tame, resigned prisoners. The warden cannot risk two firebrands in the same cell. The overcrowded prison is always a powder keg.

There is no staff to classify the prisoners and no space to group them according to age, background, or potential. The young first offender is bunked with the hardened repeater, the high school graduate with the illiterate, the sex deviate, the emotionally unstable, the mentally ill, and the retarded.

Our freshman convict will find very little in the way of educational programs inside the walls. He will get no organized training in skills that will help him earn a living if he is ever released. Whatever vocational training he gets is incidental to this assignment to one of the prison workshops or hospital. If he is eager to rejoin society when he has served his sentence, he may take a correspondence course or teach himself some trade or dexterity. Or he may become merely prison smart and learn the most painless way to make time pass, deteriorating steadily until he is returned to society less fit for it than he was when he was convicted. He may well develop into one of those inmates described as serving life on the installment plan.

If his friends and family are in a different part of the State, his only contact with the outside world may well be an underpaid, poorly educated, perhaps venal guard. Some guards no doubt need the extra quarters or dollars they receive for running errands, some illicit, for the prisoner. And if the prisoner happens to be a plutocrat of organized crime whose well-paid battery of legal talent has kept him from the chair, the underpaid guard can do quite well by keeping the big shot in luxuries. I doubt that the State will ever be able to introduce a wage scale that will compete with the bribes of professional criminals, but at least we can try to pay enough to attract men with sufficient moral

stamina to realize their responsibility toward their charges, that they must represent decently the society that has incarcerated these men.

We need more chaplains. Three men of God are hardly enough to illuminate life's spiritual values for more than 4,000 prisoners who for the most part have been cynically living by the most materialistic standards. Three are perhaps enough to help men to die on the electrical altar of a vengeful society, but many more are needed to bring the sound of a friendly human voice to men who have for months heard only the voices of fellow convicts.

We need more psychiatrists and psychologists, too, to sort out the sick from the misguided, the mentally incompetent from the educable dropout, the pathological offender from the immature but salvageable. Some men should never be released from custody. They are beyond education, training, and psychotherapy. Just as some patients are chronic invalids and must always receive medical care, so some criminals will never be able to live unsupervised. We give life sentences to pathological offenders such as pyromaniacs, embezzlers, and forgers, who find it impossible to resist the crime which originally sent them to prison. If their quirk of mind could be discovered at its first outbreak, the State would be saved great expense by committing them to a light security institution where they would be kept indefinitely and released only upon satisfactory psychiatric evaluation.

In fact, the whole concept of an arbitrary sentence of so many years for such-and-such a crime is outmoded. Some States have already adopted the indeterminate sentence, with a minimum term, and the ultimate date of release determined, on the basis of prospects of future conduct, by a board of experts. This conclusion could be reached only after extensive study of the offender's aptitude and degree of education, mental and physical condition, and personality, of its liabilities as well as his favorable potential. Experts must make this evaluation.

If the prisoner is physically ill or undernourished, his condition must be corrected to the best of our ability. If he is mentally ill, he must receive treatment. If he is mentally retarded, he must be given the best training we can provide. If he is going to be our ward for life, he must be treated as a human being and a creature of God, not as a wild animal. And I say wild advisedly, for I have seen pets and farm animals better treated than criminals and the mentally ill. If he has the intelligence to be trained, he should be given a skill to help him find a way of life. If he can be educated, he should not be released as an illiterate or semiliterate. Above all, he must be made to feel that we care what happens to him and that life can be better than he has found it so far.

Before he is paroled, he and his plan must be thoroughly investigated by competent experts. Some States have made progress in reducing the average caseload of the parole officer. But more progress is needed. We must employ more and better trained probation officers to obviate repetition of errors. To do this, we will have to abandon more false economies. We cannot attract enough good men unless we pay them enough.

During my administration I asked that the Ohio Bureau of Probation and Parole be transferred from the department of mental hygiene and corrections to the commission of pardon and parole, where it prop-

erly belongs. Parole after all is not a part of our prison system but a matter of adjustment to the nonprison world after release. I see in the pardon and parole commission, and in similar bodies in other States, a possible solution to the problem of removing the power of executive clemency from politics.

I repeat, however, that we can more easily prevent the making of a criminal than we can correct the already committed violator. We have the responsibility of helping to eradicate poverty by affording opportunity to those capable of escaping from the rut. It is easy for orators to say that this is a responsibility of the home and church, but experience demonstrates that the vast majority of our offenders have no home and do not go to church. We reach our children in our schools. There we must seek out the causes of emotional problems, slow learning, and truancy, and strike the most telling blow against incipient criminality.

But if we fail, as we must for years to come, what of those unfortunates who reach the brink of darkness, the capital crime? I have already made my plea. They should not be put to death, because it is not our privilege to play God; because death is no deterrent; because death makes an error horribly irrevocable, because vengeance is no substitute for justice; because man is not merely an entity that is three-fourths water and the rest mineral and organic products worth somewhat less than $3.

I believe that in every man there is some spark of the infinite, some fragment, however deeply submerged, of the universal good. If we can salvage the spark, we must fan it carefully until it flames into usefulness. I admit that this is not always possible. I have said many times that there are pathological incorrigibles who must be permanently separated from society. But they must not be separated by killing them in cold blood.

Dr. Karl Menninger, the distinguished psychiatrist, has said:

> To a physician discussing the wiser treatment of our fellow men, it seems hardly necessary to add that under no circumstances should we kill them. It was never considered right for doctors to kill their patients, no matter how helpless their condition. Similarly, capital punishment is in my opinion morally wrong. Punishing and even killing criminals may yield a grim kind of gratification; let us all admit that there are times when we are so shocked at the depredations of an offender that we persuade ourselves that this is a man the Creator didn't intend to create, and that we had better help correct the mistake. But playing God in this way has no conceivable moral or scientific justification.

In closing, I want to join Dr. Menninger in this statement and by saying it is with the deep feeling on my part that society will continue to improve and that we will find better solutions to our problems that I make a plea to this committee that we not retrogress to a practice that has failed. I represent no clients, I receive no compensation in appearing here today. I do so because I believe, sincerely believe, that a civilized society can best serve by setting a better example for its constituent citizens.

Senator HRUSKA. Well, Governor DiSalle, you have joined a number of notable witnesses who have expressed the same point of view that you have so eloquently. We are grateful for your appearance.

Senator Kennedy, have you questions or comments?

Senator KENNEDY. I would just like to join in welcoming Governor DiSalle to this committee, and to commend him for his statement and his comments.

Governor DiSalle brings us a very special perspective. As a distinguished Governor of one of our very major States, one can see from the testimony that this has been a subject that he has cared deeply about for many years and to which he has given an extraordinary amount of thought and concern.

I think his is really a masterful statement in tracing the history to Western and perhaps even Eastern civilizations. It serves as a reminder about how far we have come, but it also forcefully reminds us how much further we must go. I find that it is difficult to have any other reaction but complete and wholehearted support and commendation for his views.

I would like to ask Governor DiSalle, who has spent a lifetime in public affairs and public activities, how he accounts for, or if he agrees with, the various studies and polls that have shown a swing back toward favoring the death penalty.

I think we have seen this in any number of polls that have been taken recently, and I think we have seen probably some corresponding reflection of this in the Congress and Senate by people who have introduced various death penalty bills.

Does he believe that to be the trend? If so, why? How does he think that such a trend can be reversed?

Mr. DiSalle. Senator, I believe there is a trend because people are being misled. During the days of rioting on campuses, people became disturbed, upset, and they felt there was a certain permissiveness existing. People in high places have taken advantage of this climate to try to use the death penalty and restoration of the death penalty as an excuse for not doing the job that has to be done, and people want an easy way of doing it. They look for it.

I talk to so many people who say, for example, in the District of Columbia, there are law violations and—the kind of law violations we find are not the kind of violations we punish by executing people, but people do not relate these two things, and as I pointed out in my statement, I think if we are going to develop a greater respect for law, we also have to develop a feeling on the part of people that the State itself is not corrupt, that the Government itself is no corrupt, that the people in politics are not corrupt, that we have the kind of leadership available and will set the kind of example that is necessary, and certainly in this particular case, with the President of the United States asking for restoration of the death penalty for certain crimes, the people of this country, no doubt, are influenced by this sort of thing.

I have known Governors—and I do not blame them at all—they are political. They have to run for reelection. It is tough at a time like this to stand and try to stem the tide when, to them, it really does not mean any big thing.

I just think we need more and more people who have the respect of the citizens of this country to go out and speak the truth as to what little effect the death penalty has on the total system of justice.

Senator Kennedy. Your point is that with the apparent growth of crime, people have the mistaken concept that if the death penalty is passed, there will be a reduction of crime.

Mr. DiSalle. That is right, and that has never been the history of any country in the world or any period in history. There has never been a reduction. In fact, the classic case is an example in England

when they were hanging pickpockets for pickpocketing, and the day of the hanging, which was public, was the biggest day the pickpockets used to have in England because people were looking up and they were easy victims to pickpockets who watched their colleagues being executed while at the same time he was plying his trade.

Senator KENNEDY. It also seems to me to be pretty much of a fraud on the American people—at least I have seen, in a number of instances, public officials tripping over each other trying to support death penalty legislation, and yet we find that once it is passed it is rarely, rarely utilized. It seems, on the one hand, people go out and attempt to lead the public into thinking that if they pass the death penalty all will be solved, and then once it passes, it seems that the public is really kind of reluctant to actually to see that it is used.

Do you find that this is rather confusing?

Mr. DISALLE. Yes, it is confusing. In very much publicized crimes at the time the prosecuting attorney is running for reelection he is more likely to ask for the death penalty than he is if he is not running for reelection. Most prosecuting attorneys feel that if the law is there, and the death penalty is part of it, he has to ask for it. Otherwise people consider him soft on crime, and I had some figures here that I just received recently about the number of people who are really executed in the United States over a period of years, and it is relatively few. It is really a lottery. When you are executed you have to have committed a crime that really aroused a lot of sentiment and emotion, and a prosecuting attorney who really needed it at the time. And the kind of people—you know, when you consider these cases, and the question of clemency, here is a man with an IQ of 69 or 70, on a chart where 70 is the dividing line between idiocy and a moron, and here he was convicted of a crime that had a good deal of publicity in a small county in Ohio and the jurors had written to me afterward just begging that that sentence be reduced because their conscience bothered them.

Other situations like that. A woman in Cincinnati who, I was convinced later, was innocent of the crime of which she was found guilty, the principal witness for the prosecution had committed perjury. The principal witness for the defense had committed perjury, and the jury was taken out to the wrong site. They never saw the actual site. The facts were totally outside of the scope of the jury at the time they made their decision. And yet the prosecuting attorney told me after he discovered the fact that the site was wrong, this makes our case even stronger, even though in an interview the principal witness for the prosecution, had said he was at work the night the crime was committed, later told a State highway patrolman in an affidavit that he was in the apartment of a black prostitute that night. The prosecutor knew this but this was not brought before the jury, and the prosecutor told me it would not have made any difference.

Now, it is hard for me to believe that testimony of a man who had said he had gone back to work would be given less credence than a married man who was out philandering that particular night, and the circumstances under which he was philandering, that the jury would give the same weight to that kind of testimony. And yet the prosecutor knew this and he proceeded with the prosecution that lead to the death penalty for this woman.

Senator KENNEDY. Just finally, I am troubled by the classifications that are worked out in different forms of legislation. Innocent people in a hijacking, for instance. You can imagine a circumstance where in a hijacked plane if one person gets killed, the fellow says, well, I am going to go to the electric chair anyway, and therefore we might as well take down all the rest on the plane. I mean I think we can imagine a circumstance like that.

Mr. DISALLE. This is my feeling with the police killers. A man figures he is going to go to the chair anyway. He figures, I might as well shoot my way out, and he kills other people in the process.

Senator KENNEDY. Precisely. I am trying to put a higher value on an individual's life.

We have had introduced here just the death penalty for those that were going to kill Members of Congress or the Senate. I thought that was interesting, because therefore you are putting a higher value of life on a Member of Congress or Senate than an ordinary citizen, and so we are making judgments in these ways as well, which I wonder if you find distressing.

Mr. DISALLE. I find it terribly inconsistent because after all, a life is a life, and I do not think there are different degrees of safety involved.

Senator KENNEDY. I want to thank Governor DiSalle. I think that final statement, Mr. Chairman, would indicate that Governor DiSalle comes here as a private citizen, representing no special interest, which gives great credibility to him and to his views. I want to thank you very much for your appearing before the committee.

Mr. DISALLE. I would like also to point out, Senator, that today this is not a very popular political position, and although I am not a candidate or intend to be a candidate, I am speaking I think on behalf of a lot of people who would like to say the same thing but who are politically involved and feel their political life is a lot more important.

Senator KENNEDY. Well, I am politically involved, but you speak for me in your statement.

Senator HRUSKA. I should like to join Senator Kennedy in his statement in regard to the motivation of the witness here today, and as further evidence of that, Senator, I would like to place in the record at this point a biographical sketch of our witness which is replete with his many civic contributions and other activities that are in keeping with that.

[The information referred to follows:]

BIOGRAPHICAL SKETCH

DiSalle, Michael Vincent, lawyer, former governor of Ohio. Born New York City, January 6, 1908; son of Anthony and Assunta (D'Arcangelo) DiSalle; student Central Catholic High School, Toledo; J.D., Georgetown University, 1931; LL.D., Notre Dame University, 1949, Miami University, 1959, Bowling Green State University, University of Toledo, Kent State University, University of Akron, 1960; D.H.L., Ohio University, 1963; M.S. (Honorary), University of Bridgeport, 1951; married Myrtle Eugene England, December 19, 1929; children: Antoinette, Barbara, Constance, Diana, Michael E.

Admitted to Ohio Bar, 1932, and began practice in Toledo; senior member of DiSalle, Green and Haddad; Assistant District Counsel for Home Owners Loan Corporation, 1933–1935; member Ohio House of Representatives, 1937; Assistant City Law Director, City of Toledo, 1939–1941; Member Toledo City Council, 1941–1947; Vice-Mayor of Toledo, 1944–1948; Mayor (City Manager), 1948–1950; Director of Price Stabilization, Washington, D.C., 1950–1952; appointed Director of Economic Stabilization, 1952; Governor of Ohio, 1959–1963; practice law, Columbus, Ohio, 1963–1966, Partner Chapman, DiSalle & Friedman, Washington, D.C., 1966. Distinguished Professor, University of Massachusetts, 1963. Originator, First Chairman Toledo Labor-Management Citizens Committee (Toledo Plan), 1945 (plan has been adopted by other cities for mediation labor disputes); organizer and first President Ohio Association of Municipalities, 1949; Chairman, Advisory Board U.S. Conference of Mayors, 1949; Delegate International Union Cities, Geneva, 1949; served in Ohio State Guard, World War II. Named outstanding man of year by Junior Chamber of Commerce, 1944; outstanding alumnus Georgetown Student Bar Association, 1962; recipient award Interfaith Movement, 1962; Member American Bar Association, Ohio; Columbus, Toledo Bar Associations, Bar Association, D.C., Delta Theta Phi. 1961—appointed by President John F. Kennedy, Member of the Advisory Commission on Governmental Relations; 1963–1967—Member Board of Directors, Cincinnati Federal Home Loan Bank Board; 1967—appointed by President Lyndon B. Johnson, Member of Arbitrators of the International Centre for Settlement of Investment Disputes. Author, "Power of Life and Death"—Random House and "Second Choice"—Hawthorne. Many articles on Death Penalty, Price and Wage Controls. Democrat. Roman Catholic. Home: Washington residence—Watergate East, Apartment 1014N, 2510 Virginia Avenue, N.W., Washington, D.C. 20037; Office: 1709 New York Avenue, N.W., Suite 303, Washington, D.C. 20006.

Senator HRUSKA. Now, with your permission, Governor, I will call on Senator Buckley of New York to make his presentation of a witness who will testify this afternoon.

Senator Buckley, will you come forward for that purpose?

Later in these hearings we will have as witnesses Dr. Mildred Jefferson and Mr. Robert F. Green of the National Right to Life Committee, and their subject is abortion.

Senator Buckley, it is good of you to come.

STATEMENT OF HON. JAMES L. BUCKLEY, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator BUCKLEY. Thank you.

Thank you, Mr. Chairman. I am delighted to appear here today and present to you Dr. Mildred F. Jefferson, one of Senator Kennedy's most distinguished constituents.

Dr. Jefferson comes from Boston, Mass. She was graduated with highest honors from Texas College and received her masters degree in biology from Tufts University before going on to the Harvard Medical School where she compiled an outstanding record. She received her surgical training at Boston City Hospital, the Boston University Medical Center, and the Massachusetts General Hospital in Boston. Dr. Jefferson is currently a general surgeon on the staff of the University Hospital at the Boston University Medical Center and assistant clinical professor of surgery at the Boston University School of Medicine.

She is thus eminently well qualified to speak on the matters now before the subcommittee, and specifically on the question of how the terms "human being" and "person" ought, from a medical and scientific point of view, to be defined in the proposed new Federal criminal code.

For my part, Mr. Chairman, I would only say at this point that I fully endorse what Dr. Jefferson is about to say to you. As you know, I recently introduced S.J. Res. 119, together with six cosponsors, proposing a constitutional amendment to protect the lives of unborn children. The reasons which prompted me to do so are nowhere better articulated than in the moving and eloquent testimony you are about to receive. I urge the committee to give its most thoughtful consideration to what Dr. Jefferson has to say. I am also pleased to note, Mr. Chairman, that Dr. Jefferson will be accompanied by Mr. Robert F. Greene, an attorney from Covington, Ky., who is a member of the Executive Board of the National Right-to-Life Committee, and I am sure that the testimony you will hear from him will also be extraordinarily pertinent to the matter before this subcommittee.

I thank you for this opportunity.

Senator HRUSKA. Thank you for coming.

This afternoon at 2 o'clock we will have Mr. Charles Maddock as a witness. He is accompanied here this morning by a former colleague of ours, Senator Boggs.

Senator, would you like to introduce your witness now or this afternoon?

Senator BOGGS. Thank you. I will do it this afternoon. Thank you, Mr. Chairman.

Senator HRUSKA. Very well. [Governor DiSalle resumes as witness.]

Governor, while you have represented well the views that you espouse in regard to the death penalty, I need not tell you that your views are not unanimously held by either the public or by witnesses who appeared on this same subject both before the Brown Commission and here before this committee.

Governor Brown, whom you know well, testified on the same scale that you did, and he maintained that same position on the Commission. There is a very substantial difference of opinion in America on the subject, and of course, the polls taken over the last 20 years show remarkable waves up and down, both for and against capital punishment. As evidence of that fact, we will place into the record, without objection, a letter of July 9, 1973, from the Library of Congress dealing with public opinion surveys on the death penalty and other materials concerning the reinstatement of capital punishment.

[The material referred to follows:]

THE LIBRARY OF CONGRESS,
CONGRESSIONAL RESEARCH SERVICE,
Washington, D.C., July 9, 1973.

To: Criminal Laws Subcommittee
From: Education and Public Welfare Division
Subject: Public Opinion surveys on the death penalty

In response to your request regarding public opinion surveys on the death penalty, we have compiled the following charts on recent Gallup Polls and Harris Surveys. We have no records of Harris Surveys on this topic before 1969.

GALLUP POLL

Question. "Are you in favor of the death penalty for persons convicted of murder?"

	Percent		
	Yes	No	No opinion
November 1972	57	32	11
March 1972	50	41	9
1971	49	40	11
1969	51	40	2
1966	42	47	13
1965	45	43	17
1960	51	36	11
1953	68	25	9

HARRIS SURVEY

Question. "Do you believe in capital punishment (death penalty) or are you opposed to it?"

	Percent		
	Believe in	Opposed	Not sure
1973	59	31	10
1970	47	42	11
1969	48	38	14

We are enclosing the original releases on most of these surveys and some newspaper articles on them in case you would like more detail.

On June 15, 1973, just a few days after the most recent general Harris Survey listed above was released, another more specialized Harris Survey on the death penalty came out. This survey (enclosed) revealed that, despite the fact that 59% of the American people believe in the death penalty, only 39%, as jurors, could say, "If guilt were proven, I could always vote guilty even though the defendant would automatically receive the death penalty". This finding suggests a reluctance to make imposition of the death penalty automatic or, similarly, a reluctance to convict if upon conviction imposition of the death penalty would be automatic.

We hope this information will be helpful to you. If we can assist you further, please let us know.

JENNIFER CLAPP.

Enclosures.

THE HARRIS SURVEY—MAJORITY OF AMERICANS NOW FAVOR CAPITAL PUNISHMENT

(By Louis Harris)

Despite recent rulings of the U.S. Supreme Court virtually outlawing the death penalty, a majority of the country believes in capital punishment, 59–31 percent. This marks a sharp increase in sentiment supporting the death penalty, up from a much closer 47–42 percent in 1970.

The key to current thinking on capital punishment can be found in the belief that it has a deterrent effect on people who might otherwise take the life of another person. For example, by 57–29 percent, a majority of the public agrees with the statement that "the death penalty is more effective than a life sentence without parole in keeping people from committing murder."

When asked if it could be proven that a long sentence was an effective a deterrent as the death penalty, most Americans say, by 48–35 percent, that they would then oppose capital punishment. This result indicates that in supporting death as punishment for murder the American people are not endorsing

the old Biblical command of "an eye for an eye and a tooth for a tooth." In fact, when asked directly about that expression from the Bible, the public rejected that idea by a 49–40 percent margin. Still another "hard line" approach, the statement that "someone who has committed a terrible crime such as murder is an animal and deserves to be executed," met with 51–41 percent rejection.

Recently, the Harris Survey asked a nationwide cross section of 1,537 households this question, repeated from previous years:

"Do you believe in capital punishment (death penalty) or are you opposed to it?"

BELIEF IN CAPITAL PUNISHMENT

[In percent]

	1973	1970	1969
Believe in	59	47	48
Opposed	31	42	38
Not sure	10	11	14

There has been a clear intensification of support for the principle of capital punishment. The main reason for this shift emerged from another series of questions:

"Do you feel that the death penalty is more effective (a better deterrent) or not more effective than (READ LIST) in keeping other people from committing such crimes as murder?"

RELATIVE EFFECTIVENESS OF DEATH SENTENCE

[In percent]

	More effective	Not more effective	Not sure
Compared with:			
Life sentence with possible parole	56	32	12
Life sentence without parole	57	29	14

It is evident that the public believes that imprisonment of a person convicted of murder for life simply is not as effective a deterrent as the death penalty. Whether there is a chance to achieve parole or whether the convicted criminal serves out his full term for life appears to make little difference in people's assessment of the relative effectiveness of the sentences.

Some might take these results to mean that in its continuing concern over unchecked crime, a majority of the public has become vindictive in the extreme. Further probing, however, did not bear this out.

The cross section was also asked:

"Now I'd like to read you some statements other people have made about why they support capital punishment. For each one would you tell me if it represents your own view completely, fairly well, only slightly, or not at all?"

STATEMENTS ABOUT CAPITAL PUNISHMENT

[In percent]

	Reflects own view	Does not	Not sure
Capital punishment is more effective than other penalties in keeping people from committing crimes	61	33	6
A government which cannot execute criminals is going to become weak and lose the respect of the people	49	42	9
The Bible is right when it preaches "an eye for an eye and a tooth for a tooth"	40	49	11
Someone who has committed a terrible crime such as murder is an animal and deserves to be executed	41	51	3

The public sees the use of capital punishment as a tactical weapon rather than a matter of high principle, under which the taking of a life automatically should mean the death penalty. The proof of this finding was evident when people were asked this question:

"Suppose it could be proved to your satisfaction that the death penalty was not more effective than long prison sentences in keeping other people from committing crimes such as murder, would you be in favor of the death penalty or would you be opposed to it?"

[In percent]

	Favor	Oppose	Not sure
Nationwide	35	48	17
By age:			
Under 30	32	56	12
30 to 49	34	48	18
50 and over	39	43	18
By education:			
8th grade or less	36	40	24
High school	37	45	18
College	32	59	9
By sex:			
Men	40	44	17
Women	31	53	16

Most ready to abandon the death penalty are young people, those with some college education, and women. Older persons, those with less education, and men are more reluctant to see life imprisonment substituted for capital punishment.

Of course, all of the results reported in this Harris Survey deal with the public's point of view about capital punishment and its effectiveness in deterring crime. How people would behave if they were jurors in murder trials is quite another story and will be reported in Thursday's Harris Survey.

THE GALLUP POLL—PRESIDENT NIXON LIKELY TO BE BACKED ON DEATH PENALTY

Princeton, N.J., March.—President Nixon's proposal that the death penalty be restored for certain federal crimes will likely meet with approval from the majority of the American people.

A Gallup survey taken in November showed support for capital punishment for murder to be at the highest point in two decades, despite the U.S. Supreme Court's ruling which, in effect, struck down the death penalty. A majority of 57 percent of persons interviewed voted in favor of the death penalty, while 32 percent were opposed and 11 percent undecided.

In a radio speech Saturday, President Nixon announced that he had asked Atty. Gen. Richard G. Kleindienst to draft a capital punishment law that would revive the death penalty for assassination, treason, kidnapping, skyjacking and the murder of law enforcement officials and prison guards.

Further evidence of the public's current "hard line" mood is seen from recent Gallup findings which show 67 percent of Americans in support of Gov. Nelson Rockefeller's proposal that all sellers of hard drugs be given life imprisonment without the possibility of a parole.

SUPPORT FOR DEATH PENALTY AT HIGHEST POINT IN TWO DECADES

THE GALLUP POLL—DESPITE SUPREME COURT RULING

(By George Gallup)

Princeton, N.J., Nov. 22.—Despite the U.S. Supreme Court's ruling striking down the death penalty, public support for capital punishment is currently at its highest point in nearly two decades.

In the latest survey, completed last week, a majority of 57 per cent of adults 18 and older said they favor the death penalty for persons convicted of murder. This percentage represents a sharp increase in support since March of this year when the figure was 50 per cent in favor.

The previous high was recorded in 1953 when 68 per cent of all adults interviewed voted in favor of capital punishment.

The following table shows the latest results and trend since 1953, when the current question wording was first used:

TREND SINCE 1953
[In percent]

	Yes	No	No opinion
November 1972	57	32	11
March 1972	50	41	9
1971	49	40	11
1969	51	40	9
1956	42	47	11
1965	45	43	12
1960	51	36	13
1953	68	25	7

FEAR FOR PERSONAL SAFETY KEY FACTOR

The increase in support for the death penalty since March may be due in considerable measure to widespread fear concerning personal and family safety—the "hidden issue" in this year's presidential election, according to Gallup Poll analysts.

Survey evidence indicates that the proportion of voters who say they are afraid to go out alone at night in their own neighborhoods has shown a dramatic increase in recent years. It is especially high in cities over 1 million in population but even in smaller cities it has reached a high level.

Voters throughout the nation feel that crime has increased during the last year in their communities and favor stricter law enforcement, as well as tougher sentences for lawbreakers.

EVIDENCE OF "HARD LINE" MOOD

Indicative of the public's current "hard line" mood regarding crime was the recent vote in California on the death penalty.

California voters, by a vote of 67.5 per cent to 32.5 per cent (unofficial), approved the restoration of capital punishment for the crimes of train-wrecking, perjury resulting in execution of an innocent person, treason against the State and deadly assault against a prison guard by a life-term convict.

Six in ten whites favor the death penalty, but a majority of blacks (53 per cent) oppose it. Young adults (18 to 30) are less inclined to favor capital punishment for persons convicted of murder than are older persons, although the weight of opinion among young adults is 5-to-4 on the side of support.

Although women are less in favor of capital punishment than are men, they nevertheless lean heavily in support of it in the latest survey. In the March survey, by contrast, women were divided in their views on the death penalty.

In the March survey, public support for the death penalty was higher in the largest cities where worry over crime is most pronounced. Today, little difference is found on the basis of size of city or community, with as high a proportion of persons living in small towns or rural areas in favor of the death penalty as big city residents.

Following are the latest results by key population groups:

FAVOR DEATH PENALTY FOR MURDER?

[In percent]

	Yes	No	No opinion
National	57	32	11
Men	64	26	10
Women	50	37	13
Whites	60	29	11
Non-whites	29	53	18
College	58	36	6
High school	60	28	12
Grade school	50	34	16
Under 30 years	50	39	11
30 to 49 years	60	30	10
50 and over	60	27	13
Community size:			
1,000,000 and over	58	31	11
500,000 to 999,999	54	35	11
50,000 to 499,999	53	38	9
2,500 to 49,999	57	35	8
Under 2,500, rural	58	32	10

The latest survey results are based on in-person interviews with 1,207 adults, 18 and older, interviewed in more than 250 scientifically selected localities between November 10 and 13. This question was asked:

Are you in favor of the death penalty for persons convicted of murder?

[From the Washington Post, Nov. 23, 1972]

THE GALLUP POLL—DEATH PENALTY GETS SURGE IN APPROVAL

(By George Gallup)

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2,500 to 49,999	57	35	8
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[From the Evening Star and Daily News, Washington, D.C., Nov. 13, 1972]

Death Penalty Staging a Comeback

(By Fred Barnes, Star-News Staff Writer)

The death penalty, virtually banned by the Supreme Court, earlier this year, is staging a comeback.

Since the high court's 5-to-4 ruling in June, which outlawed the death penalty as it is imposed almost everywhere in the nation, a strong effort has been made in many states to restore capital punishment.

In recent weeks, the campaign has begun to make headway. For example:

By a 2–1 margin, California voters on Tuesday voted in referendum to reinstate the death penalty in state prosecutions. The vote overturned a ruling of the California Supreme Court which flatly banned capital punishment. However, the change so far would be effective in few cases.

On Nov. 2, the Delaware Supreme Court declared that the state law prescribing death as the punishment for murder is constitutional. The court held the Delaware law is permissible under the U.S. Supreme Court decision because it makes the death penalty mandatory.

The Supreme Court's June ruling did not say in so many words that death penalties would be valid if they were mandatory. However, the justices whose votes were crucial in the split decision indicated they might be prepared to vote to uphold capital punishment where it was not left to the discretion of juries or judges, but rather was imposed in all capital cases alike.

Florida Gov. Reuben Askew, reluctantly acceding to the demands of politicians in the state, has called a special session of the Florida Legislature to deal with capital punishment. The session begins Nov. 28 and the legislators are expected to pass overwhelmingly a bill making the death penalty mandatory for a variety of crimes.

Officials in perhaps half a dozen other states have announced plans to push for legalizing the death penalty in the next regular session of their legislatures. Utah Atty. Gen. Vernon Romney, for instance, said Friday that he will propose "a carefully framed statute" that might meet U.S. Supreme Court tests.

A special 11-member committee of the National Association of Attorneys General is drafting model state legislation that will be allowable under the high court's ruling. The proposed capital punishment statute may be unveiled when the association meets next month in San Diego.

14 ALREADY HAD BANNED

The Supreme Court's decision affected 34 states. In 14—Alaska, Michigan, Hawaii, New York, New Mexico, West Virginia, Iowa, Oregon, Rhode Island, Vermont, Wisconsin, Minnesota, Maine and North Dakota—the legislatures earlier had banned the death penalty.

In New Jersey and California, the state supreme courts had ruled that capital punishment was unconstitutional.

The campaign to restore the death penalty in California has been directed from the Governor's mansion, and carried out by an army of volunteers under Atty. Gen. Evelle Younger.

Gov. Ronald Reagan was angered by the 6-to-1 ruling of the state high court in February that said capital punishment is "incompatible with the dignity of man and the judicial process."

To get a referendum on the ballot on the issue of the death penalty, 500,000 signatures were needed. Petitions were handed out at police stations and courthouses, among other places. Nancy Reagan, the governor's wife, volunteered to obtain signatures.

"With an operation like that, they didn't have any trouble getting enough signatures," commented Douglas Lyons, executive director of Citizens Against Legalized Murder Inc., an anti-death penalty group.

ISSUE PASSES EASILY

More than 1 million signatures were obtained, the issue went on the ballot and easily passed.

The referendum sought to restore all the death penalty statutes that were struck down by the California Supreme Court. But only four of them can be used—the ones which make death a mandatory punishment.

These are for somewhat infrequent crimes—killing a prison guard, train wrecking, treason against California and perjury that leads to the execution of an innocent person—and thus there will be little immediate impact.

Other restored laws which allow judges and juries to impose capital punishment at their discretion can't be put into effect because they apparently would violate the highest court's ruling. A state referendum can't overturn a federal court decision.

The referendum also barred the state Supreme Court from declaring capital punishment void again. And it said that the state legislature is "free to enact" new legislation making the death penalty mandatory and thus outside the Supreme Court ban.

LEGAL ATTACK EXPECTED

A legal attack on the referendum is expected, however. Opponents have charged that it was illegal since voters couldn't simply endorse or reject the laws with a mandatory death sentence. Californians had to vote on all death penalty laws, even the ones that the high court has outlawed.

In Delaware, there were two laws prescribing the death penalty for murder. One simply said a convicted killer gets death, and the other said it was up to juries and judges to decide on a sentence for murderers.

Did the U.S. Supreme Court's decision throw out both of those laws? Only the one that made the death sentence discretionary, answered the Delaware Supreme Court.

The first mandatory death penalty case to reach the Supreme Court will probably come from Florida, according to Ass't. Atty. Gen. George Georgieff.

Florida will be the first state to impose the required death penalty, he said, and thus become the first state to have the penalty challenged.

"Necessarily we'll be the first ones to go to Washington," he said.

Though Gov. Askew opposes capital punishment, Georgieff said he was "importuned" into calling the special legislative session by a collection of state politicians and Atty. Gen. Robert L. Shevin.

Georgieff said that the legislation expected to come out of the special session will require death for premeditated murder, felony murder, air piracy, killing a policeman and assassinating a public official.

The campaign to restore capital punishment should pick up markedly next year when state legislatures convene. Strong efforts are expected to come in Utah, Indiana, Pennsylvania, Oklahoma, New York and several Southern states, among others.

Indiana Atty. Gen. Theodore L. Sendak has formed a 50-member committee to study how to get the death penalty back on the books in his state.

Sendak's pro-capital punishment stance is credited with aiding his re-election last Tuesday. He was the leading vote-getter in the state.

Sendak is one of the members of the National Association of Attorneys General's special committee on capital punishment. Attorney Generals Andrew Miller of Virginia and Francis Burch of Maryland are also on the committee.

The group met last month in Oklahoma City, and there was some disagreement among the members. Many expressed doubts that the high court would go along with a mandatory death penalty.

The ruling in June didn't say that a required death sentence was legal. It simply left that matter open as it struck down the discretionary use of the penalty.

Georgieff was among those pessimistic about getting court approval. "I think for the most part we've seen the end of capital punishment," he said.

Before the issue reaches the Supreme Court, there are not likely to be any executions. No one has been put to death in the U.S. since 1967.

Senator HRUSKA. Governor, I would like to ask you this question which has come to us again and again, and in fact, those questions which I ask will all come from previous witnesses. They are, in effect, principles that form the basis for an espousal of the death penalty rather than its prohibition.

It is said that when the death penalty is visited upon someone convicted of the crime for which the death penalty can be exacted, after all, that is a situation visited upon a man who believes in the death penalty. When a man corrals eight nurses into an apartment and one after another kills them with a butcher knife, he believes in the death penalty. He did it to eight people.

When two or three hoodlums take a 240 pound man, impale him on a meathook and let him rot there for 3 days before the Lord takes him unto his bosom, those gangsters believe in the death penalty. They inflicted it.

So often we hear the storming on behalf of the criminal, but we do not hear mention of any of the victims.

What about the victims in society?

Mr. DISALLE. My statement was not devoid of mention of the victim. I do say in that statement that society should act more forcefully before we have a victim and to try and prevent crime, and to try to prevent killings. We just cannot excuse society from being just because the people who commit crimes are not just. I think we must expect more from the total conscience of society than we can expect from the

sick conscience of a very bad member of society. We cannot just write a law because certain people maybe do not belong in society. We must write law on the basis of the people who constitute a society and who want a good society.

If we say, because these people believe in the death penalty they should receive the death penalty, should we say that because they believe in burglarizing, we ought to engage in burglary, too? Should we also say that because we have bad examples, that we should follow the bad example and not try to establish a better example on behalf of the majority of the people of this civilization of ours?

We just cannot write law on the basis of the exceptionally bad person who happens, as an accident, to be a part of our society. It just cannot de bone that way. We must set a better example. We cannot say, because you kill we in turn will kill you, because you believe in killing we also believe in killing. We cannot do that, Senator.

Senator HRUSKA. Well, what about the deterrent value?

You have indicated, as other witnesses have indicated, that the death penalty has no deterrent value, and you offer statistics from 14 States that abolished the death penalty and then those that had not abolished it, and you argue from that.

The fact is that for the last 12 years, as nearly as I remember, there have been no executions any place in America.

Now, of what value are statistics taken from States, all of which have refrained from using the death penalty, to say that 14 of them have by law abolished the death penalty. Thirty-six of them have not used it and they knew they were not going to use it. What about the deterrent value?

If you are going to say that the threat of the deprivation of a man's life will not deter, why should 5 years in prison or a year or 10 years deter, and if it will not, then, let's do away with punishment and anybody can do whatever he wants to.

Would that be a logical conclusion?

Mr. DISALLE. That is certainly not logical, and it is not logical from my statement. I have not said we should not punish, and I have not said that we should not deter. I have said that killing in and of itself is an irrevocable means of punishment where we have no opportunity to right an error, and that it does not serve an effective purpose for society.

Let me say this, that maybe—I have talked personally with more killers or convicted killers than a lot of people. Not one of them ever knew on the morning that this crime was committed that that day they would commit a crime, and this is verified by Camus in one of his works in which he tells of a magistrate who had presided in more murder cases than anybody in the area, who said that he had never presided at a trial of a killer who that morning when he was shaving knew that on that day he would be killing someone. It is not a deterrent because it is not thought of in the emotion of committing a crime. People do not consider the death penalty, and if they do consider it, it certainly has not stopped them from proceeding with their crime.

So, it is not a deterrent, and I think it is bad enough—this is one crime in which society shares. We do not condone burglary. We try to do something about it. We have not done very well with it, but we

seem to condone killing by participating in killing as a government, a Government agency, killing people. We do not go out and also burglarize just because other people do it. Criminals do it. Or at least we are not supposed to.

But this is—you see, Senator, the whole history—for example, Alabama had a very high rate of homicides, very high number of executions, and it goes down this way. There seems to be a relationship between high killings on the part of States and countries and the number of crimes in those particular States and countries.

Senator HRUSKA. Well, it has never been determined what the rate of killing would be if there were no death penalty in those nations, has it?

Mr. DISALLE. In the United States we have examples for hundreds of years, in the State of Michigan, for example, over 100 years of experience in enforcing the law without the death penalty, and their rate of crime is not as great as Ohio's where there had been executions constantly during that period.

Senator HRUSKA. Well, I will say that if we assent that capital punishment does not deter, there is a serious challenge or perhaps even a total lack of foundation for all penalties.

Mr. DISALLE. Senator, the choice is not between death and no punishment at all, or no deterrents, or no supervision of the criminal. The choice is between the death penalty and another form of punishment where there is a chance of rehabilitation.

Now, I can give you case after case of—for example, let me tell you the case of a boy 14 years old who was sentenced to life in the city of Cleveland because he participated with an older man in a robbery of a junk yard where the victim was tied and then died from exposure. This boy, 14, was given a court appointed attorney because his mother and father could not afford counsel, and the lawyer convinced the mother and father, by saying, if he will plead guilty to first degree murder, I can save him from the chair, and so, being afraid of having the boy executed, they agreed, and he pleaded guilty.

He went into the Ohio State Penitentiary at the age of 14. I commuted his sentence 21 years later. He was then a man of 35. Here was a man that I learned to know intimately because he lived at the mansion with me. I had seen him first at the London Prison Farm when he was maybe 26, 25, or 26. He had been in the penitentiary twice as long, practically, as he had been out.

Now, at the time I met him he was at the penitentiary. Later he was acting as a baby sitter for my grandchildren, being privy to everything the family did, being a part of it. I found him reading paperbacks, and I said, John, that is not going to help you. Why do you not go up to the library and see some of the books up there and start reading those books, and he did and he would come in in the morning just hardly able to keep his eyes open because he had read all night. He was getting into something. He was learning something.

Now, when his sentence was commuted, he went to work for the State but after I left office, he lost his job like a lot of Democrats lost their jobs, and he—I would like to finish this by telling you the kind of life he is living today, totally rehabilitated. He is night supervisor doing a good job in a good company in the city of Columbus,

raising a step child and also raising an adopted child, a foster child that nobody wanted because the boy was so bad. And I said to him, John, what a chance you are taking, and he said, Governor, if I don't know how to raise a bad boy, no one does.

And he just has the love and affection of those two boys. He is raising two fine boys. He was in that penitentiary a long, long time for a boy of 14. So there is hope for people, and it can be done.

Senator HRUSKA. Well, it would be most difficult to generalize from a case involving a 14-year-old boy under those circumstances.

Mr. DISALLE. Senator, I am not generalizing because this is repeated thousands and thousands of times throughout the world. Really, it is not just one case. I can—I cite you a case as an example, and I could give you a lot more from personal experiences.

Senator HRUSKA. And of course, we could bring a lot more examples from other sources that would find their basis in bodies having washed upon the shore of the Atlantic Ocean with ankles tied with baling wire to a cement block. They went down into 20 feet of water, and the merciful tide washed them upon the shores so that they could get a Christian burial.

Now, then, anyone who would want to contend that the man who tied that block on that man's shoes did not intend to murder that day would be most naive, sir. If we get into the matter of illustrations, you see——

Mr. DISALLE. Senator, that is a gangland killing, and I bet you that gangster never saw the penitentiary, nor was he ever executed or was he ever sentenced to death for that crime, and this is one of the real inequities of the whole system, because if you have the money to retain counsel, you very seldom go to the electric chair. It is only the poor, the illiterate, and the underprivileged who go to the electric chair or are executed in most States.

Senator HRUSKA. Most respectfully, I would like to call the attention of the Governor to the fact that we now have a criminal justice act, and the man who presides here was its principal author, for the purpose of furnishing counsel of the best type for all types of crime, including misdemeanors.

So that argument does not wash anymore.

Mr. DISALLE. Well, it does count in the District of Columbia especially. I am a member of the Committee on Committees that wrote the by-laws for the District Bar and the District is right now without money and it has not been appropriated for the assignment of counsel to indigents. There is real difficulty in trying to get a qualified lawyer to take those kind of cases.

Senator HRUSKA. There have been ample funds in all of the States and in virtually all of the Federal jurisdictions except the local jurisdiction, and that is being taken care of, but that is beside the point.

The point is that in addition to the criminal justice system, we also have a Supreme Court decision which now says we cannot inflict the death penalty capriciously, arbitrarily, and against only a certain economic class. It has to be done under certain constrictions and with certain requirements, and I submit that is another development in criminal law which follows many others. The Supreme Court decision will have a great impact in this area.

What is your assessment of the Supreme Court decision?

Mr. DiSalle. I think it is excellent, but we have had to have cases where we have had to have lawyers admit for the purpose of the record, in order to justify an appeal, that they were not competent counsel in that particular case.

Senator Hruska. Now, with regard to this idea of a skyjacker saying, Oh, well, I am going to the electric chair anyway. I might as well blow up this airplane, we have in our records of this committee on these bills much testimony to this effect, that a gang of three people at about 4:30 or 5 in the afternoon, for example, rounded up 18 or 20 employees in a towel and linen supply company and they shot into the air and they laid their plans to blow the safe open. They herded them into a very little room, and the man with the pistol that did most of the shooting said, well I have an idea to plug all of you. They cannot do anything to me. There is no death penalty. Even the Supreme Court cannot send me to the electric chair. That is no isolated instance. Again and again we have that idea communicated to us.

And of course, the skyjacker could say, I killed all of these people, sure, but so what. You can't do anything more to me than put me in jail. The Supreme Court said so.

Mr. DiSalle. If we are going to——

Senator Hruska. How do you meet that?

Mr. DiSalle. If we are going to abandon general principle and go to isolated instance, we also have those who killed because they wished to be executed, people with suicidal tendencies who do not have nerve enough to kill themselves, but who want to be killed by the State and kill the people with that in mind. But there are many, many cases of that kind.

Senator Hruska. The suggestion has been made that the Congress by passing a law inflicting the death penalty on anyone who kills a Member of Congress implied that we pay a higher degree of respect to the lives of Members of Congress than to other citizens'. This should be put in proper perspective.

The death penalty was imposed there to be sure that it was a matter of Federal jurisdiction. We ought to keep the record straight in that regard.

Mr. DiSalle. Why not keep it a case in the Federal jurisdiction by limiting the sentence to a life sentence instead of killing them?

Senator Hruska. On that score, let me suggest that the last time that the Congress voted on this issue—in October of 1970, the Members of the Senate, after a very spirited debate, decided by a substantial margin, more than two to one, for the retention of the death penalty in the District of Columbia. Therefore, when you say, why didn't they create a life sentence instead of a death sentence, I answer that more than two thirds of the Senators said no. We believe in the retention of that death penalty.

So you see, you and I could go on a long time on the different aspects of this, and we have, and we are grateful to you for your appearance here, and for your explanation of your viewpoints.

The purpose for my questions was not to try to convince you. I do not think I would have those persuasive powers.

Mr. DiSalle. Well, I thought my statement, Senator, was not for the purpose of convincing you, either.

Senator HRUSKA. I am quite confident that that is equally true.

Mr. DISALLE. I have known of your interest and background for many, many years, and I knew I could not change it now.

Senator HRUSKA. We have heard this. We have had witnesses who have testified for the penalty, and on those occasions this Senator has taken the liberty of asking questions that are based upon the kind of views that you have for the purpose of putting in the same part of the record the fact that there is in existence a directly opposite view on the subject, and that is one of the principal reasons I bring them out.

Mr. DISALLE. I would be glad to offer my services on an unpaid basis as a consultant to you to ask those people some questions on your behalf.

Senator HRUSKA. Fine.

Thank you again for coming.

Mr. DISALLE. Thank you.

Senator HRUSKA. It will be necessary for us to adjourn at 1 o'clock. We will return this afternoon at 2 to hear the testimony of Mr. Maddock, Dr. Jefferson, accompanied by Mr. Greene, and Mr. von Hirsch.

[Whereupon, at 12:50 p.m., the subcommittee was recessed, to reconvene at 2 p.m. the same day.]

AFTERNOON SESSION

Senator HRUSKA. The subcommittee will come to order.

Our first witness this afternoon will be Mr. Charles Maddock, legal department of Hercules, Inc. He will testify to us about aspects of the revision of the criminal code in the field of business law.

There will be inserted in the record at an appropriate place the biographical sketch of Mr. Maddock, and also the text of his statement, which has been submitted to the committee in advance.

Mr. Maddock, I know you are aware of our rationing of time, so if you will proceed now to highlight your statement, as indicated, that will be fine.

[The prepared statement and the biographical sketch of Charles S. Maddock follows:]

BIOGRAPHICAL SKETCH OF CHARLES S. MADDOCK

Mr. Maddock is appearing as a witness for the American Bar Association Section on Corporation, Banking and Business Law, although, because there has not been time to clear the entire text of his statement with the Council of the American Bar Association Section, certain portions of his statement and testimony must be considered as his own view alone.

Mr. Maddock was born in Utica, New York in 1911; educated in the public schools of Denver, Colorado; graduated with a BA degree from the University of Colorado in 1932 and from the Harvard Law School with an LL.D degree in 1935.

From 1935 to 1943 he was associated in the practice of law in Boston, Massachusetts, with the firm of Gaston, Snow, Saltonstall & Hunt (now, Gaston, Snow, Motley & Holt). In 1943 Mr. Maddock became Assistant General Counsel of Hercules Powder Company (now Hercules Incorporated) in Wilmington, Delaware, and since 1955 has been General Counsel of Hercules Incorporated.

Mr. Maddock is admitted to practice before the Supreme Court of the United States, in the Commonwealth of Massachusetts, and the State of Delaware.

STATEMENT OF CHARLES S. MADDOCK

PROVISIONS OF S. 1 AND S. 1400 (COVERED HEREIN AT PAGES INDICATED)

Subject	S. 1	S. 1400	Brown report	Page
Organization criminal liability	1-2A7	402	402	6642
Personal criminal liability for conduct on behalf of organization	1-2A8	403	403	6642
Definition of organization	1-1A4	111	409	6642
Interference with activities of employees and employers	2-7F6	None	1551	6642
Special sanctions for organization	1-4A1(c)(7)	2004	3007	6643
Disqualification from organization functions	1-4A3(G)	2001	3502	6643
Regulatory offense	2-8F6	None	1006	6643-48
Securities violations	2-8F5	1761	1772	6648-49
Environmental spoilation	2-8F3	None	None	6649-50
Unfair commercial practices	2-8F4	None	None	6650
Fraud in regulated industry	None	1765	None	6650
Adulterated food product violations	None	1766	None	6650

On March 22, 1972, I had the pleasure of testifying before this Subcommittee as a representative of the Corporation, Banking and Business Law Section of the American Bar Association. At that time this Committee was concerned with recommendations of the National Commission on Reform of Federal Criminal Laws (the Brown Commission Report).

The two Bills under present consideration—S. 1 and S. 1400—grew out of the Brown Commission Report and the major part of my testimony today is concerned with those Sections of S. 1 and S. 1400 that correspond with the Sections of the Brown Report which were the subject of my previous testimony. Other Sections of S. 1 and S. 1400, however, raise problems that were not specifically covered in my earlier testimony.

Because of time limitations I have not been able to clear my remarks with the Council of the Corporation, Banking and Business Law Section of the American Bar Association. Accordingly, to the extent that my remarks are involved with areas different from what was covered by me in my testimony regarding the Brown Report, my statements must be considered as my own.

I am completely familiar with the testimony of Mark Crane, for himself and on behalf of the Antitrust Law Section of the American Bar Association. I, and I am sure that I speak for the Corporation, Banking and Business Law Section on this point, am in agreement with all points made by Mr. Crane except for his comments regarding the provisions of S. 1 and S. 1400 as they relate to punishment for criminal activity as applied to either individuals or organizations. With those exceptions, I would like to register my assent to his comments. [See last full paragraph p. 6653.]

We are very pleased to find that many of the objections that our section had to the Final Report of the Brown Commission have been answered in comparable provisions of Senate Bill No. 1. Accordingly, if there is to be legislation in the areas involved, we prefer the following Sections of S. 1.

Section 1-2 A7—Organization Criminal Liability;

Section 1-2 A8—Personal Criminal Liability for Conduct on behalf of Organization;

Section 1-1 A4—The Definition of Organization;

Section 2-7 F6—Interference with Activities of Employes and Employers.

The Companion Sections of S. 1400 on the other hand repeat or paraphrase the provisions of the Brown Commission Report and the objections we presented to that Report at the time of our earlier testimony still apply to the provisions of both the Brown Report and S. 1400. The following table keys the above Sections of S. 1 to the comparable provisions of S. 1400 and the Brown Report.

S. 1	S. 1400	Brown report
1-2A7	Sec. 402	Sec. 402.
1-2A8	Sec. 403	Sec. 403.
1-1A4	Sec. 111	Sec. 409.
2-7F6	No provision	Sec. 1551.

The other areas of concern at the time of our earlier testimony are still applicable to the provisions of S. 1 and S. 1400 which carry forward the concepts to which we took exception in the Brown Report. In several instances these concepts have been enlarged.

In the area of punishment for criminal activity, we continue to believe that the notice of guilt and disqualification from office provisions are unnecessarily harsh and retrogressive. These provisions are found in Sections 1–4A1 and 1–4A3 of S. 1; and in Sections 2004 and 2001 and 2103 of S. 1400.

Our objections to these concepts are fully set out in our previous testimony at pages 1639 and 1640 of the Subcommittee record and we would appreciate the Subcommittee's kindness in considering those comments as being repeated here.

Far and away our greatest concern is directed to the proposal for the establishment of "regulatory offenses" described as such in Section 2–8F6 of S. 1.

Section 2–8F6 establishes what is designated as a "Regulatory offense" and provides sanctions for the enforcement of penal regulations. Penal regulation is defined as "any requirement of a statute, regulation, rule or order which is enforceable by criminal sanctions of civil remedies."

The problem we see in this provision is twofold: first how it would be implemented and second the basic legal and philosophical problems which underly the concept.

The Section provides that the sanctions shall be applied "to the extent that another statute so provides". Insofar as the conforming provisions of S. 1 are concerned, we see already how the provision is to be implemented. Various existing statutes are amended by describing the violation of the provisions of the statute as a "regulatory offense". Presumably the idea is that future statutes will follow the same pattern. Consequently, when we are dealing with a specific statute the intent is clear. But we are in the dark as to how the sanctions will apply when the penal regulation involved is the requirement of a regulation, rule or order. In these cases, is the statute which "so provides" the statute authorizing the rule, regulation or order, a new statute that makes this new concept generally applicable, or what? At a minimum, therefore, we need clarification on how this provision will be made applicable to "regulations, rules or orders" before we are in a position to even consider questions associated with the implementation of the Section.

The legal problem associated with the regulatory offense concept concerns primarily the extent to which Congress may delegate to administrative authorities its authority to determine what constitutes criminal conduct.

The most referred to case in this field is *United States* v. *Grimaud*, 220 U.S. 506; 55 L.Ed. 563 (1910). The defendants contended that the Forest Reserve Act of 1897 was unconstitutional insofar as it delegated to the Secretary of Agriculture the power to make rules and regulations and provided that a violation of such rules or regulations was a penal offense. The Supreme Court upheld the right of Congress to make such a delegation. The reasoning and language of the Court, however, make it clear that in order for such delegation to be proper, Congress must make the determination that a violation of the authorized rules or regulations is criminal at the time the regulations are authorized and in the context of the subject matter to which the statute authorizing the delegation relates.

"From the beginning of the government, various acts have been passed conferring upon executive officers power to make rules and regulations—not for the government of their departments, but for administering the laws which did govern. None of these statutes could confer legislative power. But *when Congress had legislated and indicated its will, it could give to those who were to act under such general provisions 'power to fill up the details'* by the establishment of administrative rules and regulations, the violation of which could be punished by fine or imprisonment fixed by Congress, or by penalties fixed by Congress, or measured by the injury done." (Emphasis supplied.) [at page 568 of 55 L.Ed.]

In the legislation questioned in the *Grimaud* case, the Court held that the rules and regulations merely "filled up the details" of the Statute and made specific reference to what this meant:

"From the various acts relating to the establishment and management of forest reservations, it appears that they were intended 'to improve and protect the forest and to secure favorable conditions of water flows.' It was declared that the act should not be 'construed to prohibit the egress and ingress of actual settlers' residing therein, nor to 'prohibit any person from entering upon such forest reservations for all proper and lawful purposes, including that of prospecting, locating, and developing mineral resources thereof: provided that such persons comply with the rules and regulations covering such forest reservations.'

(Act of 1897, 30 Stat. at L. 36, chap. 2 U.S. Comp. Stat. 1901, p. 1540.) It was also declared that the Secretary 'may make such rules and regulations and establish such service as will insure the objects of such reservations; namely, to regulate their occupancy and use, and to preserve the forests thereon from destruction; and any violation of the provisions of this act or such rules and regulations shall be punished'. [30 Stat. at L. 35, chap. 2, U.S. Comp. Stat. 1901, p. 1540], as is provided in § 5388 of the Revised Statutes (U.S. Comp, Stat. 1901, p. 3649), as amended."

"Under these acts, therefore, any use of the reservation for grazing or other lawful purpose was required to be subject to the rules and regulations established by the Secretary of Agriculture. To pasture sheep and cattle on the reservation, at will and without restraints, might interfere seriously with the accomplishment of the purposes for which they were established. But a limited and regulated use for pasturage might not be inconsistent with the object sought to be attained by the statute. The determination of such questions, however, was a matter of administrative detail. What might be harmless in one forest might be harmful to another. What might be injurious at one stage of timber growth, or at one season of the year, might not be so at another.

"*In the nature of things it was impracticable for Congress to provide general regulations for these various and varying details of management. Each reservation had its peculiar and special features; and in authorizing the Secretary of Agriculture to meet these local conditions, Congress was merely conferring administrative functions upon an agent, and not delegating to him legislative power . . .*" (Emphasis supplied.) [at page 567]

In short, when Congress passes a law covering a specific area of legislative interest it may authorize an administrator to issue rules and regulations to provide the details necessary to effectuate the general purposes of the specific legislation and in order to assure that the will of Congress will be carried out, provide that a violation of those rules or regulations is a penal offense.

The approach in S. 1, however, appears to go considerably beyond this concept. S. 1 is not a Statute providing for regulation or control of activities in a specific area of interest to the Federal Government. Quite the opposite, it is the kind of generalized treatment of the whole relationship between citizen and State that is typical of a codification of law. Congress is not giving the administrator the authority to "fill up the details" of how a particular sort of regulatory activity is to be carried on and attaching penal sanctions to a violation of the regulation. What S. 1 appears to say in its most favorable constitutional light is that the violation of *any* regulation, rule or order under any Statute authorizing such regulation, rule or order is a penal offense. Here, there is no concern at all for the relationship of the detail by regulation to the general area of interest in the specific legislation; nor is there any concern for the requirement that the regulation is in fact a filling-up of detail in that specific area. By making the penal declaration applicable to the violation of any rule, regulation or order and placing it in a generalized omnibus declaration of crime, rather than as part of a specific Statute in a specific regulated area, Congress is not delegating authority to fill in details for there is no subject matter to which the rules or regulations relate in a defined statutory area of regulation as is required by constitutional considerations; rather, Congress is delegating its authority to determine what is and isn't criminal in a broad way to anyone who has the right to issue any rules, regulations or orders in any and all areas.

This we believe is the constitutional problem even where the penal regulation referred to in S. 1 is one presently enforceable by criminal penalty if the intent is to do more than is already provided for in existing statutes such as the Forest Reserve Act of 1897. If on the other hand nothing more is intended than is already provided for by the express terms of existing statutes, there is no point at all in adding an additional meaningless provision to a new Criminal Code.

In a situation where the penal regulation is one presently enforceable by *civil* remedy the constitutional problem is even more pronounced. If Congress did not provide for criminal punishment when the authority to regulate was first granted, it is clear that Congress cannot now, when dealing with a criminal code wholly unrelated to the area regulated by a specific Statute, change the nature of the authority delegated at the time the regulatory statute was enacted. Congress is not now considering a specific area to which regulatory authority relates, nor is it fixing "appropriate" penalties in relation to the problem cared for by the specific legislation. Rather, the Congress is considering penalties in

the broad sense involved in a codification of criminal law. Section 2–8F6 which details the crime is completely divorced from any specific regulatory legislation and, therefore, cannot possibly be a specific delegation in a specific situation.

If the Congress now desires to make the violation of any authorized regulation punishable as a crime, where that is not now provided, then the specific legislation pursuant to which the authority to regulate was granted must be changed in order to accomplish that result. This being the case, we do not believe that any useful purpose is served at all by the proposed establishing of a "regulatory offense". Since all existing regulatory legislation that is to be covered within the concept of "regulatory offense" must be specifically amended to provide for the new penalty, nothing new or additional except confusion is added by placing a new Section "Regulatory Offense" in the Criminal Code.

As indicated above, we believe that if existing statutes in the regulatory area already provide criminal sanctions for their violation, no useful purpose is served by duplicating the fact and applicability of such sanctions in additional new legislation even though this legislation is part of a criminal code. Even if this were not true, great harm would result from the proposal. The warning regarding the possibility of criminal sanction is present in the regulatory provision itself where it will be seen and understood in the context of the regulatory scheme. Nothing but confusion is added when the sanction is repeated or enlarged in the criminal code.

If the purpose is to add new or additional penalties, then the alert should be sounded in the regulatory provisions and the regulatory provisions should be amended. This is the statutory law to which the attention of those affected by the Statute is directed. If one is involved in the Securities field, for example, he should be able to find the rules and penalties applicable to his activity in that field in those provisions of the law dealing with the regulation of Securities. Penalties beyond those provided for in the regulatory scheme should not be hidden away in a criminal code that is basically concerned with traditional crimes. If the purpose of the criminal law is to obtain compliance with the rules which society imposes, it is extremely important that notice of the rules—and of the penalties for violating them—be readily visible. The best place to spell out the penalties for violating our regulatory rules is in that place where the rules themselves appear. It is there that those subject to the rules would expect to find the information they need in order to conduct their activity in a proper manner.

If codification is desirable, then there should be codification of the regulatory rules rather than codification of the punishment applicable to a violation of such rules. The hazards involved in the present approach are clearly demonstrated in the conforming provisions of S. 1.

In many of the Statutes being amended by the conforming provisions a violation of the Statute is presently defined as a misdemeanor and a maximum fine is provided for a violation. In the conforming provisions of S. 1, many of these violations are now described as a "regulatory offense" with provision for a maximum fine. Today the violation of a whole host of rules relating to National Parks, carrier pigeons, fishing, wild life preserves, etc. is a misdemeanor punishable by a fine of a few hundred dollars. Under S. 1, a "regulatory offense" can be either a felony or a misdemeanor. Consequently, the same violation would, under the proposal, carry not only a fine but the possibility of imprisonment for felony. The effect of the change is, therefore, to upgrade the offense. Probably this is not intended by the draftsmen of S. 1, for certainly there has been no showing anywhere that the violation of these laws has become such a problem that the penalties need to be substantially increased in order to stop the violations. The intent in S. 1 was probably nothing more than a desire to fix the maximum "penalty" but by using the word "fine" in the conforming Section the fact that a regulatory offense can be a felony was completely overlooked. And, if all that is to be changed is the fine, why not make only that change? What possible useful purpose can be achieved by describing the offense as a "regulatory offense"? The cause of clarity—the normal result desired in codification—is certainly not served.

This whole problem is avoided, as is the Constitutional question, when the Congress deals with the regulatory scheme, as such, and fixes appropriate penalties in the regulatory Statute itself. The problems arise when we try to divorce our consideration of the regulatory scheme from the penalties which are truly part and parcel of the regulatory scheme.

We suggest that even if the only purpose of the regulatory offense concept is codification of existing law where criminal sanctions are now applied for the violation of a statute, regulation, rule or order, confusion results rather than clarity. In addition, by separating the clear statement of the penalty from the description of the offense, an objectionable "gamesmanship" feature is introduced which hides the full nature of the warning penalty from those affected by the law. This is not the legislative plan in a country where penalties are intended to prevent improper conduct rather than being a trap for the unwary.

Entirely apart from these problems there is also need for a clarification of what is intended by the language chosen. What is meant by the words "rule, regulation or order"? Issued by whom—Federal, State or local official—representative of the Executive, Legislative, or Judicial body—and at what level and by virtue of what authority? And—is it a preliminary, intermediate or final rule, regulation or order, whether or not subject to review?

What is meant by civil remedy? The language is broad enough to cover civil actions at common law between private persons, so that failure to comply with an order by a zoning commissioner to move a fence mislocated in accordance with a zoning ordinance—being an order—would now become a Federal crime punishable by fine or imprisonment, since there is civil remedy available to the landowner whose property adjoins the offending fence. It is doubtful that anyone contemplates that sort of expansion of the Federal criminal law, but the language could give this result.

But even if the language were satisfactorily changed and we are able to satisfy Constitutional requirements, we still have many serious philosophical problems.

At the outset, the concept places a very serious limitation upon the opportunity to challenge the legitimacy of the rule, regulation or order issued by the Federal agency.

Under the law today, there is a reasonable opportunity, in most cases (if one is willing to spend the money and time involved), to challenge the legitimacy or applicability of a rule, regulation or order. Consider, for example, a Trade Regulation rule issued by the Federal Trade Commission. Although those to be affected by the rule have a chance to be heard at the time the rule is proposed, the full meaning and applicability of the rule is rarely or fully appreciated until after it is adopted and there is a stated intention by the Commission to make it applicable to a particular party in a particular proceeding. In addition, it may be applied to individuals or companies not in existence—or not in a line of business that made them subject to it at the time it was promulgated.

The procedure today, if the Commission believes the rule has been violated, is to issue a Complaint, try the matter out under the Commission rules, and, if the Commission believes there has been a violation, issue an Order requiring compliance. Punishment is imposed only for a violation of the Order issued by the Commission *after* there has been a determination of the applicability of the rule.

In this situation, a party dealing with the Commission in connection with a charge that a Trade Regulation rule has been violated has a reasonable opportunity to contest the validity and applicability of the rule or to bargain fairly with the Commission Staff concerning a possible settlement of the proceeding, short of a full Hearing. Except for the fact that the Government has considerably more resources in time, money and staff, the parties are in a reasonably equal relationship with respect to settlement of the controversy and the essential element of fairness in our legal system is preserved.

If, however, the violation of the rule itself is a crime and a part of the cost of challenging the rule is the possibility that someone will go to jail or be disqualified from holding a similar position, or that a corporation will be fined and required to publish notice of its guilt, the existing balance is destroyed and considerably more "muscle" is added to the administrative agency in its enforcement policy—the pressure to settle on a basis demanded by the authorities, regardless of how outrageous the demand, becomes almost—if not completely—irresistible. The incentive to contest unreasonable demands by Government is reduced to a point of practical non-existence in all but a life and death situation.

I have had an experience in a Food and Drug situation where criminal sanctions were provided by the specific Statute involved—no problem regarding rules and regulations—but there was a question of whether the Statute was in fact applicable. If we manufactured drugs—it was; if we made only food—it was not. There was a very real question whether the product which was a raw material was in fact a food or drug or both. I was satisfied that the Statute did not cover our case. However, I was unwilling to risk an employe's freedom on the

absolute correctness of my interpretation of the law—for—if I was wrong, our employe could be sentenced to jail as a result of following my advice. This was in an area where violation of the Statute was directly punishable as a crime. To extend this principle, as is suggested by the proposed legislation, to all areas of regulated activity and to every rule, regulation or order, no matter by whom it is issued, would do a serious dis-service to the concept of a Government of laws—not men.

I am not suggesting that the administrative officials and employees of our Government are evil men—they are not. Far and away, the largest percentage of them—as is true of business executives and employes—are honorable men doing their best to carry out their responsibilities and authority in the best interest of the country—as they visualize that best interest. However, since there are different views of what is the "best interest", we should keep open the opportunity to establish which view is correct. The threat of criminal prosecution and conviction, if one is wrong, should not be legitimatized as a deterrent to the challenge of administrative supremacy.

What I am concerned with is destruction of the right of those affected by administrative rules, regulations, and orders to petition for redress from what they believe are improper rules, regulations or orders and their right to fairly challenge the applicability of such rules to them. The heavy penalties of criminal punishment, if one is wrong in his evaluation of his rights, effectively stifles any meaningful effort to have administrative decisions reviewed and determined, inside or outside the agency involved. This deterrent to review is even more effective than a positive provision denying review—for the latter at least offers a basis for attacking the validity of the Statute which denies review. To deny review by placing such a high price on the "right" to review is accomplishing indirectly what could not be done by the express language of the Statutes.

To move from what we have today in most areas to a system where it is a crime to unsuccessfully challenge any regulation, rule or order enforceable by civil remedies would seriously damage our Constitutional structure.

The Federal Trade Commission example that I have used is an easy illustration because we are dealing with an existing agency that can issue rules, regulations and orders within a presently understood framework. To a lesser degree, this is true of some of the other Federal agencies. Even in these situations, however, the proposed legislation offers the very real potential for substituting a rule of men for the rule of law. We open an opportunity for administrative blackmail at a time when our country is deeply concerned over the abuse and potential abuse of administrative authority.

This is not a problem for large industrial corporations alone. All organizations—including labor unions—and all persons are subject to the regulatory offense provisions of S. 1 and there are very, very few activities of anyone which are beyond the reach of some administrator or administrative agency with the power to issue rules, regulations or orders. The list of covered areas applicable to business organizations engaged in interstate commerce is very complete.

Today, almost every single act of every such organization is directly affected by rules, regulations or orders of some Federal agency. The hiring, advancement and pay of employees; the place where—and the tools used by employes at work; their relationship to each other—to the company and to unions; their pensions—in fact anything and everything to do with employes from the time they first apply for work to and after their death, dismissal or pension are covered by regulations of several Federal Government agencies. The product made by the corporation, starting with the protection of the concepts for the product or its method of manufacture, through the manufacture, advertising, sale and use of the product, and in some cases, what may or may not be manufactured, and if so—how, are covered by regulations of several Federal Government agencies. The effect of the manufacturing operation on close and distant neighbors is also closely regulated. The raising of capital, the use of capital, what can and cannot, as well as what must be said to stockholders, and when and in what form, are also extensively covered in Federal Government regulations. In fact, the very structure of business is subject to extensive regulation. These are not emergency short-term regulations, but those that continue as a normal part of our economic framework. There is literally no part of business activity that is not touched by the Federal Government. Everything—from the location and equipment in washrooms on through and including million dollar bond issues—are covered by some Government regulation.

We have come a long way in the United States in extending power to administrative officials of the Government. Before giving these officials the awesome power of the criminal law as a tool to enforce their rules, regulations and orders, it is well to reconsider the whole jurisprudencial concept of administrative law and ask ourselves whether the regulatory pattern isn't better served by leaving it in the context of the civil, rather than the criminal law.

The late Dean Roscoe Pound, in his Treatise on Jurisprudence, suggests the need for limitations on the power of administrative agencies. I urge your consideration of his thoughts which are attached as a supplement to this testimony. What he said is truer today than when he wrote it and bears directly on the need to assure and even encourage a practical right to review administrative decisions.

S. 1 moves—not in the direction of improving the fairness of the regulatory scheme—quite the opposite, for it forecloses the opportunity to apply checks to the power of administrators by increasing to a breaking point the cost of challenging either the authority or the applicability of administrative decisions.

We oppose very strongly the concept embodied in Section 2–8F6 of S. 1. Since this Section is substantially the same provision as appeared in Section 1006 of the Brown Report, and since my opposition to that provision was approved by the Council of the Corporation, Banking and Business Section of the American Bar Association, I am sure that my opposition to Section 2–8F6 has the approval of that Section of the American Bar Association.

S. 1400 does not provide for a "regulatory offense" as such.

Both S. 1, in Sections 2–8F5, 2–8F3 and 2–8F4, and S. 1400, in Sections 1761, 1765 and 1766, provide for new criminal legislation in certain aspects of the regulatory area. By proposing this action in a Statute adopting a new criminal code, rather than by amending the particular Statutes themselves, several problems, closely related to those already discussed, are presented. I am now involved in testimony that has not yet been approved by the American Bar Association Section and am therefore offering my own views only.

Why—out of all the areas of regulated activity these particular ones were selected is not clear. There is nothing in the legislation, the press releases relating to it, the articles written about it or the comments of the Brown Commission Report which give any clue. We suggest that these hearings on the kind of legislation presently before the Subcommittee are neither the time or place where the regulatory scheme in the particular areas involved should be changed—if in fact there is need for change.

Section 2–8F5 of S. 1 applies the regulatory offense concept to some aspects of the Securities laws, including the regulations, rules and orders issued in connection with the registration requirements of the law. Section 1761 of S. 1400 goes much farther and covers the entire Securities field and all rules, regulations and orders in that field.

The Constitutional problems earlier discussed, where a penal offense is established independent of the regulatory Statute, are also present in connection with these provisions. The Congress is not here concerned with Securities regulations or with delegating authority to fill in the details—it is concerned with a criminal code. In addition, the regulatory offense concept is particularly troublesome in the Securities field because of the "confused" and changing nature of the law as interpreted by the Courts.

Mr. G. Bradford Cook, past Chairman of the SEC, focused attention on this problem in a speech entitled "The Directors Dilemma" on April 6 of this year:

"I know that many of you do not have the opportunity to peruse, in those rare moments of leisure, the legislative history of the Securities Exchange Act of 1934. But of all the statements made in Congress at that time, one seems particularly appropriate here. In complaining about the complexity of the Bill which ultimately became the Securities Exchange Act, a cynical or perhaps realistic Congressman suggested that one class of persons would surely benefit from all of the Bill's intricacies. He noted that:

" 'Its provisions are unclear, so much so that members of the committee who have been sitting for weeks working over this Bill line by line are not agreed as to precisely what it means. One thing is certain, if this measure is enacted, following upon many others with perplexing obscurities, there is one profession at least which will not suffer from unemployment, and that is the profession of the lawyer.'

"While, as a lawyer, I am, of course, sympathetic to anything which generates business for lawyers, I must confess that at the Commission we have been work-

ing on a different approach. This is a regulatory approach by which the Commission, through the issuance of position papers interpreting its own rules, seeks to define more clearly the responsibilities of those in the corporations. Part of the problem is that the progress of case law, in as sensitive an area as fraud, has not been entirely to our satisfaction. The really basic issues simply have not found their way into decided cases, and the so-called 'big' cases usually manage to underestimate certain pragmatic, non-legal problems faced by industry—problems that are easy to ignore in the face of the truly egregious facts those cases usually present. There is just no getting around the fact that hard cases can, and often do, make hard law. I think it is unfortunate that there is confusion and concern of a magnitude that can deprive some companies of the talent, the expertise and the independent view that outside directors can bring.

"The Commission feels a sense of obligation to the courts, to public investors, to the Securities bar and to those persons whose activities may place them within the structures of the Federal Securities laws, to enunciate the broad standards these Acts impose. I believe the players have a right to know what the rules of the game are."

The Securities and Exchange Commission is interpreting the law by the issuance of guidelines as well as by rules and regulations. Of all of the Federal regulatory agencies, the SEC has to date at least made probably the best effort of any agency to be helpful in letting those affected by its interpretations know what it believes the rules of the game are, and by permitting those affected to assist in making those rules.

In the Securities field, even the SEC sees a need for constant interpretation and has difficulty understanding and keeping up with Court interpretations.

In the context of this situation where the law is evolving and developing, it is a strange concept at best to attach a criminal sanction to a failure to comply with a rule, regulation or order issued pursuant to a law still undergoing interpretation by the Courts. It would be far more consistent with our traditions of justice to first settle the propriety of the rule, regulation or order by some intermediate proceeding before attaching a criminal penalty to the violation of such rule, regulation or order.

S. 1400, in Section 1761, makes a criminal offense of any conduct contrary to any of the provisions of any of the laws relating to securities, or any rule, regulation or order issued pursuant to most of them.

I strongly oppose the provisions of both S. 1 and S. 1400 in the Securities field, not only for the reasons mentioned earlier but also because I seriously question the need for a special provision in the criminal code in this area. The existing regulatory Statutes speak for themselves and carry their own penalties as a part of the regulatory scheme. Fair warning of the laws' requirements and penalties are contained in the existing law in a place where one affected can find them with relative ease. Duplication of penalties in the Securities Code as well as the Criminal Code serves no useful purpose and can create confusion.

To the extent that new criminal provisions are introduced we know of no circumstance that has created the need. In fact, the comments in the Brown Commission Report to Section 1772 of that Report indicate the opinion of the Commissioners that the criminal sanctions presently provided are completely adequate to insure compliance.

We suggest that the Securities and Exchange Commission's approach is the right one and that they and those they regulate should be free to work within a cooperative framework. The opportunity to impose criminal sanctions on those who disagree with an interpretation is as unhealthy for the Commission as it is for those who are regulated and disagree at their peril. The long-standing spirit of cooperation between the regulator and regulated in this area of the law should not be discouraged by legislation such as Section 2–8F5 of S. 1, or Section 1761 of S. 1400.

S. 1 and S. 1400 follow the same pattern provided for Securities in other fields that also are already covered rather completely under existing law. I believe that if the law is to be changed, the existing Statutes should be amended—only confusion can result when there is an enlargement or modification of concept through new criminal provisions without making the change consistent in present laws. If we are amending our laws we should do so directly, not by adding a new and different law covering substantially the same area.

SECTION 2–8F3—ENVIRONMENT SPOLIATION

There are few areas of public concern that have received more attention than protection of the environment. Various committees of the Congress and the Environmental Protection Agency have been concerned with a wide variety of proposals.

There is already a great deal of legislation on the books covering this area rather completely.

We suggest that the place to consider and pass additional legislation directed to the protection of the environment, whether it relates to requirements of law or penalties for violating the law, is before the Committees of the Congress specifically concerned with this subject. We do not believe that a hearing directed to the adoption of a criminal code offers the best forum for the proper consideration of legislation on this subject. The major issue is how best to protect the environment consistent with other national goals. This is what the other Committees are concerned with. They can also be expected to provide suitable penalties in the laws they recommend. To focus on penalties as is the case here, is, we believe, to put the cart before the horse.

SECTION 2–8F4—UNFAIR COMMERCIAL PRACTICES

Here again the proposal deals in the criminal area with matters already the subject of established law and better dealt with in the consideration of legislation falling under the jurisdiction of other Committees of the Congress concerned with the subject matter. Most, if not all, of what is covered is also subject to the provisions of Section 5 of the Federal Trade Commission Act.

We suggest that no useful purpose is served by the special treatment of these subjects in the Criminal Code and that mischief and confusion can result from the duplication.

In S. 1400, Sections 1765 "Fraud in a Regulated Industry", and 1766 "Adulterated Food Product Violations", are subject to the same comments.

As indicated earlier, there is no indication from any source why of all the wide variety of possible subjects those chosen for special criminal treatment are those in Sections 2–8F3, 2–8F4, and 2–8F5 of S. 1, and Sections 1765 and 1766 of S. 1400. We are sure that there are many other areas of Governmental interest where the same type of treatment would be equally applicable. But all of these are areas where the criminal sanction should be considered as part and parcel of the general legislation in each special area. The consideration of punishment should not be separated from a consideration of the requirements of the law itself. The time and place to consider criminal penalties is when and where the *subject matter* of the legislation is considered, be it Securities, Environment, Commercial Practices, Food and Drug, or what not. At that time and place there can be full hearings and considerations of what the requirements of the law should be—then, when that is decided, the punishment can be tailor-made by the same group to fit the requirements to insure compliance. The criminal law with which this Subcommittee is concerned is the device by which other laws are enforced—it is not and should not be an end in itself.

For the reasons indicated, I urge the rejection of the concepts provided for in Sections 2–8F3, 2–8F4 and 2–8F5 of S. 1, and Sections 1765 and 1766 of S. 1400.

JURISPRUDENCE: THE NATURE OF LAW

(By Roscoe Pound)

(1) It is not uncommon for administrative agencies to give notice or make complaint on one point or ground and, after a hearing in which the respondent directs himself to that point, to make an order upon another as to which the respondent was not heard.[98]

(2) It is a characteristic tendency of present-day administrative agencies to use as a ground of decision some idea of policy not to be found in the statute or general law nor in any formulated rule of the agency and to reach its result on some extra-legal basis for the particular case, which it does not hold itself

[98] See Greene v. Secretary of State for Home Affairs, [1942] A.C. 284, 297–299.

bound to follow in the next case [97] but justifies on some ground or policy nowhere established or declared.[98]

(3) There is a tendency to make determinations and orders without basis in the facts or in evidence of logical probative force,[99] or on the basis of matters not before the tribunal or on secret reports or evidence not produced at the hearing,[100] or after private consultations with one side.[101] The result is to make the statutory requirement of a hearing a mere form.[102]

(4) Without any necessary intention of unfairness, administrative agencies have developed a characteristic unfairness in their operation. Zeal for carrying out the special function assigned to them leads them to look at their special task out of proportion and to consider individual rights, constitutional guarantees, and the law of the land as negligible. This is noticeable also in the conduct of government litigation.[103] It was marked in the administration of the National Prohibition Act [104] and has been specially marked in recent administrative proceedings.[105]

(5) There is a persistent tendency to decide without a hearing or without hearing a party adversely affected,[106] and so to make decision on the basis of preformed opinions and prejudices.[107] A like tendency has appeared in courts held by single judges with an informally "socialized" procedure.[108] But in such cases the tendency is promptly repressed by judicial review.

(6) There is a general tendency in administrative agencies to exercise their deciding powers by deputies or subordinates, so that decisions are made not by

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[97] Armour & Co. of Delaware v. Brown, 137 F. 2d 233, 240–241 (Em. App. 1943).

[98] Securities and Exchange Commission v. Chenery Corp., 318 U.S. 80, 92–93, 63 S. Ct. 454, 461–462, 87 L. Ed. 626 (1943); Southern Steamship Co. v. National Labor Relations Board, 316 U.S. 31, 62 S. Ct. 886, 86 L. Ed. 1246 (1942); Helvering v. Credit Alliance Co., 316 U.S. 107, 113, 62 S. Ct. 989, 992, 86 L. Ed. 1307 (1941); Durkee Famous Foods v. Harrison, 136 F. 2d 303, 307 (C.C.A. 7th, 1943); Hollyhill Fruit Products v. Addison, 136 F. 2d 323, 325 (C.C.A. 5th, 1943); Walling v. McCracken County Peach Growers' Ass'n, 50 F. Supp. 900, 905 (D.C. Ky. 1943); Kandalin v. Social Security Board, 136 F. 2d 327, 328–329, 147 A.L.R. 596 (C.C.A. 2d, 1943); Doran v. Eisenberg, 30 F. 2d 503 (C.C.A. 3d, 1929); Motsinger v. Perryman, 218 N.C. 15, 21, 9 S.E. 2d 511, 515 (1940); In re Atchison, T. & S.F.R. Co.'s Protest, 44 N.M. 608, 613, 107 P. 2d 123, 126 (1940); Puhl v. Pennsylvania Public Utilities Commission, 139 Pa. Super. 152, 158, 11 A. 2d 508, 510 (1939).

[99] Taylor v. Cornett Lewis Coal Co., 281 Ky. 366, 368, 136 S.W. 2d 21 (1940), and cases discussed in Pound, Administrative Law (1942) 68–73. See also Oklahoma Transp. Co. v. National Labor Relations Board, 136 F. 2d 42, 44 (C.C.A. 5th, 1943); J. B. Lippincott Co. v. Federal Trade Commission, 137 F. 2d 490, 494 (C.C.A. 3d, 1943); New England Dairies v. Wickard, 51 F. Supp. 444, 447–448 (D.C. Vt. 1943).

[100] Cardozo, J., in United States v. Chicago, M. & St. P. R. Co., 294 U.S. 499, 510, 55 S. Ct. 462, 467, 79 L. Ed. 1023 (1935); Morgan v. United States, 304 U.S. 1, 14–15, 17, 19–20, 58 S. Ct. 773, 776–777, 82 L. Ed. 1129 (1938); 9 Wigmore, Evidence (3 ed. 1940) § 2569; and cases from state courts cited in Pound, Administrative Law (1942) 69–72.

[101] See Pound, Administrative Law (1942) 69–71 and cases cited.

[102] "Findings cannot be said to have been fairly reached unless material evidence which might impeach, as well as that which will support, its findings, is heard and weighed." Jackson, J., in National Labor Relations Board v. Indiana & M. Electric Co., 318 U.S. 9, 28, 63 S. Ct. 394, 405, 87 L. Ed. 579 (1942). Monographs Prepared for Attorney General's Committee on Administration Procedure, pt. 6, pp. 26–27; pt. 7, p. 13; pt. 8, p. 23; pt. 12, p. 26.

[103] W. D. Mitchell in Massachusetts Bar Ass'n publication entitled The Supreme Judicial Court of Massachusetts, 1692–1942 (1944) 67–68.

[104] National Commission on Law Observance and Enforcement, Report on the Enforcement of the Prohibition Laws of the United States, 81–82 (1931).

[105] House Rep. no. 3109, 76th Congress, 3d Session, pt. 1, p. 138 (1941); Consolidated Edison Co. v. National Labor Relations Board, 305 U.S. 197, 59 S. Ct. 206, 83 L. Ed. 126 (1938); National Labor Relations Board v. Washington Dehydrated Foods Co., 118 F. 2d 980 (C.C.A. 9th, 1941); Stephens, J., in Bethlehem Steel Co. v. National Labor Relations Board, 74 App. D.C. 52, 120 F. 2d 641 (1941); National Labor Relations Board v. Phelps, 136 F. 2d 562, 566–567 (C.C.A. 5th 1943). The board involved in these cases attained a bad eminence for unfairness. But it was not unique in this respect. See San Francisco Bar, December, 1943, Committee Report on the Office of Administrative Hearings of the Office of Price Administration, 9–12; Report of the Attorney General's Committee on Administrative Procedure (1941) 62–63, 124–125.

[106] Roche, L. J., in Errington v. Minister of Health, [1935] 1 K.B. 249, 280–281; Rex v. Housing Appeal Tribunal, [1920] 3 K.B. 334, 342, 344; Cooper v. Wilson, [1937] 2 K.B. 309, 345; In re Evans, 52 New South Wales Weekly Notes, 1 (1934); Lamar, J., in Interstate Commerce Commission v. Louisville & N. R. Co., 227 U.S. 88, 91–94, 33 S. Ct. 185, 186–188, 57 L. Ed. 431 (1913); Tri-State Broadcasting Co. v. Federal Communications Commission, 68 App. D.C. 292, 96 F. 2d 564, 566 (1938). See cases from state courts cited in Pound, Administrative Law (1942) 68.

[107] See Scott, L. J., in Cooper v. Wilson, [1937] 2 K.B. 309, 345; Morgan v. United States, 304 U.S. 1, 22, 58 S. Ct. 773, 778, 82 L. Ed. 1129 (1938).

[108] Bestel v. Bestel, 153 Or. 100, 107–109, 44 P. 2d 1078 (1936)—Domestic Relations Court; Interdiction of Scurto, 195 La. 747, 750, 751, 197 So. 417–418 (1940)—guardianship proceedings.

responsible heads but by subordinates sometimes of no special competence. The chairman of one very important board told a lawyers' institute not long since: "The Board members themselves cannot expect to read the records. In making its decisions the Board, therefore, avails itself of assistants. . . . The review attorneys analyze the evidence, inform the Board of the contentions of all the parties and the testimony relating thereto, and, after decision by the Board, make initial drafts of the Board's findings and order." [109] Thus the decision is practically the work of the review attorneys who determine what to leave out of their statement, how to state what they put in, and thus to make such a case as to lead to their individual conclusion. The guarantee said to be involved in high official position is thus illusory.[110]

(7) Perhaps the worst feature of administrative procedure, as it has developed since 1900, results from combining or not differentiating the receiving of complaints, investigation of them, bringing and conducting a prosecution upon them, advocacy before the agency itself by its own subordinates in the course of the prosecution, judgment, and in some agencies in effect execution of the judgment. Thus the adjudication becomes one by, or with the advice and assistance of, those who investigated, prosecuted, and were advocates for the prosecution. Such things are in clear derogation of the fundamental maxim of justice that no one is to be judge in his own case; no one is to be both accuser and judge.[111] A generation ago the courts had held uniformly that if one of the members of an administrative body made or preferred a charge his mere sitting at the hearing of the charge, although he did not participate in decision would vitiate an order.[112] A regime in which complaint is made to an administrative agency which takes it up, investigates it, orders a hearing before itself on the complaint it has made its own, at the hearing advocates it by its own counsel before one of its own staff as trial examiner or hearing commissioner, and renders a decision and makes an order thereon depriving an individual of some valuable right, involves an emotional interest in the result which precludes objective and impartial action as surely as the pecuniary interest which has always been held to disqualify.[113] The bad features of this regime are brought out in the monographs prepared for the Attorney General's Committee on Administrative Procedure [114] and are recognized in the report of that Committee.[115] In some administrative proceedings this combination of roles has led to procedures little short of scandalous.[116]

STATEMENT OF CHARLES S. MADDOCK, LEGAL DEPARTMENT, HERCULES, INC.

Mr. Maddock. Thank you, Senator.

I plan to take about 20 minutes, and I hope, if there are questions as I go along, you will feel free to interrupt me.

Senator Hruska. Good.

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[109] 51 Rep. Va. State Bar Ass'n (1939) 414.

[110] This was strikingly illustrated in England in the action of the Home Office in the Beck case. Unlimited power in a departmental administrative subordinate proved to be all that was involved. The actual determinations were made by an Assistant Under Secretary whose minutes were accepted and acted on. Any thorough investigation, without a preconceived judgment of the matter, would have disclosed the truth. Watson Trial of Adolph Beck (1924), 43, 44, 57–60, 62. See also Landis, Deportation and Expulsion of Aliens (1931) 5 Encyclopedia of the Social Sciences, 95, 99. Decision on the basis of abstracts of the record not accessible to the parties would not be tolerated in a court.

[111] Bonham's Case, 8 Co. 114, 118 (1605); Day v. Savadge, Hob. 212, 217–218 (1615); City of London v. Wood, 12 Mod. 669, 687–688 (1701); Wilcox v. Supreme Council Royal Arcanum, 210 N.Y. 370, 104 N.E. 624, 52 L.R.A., N.S., 806 (1914); People ex rel. Pond v. Board of Trustees of Village of Saratoga Springs, 4 App. Div. 399, 401–403, 39 N.Y.S. 607 (1896); People ex rel. Winspear v. Kreinheder, 197 App. Div. 887, 889, 189 N.Y.S. 767 (1921); State v. Board of Education of City of Seattle, 19 Wash. 8, 17–18, 52 P. 317, 320–321, 40 L.R.A. 317 (1898). See also Employee's Benefit Ass'n of Calumet & Ariz. Mining Co. v. Johns, 30 Ariz. 609, 619, 249 P. 764, 767, 51 A.L.R. 1414 (1926); Supreme Council of Catholic Benevolent Legion v. Grove, 176 Ind. 356, 363, 96 N.E. 159, 161, 36 L.R.A., N.S., 913 (1911).

[112] State v. Crane, 36 N.J.L. 394, 404 (1873); Queen v. Justices of Great Yarmouth, 8 Q.B.D. 525, 528 (1882); Reid v. Medical Society, 156 N.Y.S. 780, 790–791 (Sup. 1915); Rex v. Hendon District Council, [1933] 2 K.B. 696; Kuberski v. Haussermann, 113 N.J.L. 162, 170, 172 A. 594 (1934); Narragansett Racing Ass'n v. Kiernan, 59 R.I. 90, 105, 112–115, 194 A. 692, 698, 702–703 (1937).

[113] See particularly Report of Committee on Ministers' Powers (1932) 76–79.

[114] E.g. Monographs, pt. 1, p. 16; pt. 3, p. 138.

[115] Report of the Attorney General's Committee on Administrative Procedure (1941) 207–210.

[116] House Rep. No. 3109, 76th Congress, 3d Session, pt. 1, p. 138 (1941).

Mr. Maddock. I should like, first of all, to acknowledge my appreciation of the work that the subcommittee and the staff have carried on in this very important area.

Respect for law and compliance with law are, I believe, directly related to the depth of understanding of the law by those who are affected by its provisions. When law is made more understandable in its purpose and by the clarity of its expression, which is the goal which this committee in the criminal area seeks to accomplish—we can expect the public to react in a constructive manner. As a result, our cherished hope of freedom under law moves ever closer to reality.

As a practicing lawyer with a deep love for our profession, I am grateful to the committee and the staff for the intelligence and the devotion they have brought to a very difficult task. And I am especially appreciative of the hard unheralded work that is essential to the progress that has already been made and which will be made in the months ahead.

I hope, sincerely, that I may be of some help in the accomplishment of this task. The goal you seek is critical to the preservation of our system of freedom under law, and I hope sincerely that the burdens of your work and the recrimination that may come along the way will not alter your devotion to accomplishing the task you have undertaken. All the citizens of our country and the legal profession, in particular, are deeply indebted to you, and I am pleased to acknowledge my personal debt.

On March 22, 1972, I had the pleasure of testifying before this subcommittee as a representative of the Corporation, Banking and Business Law Section of the American Bar Association. At that time, this committee was concerned with recommendations of the National Commission on Reform of Federal Criminal Laws, the Brown Commission report.

The two bills under present consideration, S. 1 and S. 1400, grew out of that report.

Because of the limitations of time, I have not been able to clear my remarks today with the council of the Corporation, Banking and Business Law section of the ABA. And accordingly, to the extent that my remarks depart from what I said in my earlier testimony or cover different areas, they will have to be considered as my own.

I am completely familiar with the testimony of Mark Crane, for himself and on behalf of the Antitrust Law Section of the American Bar Association. I—and in this case I am sure I speak for the members of the Corporation, Banking and Business law section on this point—am in agreement with all points made by Mr. Crane.

And at this stage, I would like to correct the statement that appears in my formal statement. The formal statement excepts from my agreement with the points made by Mr. Crane the comments and the position he takes with respect to punishment for criminal activity, as applied to either individuals or organizations. I would like the committee, please, to remove this exception and indicate that I register my assent to all of Mr. Crane's comments.

We are very pleased to find that many of the objections that our section had to the final report of the Brown Commission have been answered in comparable provisions of Senate bill No. 1. Accordingly,

if there is to be legislation in the areas involved, we would prefer the following sections of S. 1: 1–2A7, Organization Criminal Liability; 1–2A8, Personal Criminal Liability for Conduct on Behalf of Organization; 1–1A4, the Definition of Organization; and 2–7F6, Interference with Activities of Employees and Employers.

The companion sections of S. 1400, on the other hand, repeat or paraphrase the provisions of the Brown Commission report, and the objections we presented to that report at the time of our earlier testimony still apply to those provisions of S. 1400.

The other areas of concern at the time of our earlier testimony are still applicable, and we take exception to those provisions of S. 1 and S. 1400 which carry forward the concepts to which we took exception in the Brown report.

In the area of punishment for criminal activity, we continue to believe that the notice of guilt and disqualification from office provisions are unnecessarily harsh and retrogressive. These provisions are found in sections 1–4A1 and 1–4A3 of S. 1 and in sections 2004, 2001, and 2103 of S. 1400.

Our objections to these concepts are fully set out in our previous testimony at pages 1639 and 1640 of the subcommittee record, and we would appreciate the subcommittee's kindness in considering those comments as being repeated here.

Far and away our greatest concern is directed to the proposal for the establishment of regulatory offenses described as such in section 2–8F6 of S. 1.

In a recent edition of the American Bar Association Journal, the chairman pointed to the very real advantages of the present proposals in unifying and simplifying by codification the more than 80 provisions of present law regarding theft into only a few, and the same treatment with respect to several other parts of the present criminal law.

I agree completely with this approach. Anything that makes the law more understandable is a real move in the right direction. If, however, the suggestion regarding regulatory offenses is viewed as such a move, I do not believe that the principle applies.

In the first place, more than 80 provisions of present law regarding theft are being eliminated and replaced by the new provisions. In the regulatory area, however, nothing is being eliminated and new provisions are being added. This moves in the opposite direction.

Secondly, the statutes, rules, regulations and orders in the regulatory area do not cover the same, but completely different, areas of public interest, whereas the laws regarding theft all fit the same general area. I think it is clear, therefore, that something more than codification is necessary to justify the regulatory offense concept.

My first problem concerning the concept is with how it will be implemented. If I am right in the suggestion made in my formal statement, that constitutional considerations require that the authority to impose penalties must be granted in the same statute which authorizes the issuance of regulations, then, in order to implement the regulatory concept, it will be necessary to amend each of the basic laws in each of the effected regulatory areas.

Mr. Blakey. Mr. Maddock, is that not the tack that has been taken in conforming amendments in S. 1?

Mr. Maddock. Part of it. But that is one of the problems. As explained in my formal statement, I believe that unintended results regarding penalties have been introduced in the conforming legislation. But my objections go beyond the problems associated with possible errors in drafting the conforming amendments. What I am talking about here is the constitutional requirement that the penalty be stated in the law that authorizes the issuance of regulations.

Mr. Blakey. But could the penalty not be stated by cross-reference?

Mr. Maddock. It could be repeated.

Mr. Blakey. The thought behind the regulatory provision was to standardize kinds of penalties found in the "regulatory offenses," and since we would have a standard list, it could be incorporated by reference from the regulatory statutes back to the common source. And as long as the common source was made clear, that need that the Supreme Court has indicated that Congress must specifically delegate the criminal statute and delegate the contours of the criminal statutes would be met.

And insofar as S. 1 specifically incorporates the regulatory offense on the face through the conforming amendments of a regulatory statute, I wonder if the constitutional objection that you raise is not met.

Mr. Maddock. Well, if, in the conforming amendments, the regulatory statute itself is amended, you have no constitutional problem. But I say you have done a useless act. If the regulatory act itself provides for the criminal penalty, then why repeat it?

Mr. Blakey. The regulatory act, in those situations, provides a general misdemeanor for any violation of this statute. For example, 505 of the Communications Act makes it a misdemeanor to commit any violation of this act. And any violation could be all of the violations associated with the communications industry, as they are regulated by specific provisions of the statute, or as they are regulated by delegation by the specific rulemaking authority.

And what this statute would purport to do—the regulatory statute would purport to do—is to set up some gradation, some scheme, of distinguishing serious from less serious, in order that the underlying regulatory statute could incorporate it and distinctions could be made, for example, between a simple violation of an FCC regulation and a very flagrant violation, and some gradation made accordingly. Thus, it would be incorporated by reference.

Mr. Maddock. To follow your analogy in the communications statute, my suggestion would be that if there is to be a change in penalties as provided in the laws related to communications, that should be cared for in the regulatory statute itself by that committee of the Congress that deals with communications and is concerned with the need for regulation and the relative importance of seeing to the enforcement of various aspects of the regulations in the communications field.

Mr. Blakey. The argument, fascinating enough, was made precisely to the contrary—that those committees who deal primarily with trade and commerce, money and banking, were experts in trade and com-

merce, and money and banking, and that the use of criminal sanctions is something that is a special expertise of the Judiciary Committee.

I might indicate that this argument was not made by a member of the Judiciary Committee, but it was made by the Brown Commission, and it felt that criminal sanctions should be examined in the context of the criminal code and the special expertise of the criminal law committees, as opposed to the regulatory committees, should be brought to bear on the sanctions in the area.

Mr. MADDOCK. I can understand that in the traditional criminal area. But when it is determined that a particular aspect of business activity should be regulated, the regulation is not for the purpose of imposing criminal penalties but is intended to accomplish some economic result—at least in most cases. And those who are knowledgeable in the area of the economic result to be accomplished and the practical facts incident to the area of regulation, I believe, are those who are best able to determine what kind of penalties—civil, criminal, what-not—would best carry out or effectuate the purpose of the regulation.

Senator HRUSKA. Would the witness suspend?

A rollcall has been ordered. I will get back as promptly as possible.

[A brief recess was taken.]

Senator HRUSKA. You may resume.

Mr. MADDOCK. Thank you, Senator.

I think that I may, perhaps, pick up the thought that I was discussing with Mr. Blakey by saying that, entirely apart from the constitutional question, which is particularly difficult, if the penal regulation is one enforced by civil remedies rather than criminal sanctions, there are other problems that I think should be considered in this area. The statutes which make certain actions criminal—our criminal law—describe the proscribed conduct, label it as criminal and fix penalties, all this is generally done within a single statutory provision.

As indicated in Senator Hruska's article, theft should be treated as theft in as simple and easy to understand language as possible. If someone wants to know about theft, he should be able to find what he needs to know easily and in one place. Since he is concerned with a crime, he will find it in the criminal code.

However, when he is interested in the regulation of securities, he should be able to find what he is looking for in those provisions of the statutes which regulate securities. There he should be able to learn the nature of the law and the penalties associated with violations of the law. He may also have to consult the Code of Federal Regulations to find the full detail of the regulatory scheme and possibly one or more of the published legal services in order to find references to case law.

But if, as proposed, we also require that he look to the criminal laws, we are complicating an already difficult problem, not simplifying it. Nor are we aiding conformity of interpretation, another of the goals sought by the committee.

These same principles apply not just to the securities field but to every single area covered in our regulatory scheme. As indicated earlier, we believe that if existing statutes in the regulatory area already provide criminal sanctions for their violation, no useful purpose is served by duplicating the fact and applicability of such sanctions in additional new legislation, even though that new legislation is part of the criminal code.

If the purpose is to add new or additional penalties, then the alert should be sounded in the regulatory provisions, and the regulatory statutes should be amended. Penalties beyond those, or in addition to those, provided for in the regulatory scheme should not be hidden away in a criminal code that is basically concerned with traditional crimes.

If the purpose of the criminal law is to obtain compliance with the rules which society imposes, it is extremely important that notice of the rules and of the penalties for violating them be readily visible.

As a parenthetical note related to the fact of reconciling these regulations—although we have published services in all regulated areas we do not have in our library any service covering the criminal code, as distinct——

Mr. BLAKEY. But you would, realistically, if they were separated out. CCH service, I suppose, would put the clause for the regulatory offense section in, and then you would get the interpretation of it by CCH as you would otherwise.

And since you are a practicing lawyer dealing with the Corporation that has occasion to know these regulatory statutes, the fact that it was located in the criminal code would not make any more difference to you than if it is located in any of the other provisions, would it?

Mr. MADDOCK. I see no useful purpose in putting it in two places, and I think you must put it in two places, because of the constitutional problem.

Mr. BLAKEY. Let me suggest this to you. This is true; if most regulatory statutes are infrequently enforced criminally, then their scope and their impact is necessarily unknown to the practitioners. If we had a standardized clause that was—while it, under any one particular statute, was infrequently employed, it, considered in its totality, was frequently employed and the contours of it were worked out carefully on a case-by-case basis, would the practitioner not having access to the whole of the jurisprudential material be better off by having that body of material available to him than he would having the discrete provision only infrequently employed?

Senator HRUSKA. Will the witness suspend once more?

[A brief recess was taken.]

Senator HRUSKA. The committee will resume. We will try again.

Mr. MADDOCK. Thank you, Senator.

I think the way to answer these last questions is perhaps—I do not think there would be any benefit at all to the practicing bar from the suggestions. It could be, as I mentioned during the recess, that perhaps a new generation of people brought up under a new system might learn to accommodate to that kind of a situation. But I think the people that are in practice today would be at a severe handicap to switch from the concept we have now, where you find the full measure of your regulatory scheme in the regulatory statute. I think they would be completely confused for a long period of time by this kind of a proposal.

Senator HRUSKA. Would Counsel yield?

I think the matter of the bar and even the bench adjusting itself to a new order obtained of this nature—maybe it is of interest and we should think about it. But the greater consideration, in my judgment,

would be about compliance with constitutional provisions. And, of course, that is a corollary, is it not?

I remember following *Dewey* v. *Compton*, was it, way back in the early 1930's? We had an awful time getting used to the new rules of civil procedure in the Federal court, but we survived.

Mr. MADDOCK. We had to.

But this is correct. My main objection, is the constitutional one, which I think requires the amendment of the existing statutes. And having to do that, why create a new statute in addition to the amendment.

My second objection is the one of fair warning, which is that people look for penalties as well as the regulations in the part of the statutes that provides for regulation. If we are adding new law, I think that should not be done in a part of the criminal code dealing with penalties, rather it should be done as an amendment to the existing statute so there is fair warning that the penalties are, in fact, being increased in these particular areas.

Finally, and of major importance, the proposal offers a great opportunity for administrative over-reaching in many areas covered by our regulatory scheme, and at a time when we are deeply concerned with the expansion of executive authority. Under the law today there is a reasonable opportunity, in most cases, to challenge the legitimacy or applicability of a rule, regulation or order.

Consider, for example, a trade regulation rule issued by the Federal Trade Commission. The procedure today, if the Commission believes the rule has been violated it will issue a complaint, try the matter out under the Commission rules, and if the Commission believes there has been a violation, it will issue an order requiring compliance. Punishment is imposed only for a violation of the order which is issued by the Commission after there has been a determination of the applicability of the rule.

In this situation, a party dealing with the Commission, in connection with the charge that a trade regulation rule has been violated, has a reasonable opportunity to contest the validity and the applicability of the rule, or to bargain fairly with the Commission staff concerning a possible settlement of the proceedings, short of a full hearing. The parties are in a reasonably equal relationship with respect to settlement of the controversy, and the essential element of fairness in our legal system is preserved.

If, however, the violation of the rule itself is a crime and part of the cost of challenging the rule is the possibility that someone will go to jail, the existing balance is destroyed and considerably more muscle is added to the administrative agency and its enforcement policy. The pressure to settle on a basis demanded by the authorities, regardless of how outrageous the demand, becomes almost if not completely irresistible.

What I am concerned with is the practical destruction of the right of those affected by administrative rules, regulations, and orders to petition for redress from what they believe are improper rules and their right to fairly challenge the applicability of such rules to them. The heavy penalties of criminal punishment, if one is wrong in his evaluation of his rights, effectively stifles any meaningful effort to have administrative decisions reviewed and determined inside or out-

side the agency involved. This deterrent to review is even more effective than a positive provision denying review.

To move from what we have today in most areas to a system where it is a crime to unsuccessfully challenge any regulation, rule, or order, now enforceable even by civil remedies, will seriously damage, I believe, our constitutional structure. The proposed legislation offers a very real potential for substituting a rule of men for a rule of law. This is not a problem only for large industrial corporations. All organizations, including labor unions, and all persons are subject to the regulatory offense provisions of S. 1, and there are very, very few activities of anyone which are beyond the reach of some administrator or some administrative agency with the power to issue rules, regulations, or orders.

A suggestion of the breadth of the regulated area is indicated in my statement on pages 18 and 19. And as a strictly personal and parenthetical note, during the more than 30 years I have been practicing law in a corporate legal department, I have seen the time devoted to advice regarding regulatory matters move from about 5 percent of the law department time to over 50 percent, and the law department triple in size. This is bad enough for a large industrial corporation, but it is a very large burden for small business. To add the burden of the criminal law in this situation could have very serious adverse effects not only on the economy but also on the basic respect for law as we know it today.

We oppose very strongly the concept embodied in section 2–8F6 of S. 1. Since this section is substantially the same provision as appeared in section 1006 of the Brown report, and since my opposition to that provision was approved by the Council of the Corporation, Banking and Business Law section of the American Bar Association, I believe that my testimony in the regulatory offense area also has the approval of the Council.

My concern for clarity, uniformity of interpretation, and fair warning to those affected are also the base for my objections to the other provisions of S. 1 and several provisions of S. 1400, which are concerned with conduct in other business-related activities.

Both S. 1 and S. 1400 provide new criminal legislation in certain aspects of the regulatory area; I am now involved in testimony where I am speaking for myself, because these remarks have not been cleared with the ABA.

Section 2–8F5 of S. 1 applies the regulatory offense concept to some aspects of the securities laws. Section 1761 of S. 1400 goes much further and covers the entire securities field and all the rules, regulations, and orders in that field. These two proposals add additional legislation in the criminal code in an area already fully and completely covered under existing law. And the existing law already includes criminal penalties. So instead of simplifying or consolidating numerous offenses into one provision of the law, the proposal goes in the absolute opposite direction.

To the extent that these new proposals are the same as present law, nothing is accomplished but duplication. To the extent they are different, we have confusion. Neither result is desirable. The end result of the proposals can only be confusion in an area which is recognized by all practitioners in this field, including the Securities Exchange

Commission, as already being unduly confused. This is the exact opposite of the goal which this committee hopes to achieve.

I am at a complete loss to understand what possible value is gained for anyone by these proposals. Perhaps if I could be enlightened on this score, I would be in a position to make a more constructive comment.

S. 1 and S. 1400 follow the same pattern in other fields that also are already covered rather completely under existing law. As a basic principle, I believe that if the law is to be changed, the existing statutes should be amended. Only confusion can result when there is an enlargement or modification of concept through new criminal provisions, without making the change consistent in present laws. If we are amending our laws, we should do so directly, not by adding new and different law covering substantially the same area.

The proposals in the other fields, which are more fully discussed on pages 25 through 28 of my prepared statement, are sections 2–8F3, Environmental Spoilation, and 2–8F4, Unfair Commercial Practices in S. 1; and section 1765, Fraud in a Regulated Industry, and 1766, Adulterated Food Product Violations, in S. 1400.

These provisions are considerably more objectionable than those in the securities field. The proposals in some respects go well beyond the existing law and use different language to describe substantially the same violation of law. Yet there is not even a cross-reference to other laws in these provisions. And additional criminal penalties are now substituted for civil penalties for some offenses. The result can only be confusion not only as to what is expected, but also as to what penalty is applicable.

In addition, as mentioned earlier, the provisions are not part of the regulatory scheme where one would expect to find them if he were seeking guidance. It is a part of the criminal code, where few people who were expecting to comply with regulatory law would look. This is particularly true where the regulatory law already provides for criminal penalties.

These proposals, at a minimum, introduce an element of gamesmanship into our regulatory structure, and they run completely contrary to what I understand this committee is trying to accomplish in clarifying the rules by which we shall live.

We suggest that all rules in a given area should appear in the same place and that criminal sanctions should be considered as part and parcel of the entire regulatory scheme, not in separate pockets. If there is insistence that these also appear in the criminal code, then, I suggest that we take them lock, stock, and barrel, and put them in both places; but do not write them in different language. If we are covering the same area, let's have the same exact language to describe exactly what it is we are talking about, so that when the courts are dealing with this situation, they will not reach different conclusions under the regulatory provisions than they reach under the criminal provisions.

If we want to apply new rules or new penalties in the environmental area, the change should come by amending the existing statutes. And the same principle applies in the other areas covered by the proposals as well.

As I suggested earlier, nothing but confusion can result from adding more and more statutes, rather than changing those already on the books.

I urge the rejection of the concepts provided for in the securities sections, which are 2–8F5 of S. 1 and 1761 of S. 1400; and the concepts provided for in the provisions of section 2–8F3 and 2–8F4 of S. 1, and sections 1765 and 1756 of S. 1400.

Again, I appreciate very much the opportunity to testify. And, as I told the staff, if there is anything that I can do to be of assistance, or which the Bar Association Committee could do, I welcome requests and certainly we will give it our attention.

Senator HRUSKA. Mr. Maddock, will this subject and this paper receive formal consideration by either the House of Delegates, your Committee, or the Bar Association this fall?

Mr. MADDOCK. I believe it will receive consideration at the August meeting, Senator, and I will advise the staff when that action has been completed.

Senator HRUSKA. That would be fine.

We would like to take you up on your offer of help, first of all to the extent of your informing us as currently and as promptly as possible of the formal action taken by the Bar with any specifics that they want to submit.

And secondly, if, as we consider redrawing a reconciliation of these two bills, if you would be available, we could use your further consideration.

Mr. MADDOCK. The section of the Bar Association I speak for is composed of people who live in this area of the law, so that there should be adequate opportunity for the kind of conferences that could be meaningful and helpful.

Senator HRUSKA. Well, there are other concerns that receive more public attention, but we have a basically good business system in this country. We want it to stand by the Constitution and our laws. And we have also a steadily-evolving system of regulation. We must.

But care should be taken to see that the regulation is not such that it might develop into unlivable and unworkable terms, because if it were, it would mean a stultification of a great number of elements of our production and distribution system?

Mr. MADDOCK. Yes, sir.

Senator HRUSKA. Thank you for coming.

Mr. MADDOCK. Thank you very much.

[Subsequently, the following correspondence was received from Mr. Maddock:]

HERCULES INC.,
Wilmington, Del., August 13, 1973.

Hon. JOHN L. MCCLELLAN,
New Senate Office Building,
Washington, D.C.

DEAR SENATOR MCCLELLAN: At the time of my testimony before the Senate Subcommittee on Criminal Laws and Procedures on July 26, 1973, I promised to advise the Subcommittee as soon as I had word as to whether or not the Council on Corporation, Banking and Business Law of the American Bar Association approved the statement I presented to the Subcommittee at that time. I have now been advised that, at its meeting of August 5, the Council unanimously approved that testimony. Enclosed herewith is a copy of the letter sent to me by the

Chairman of the Committee on Corporate Law Departments advising of that fact.

If anything further is required, please let me know.

Once again, I would like to extend my sincere thanks for the courtesies extended to me at the time of my testimony and to again renew my offer of assistance in any area in which you feel I may be of help.

Sincerely,

CHARLES S. MADDOCK, *General Counsel.*

AMERICAN BAR ASSOCIATION,
Chicago, Ill., August 9, 1973.

Re Proposed Federal Criminal Code.

CHARLES S. MADDOCK, Esq.,
General Counsel, Hercules Inc.,
Walmington, Del.

DEAR CHARLIE: As promised, I saw that each of the members of the Council of the Section of Corporation, Banking and Business Law was provided with a copy of your testimony before the Senate Committee dealing with Codification of Criminal Legislation. At its meeting on August 5, 1973 the Council, after questions and discussion, unanimously approved your testimony.

It is not the practice of the House of Delegates of the ABA to consider the specific testimony given on behalf of any unit of the organization. Instead they set up procedures to be followed. This was the case with respect to the resolution adopted in 1971 authorizing our section to offer testimony on the draft report and subsequently amended to permit testimony on the comparable provisions of S. 1 and S. 1400. The procedure essentially involved a requirement that advance copies of testimony be circulated to the principal officers of the Association and to the chairmen of other sections which had expressed an interest in the subject matter. I am satisfied that we have complied completely with all of the procedures prescribed by the House of Delegates. The only area in which there might be a question is that our original authorization was directed to specific provisions of the Draft Code. Some additional provisions required comment in your testimony in 1973 and to the extent that your testimony was directed to such new material, it may be beyond the specific authorization of the House of Delegates, but certainly not beyond the general intention.

Sincerely yours,

CHARLES H. RESNICK,
Chairman, Committee on Corporate Law Departments.

Senator HRUSKA. Our next witness will be Dr. Mildred Jefferson, accompanied by Mr. Greene.

We apologize to both of them for the delay in their appearance here.

Dr. Jefferson, we will put in the record a brief résumé of your biography.

Dr. JEFFERSON. Thank you.

Senator HRUSKA. The same thing for you, Mr. Greene.

You have submitted a very imposing and, I am sure, a complete brief on the subject. And it will be printed, consistent with committee rules, into the printed record.

You may now proceed to your testimony.

[The material referred to follows:]

INDUCED ABORTION: DISSERVICE TO THE NATION

BRIEF RESUME: MILDRED F. JEFFERSON, M.D.

B.A. Texas College, Tyler, Texas (summa cum laude).
M.S. Tufts University, Medford, Massachusetts.
M.D. Harvard Medical School, Boston, Massachusetts.
LI D. (Honoris Causa) Regis College, Weston, Massachusetts.
Surgical training, Boston City Hospital and Boston University Medical Center; Research in Cancer Chemotherapy, Children's Cancer Research Foundation,

Children's Hospital Medical Center; Post-graduate in the Department of Surgery of Massachusetts General Hospital, Boston, Massachusetts.

General surgeon on Staff of University Hospital, Boston University Medical Center; Assistant Clinical Professor of Surgery, Boston University School of Medicine.

Diplomate of the American Board of Surgery. Member of the American Medical Association; Councilor from Suffolk District Medical Society to the Massachusetts Medical Society; member of the Boston Surgical Society.

President, The Value of Life Committee; Vice President, Massachusetts Citizens For Life. Member of the Board of Directors of Americans United For Life. Vice-Chairman of Board of Directors of the National Right To Life Committee.

I am Dr. Mildred F. Jefferson, a fully-qualified general surgeon on the staff of University Hospital of Boston University Medical Center and Assistant Clinical Professor of Surgery on the faculty of Boston University School of Medicine. I am a Councilor from Suffolk District to the Massachusetts Medical Society and a member of the American Medical Association. I have long been interested in medical ethics and medical jurisprudence, particularly ethical considerations of medical practice decisions and the conflicts at the law-medicine interface. To help provide some more balanced argument in the public abortion discussion, I became one of the founding members of an educational organization, The Value of Life Committee of Massachusetts in which I now serve as a member of the Board of Directors and Governing Board in the office of President. I am a member of the Board of Directors of a similar national group, Americans United For Life. I am a founding member, member of the Board of Directors and Vice-President of the politically active pro-life group, Massachusetts Citizens For Life and Vice-Chairman of the Board of Directors of The National Right To Life Committee.

Thank you, Mr. Chairman, for the opportunity of appearing before the Committee to request reconsideration and rejection of the definitions of "person" and "human being" in both S. 1 and S. 1400 which contain the following similar provisions:

S. 1: Par. 1—1A4. General Definitions

(37) 'human being' means a person who has been born and is alive;

(52) 'person' includes a human being and an organization;

S. 1400: Ch. 1. General Provisions

Par. 111. General Definition.

" 'human being' does not include an individual who has not been born or who has died;"

" 'person' means a human being or an organization;"

I come before you as a citizen and physician concerned about the state of our republic and the trends which are leading us to abandon the founding principles of liberty and justice for all. I do not today represent officially any one of the organizations to which I belong but I know I have the support of millions who uphold the traditional sanctity-of-life ethic. A definition of "human being" denying its life before birth and thus enabling one in biological existence to be declared "non-person" offends the sense of democracy. We are accustomed to totalitarian governments declaring their subjects as "non-persons" in order to deprive them of their freedom, their property or their lives. We cannot accept a democratic government copying the same tactic to declare the unborn child not a "human being" and thus not a "person" in order to deprive it of its life.

It may have been reasonable in 1873 to presume that somehow human beings could give birth to something else or that their offspring could be some other form of animal before birth. But this is 1973 and we have the work of scientists such as Hertig and Rock of Boston, Liley of New Zealand and Shettles of New York who have shown us clearly the life of the human child before birth. I will sketch briefly the demonstrated facts of such unborn life, the reality of the biologic acts of abortion and detail some of the dangers to all the people when the doctor is licensed to kill.

The observation that "those trained in the respective disciplines of medicine, philosophy and theology are unable to arrive at any consensus" on when life begins only directs attention to the circumstance that people may form opinions without acquainting themselves with relevant facts. Some doctors may not keep their scientific knowledge up-to-date; some philosophers and theologians may

ignore all scientific discoveries. The question "When does life begin" is asked for the purpose of confusing the issues involved in the deliberate ending of new human life and excusing the fact that life has been taken. It does not matter in this discussion when about 4 billion years ago the first sign of life appeared. But it is important to know that the passing of life, the transmission of life to the individual occurs when the egg cell from the ovary of a woman is entered by the sperm cell from the testes of a man, the process known as fertilization, or conception. Scientists have studied all stages of the reproduction of humankind. Special sciences, known as embryology, fetology and perinatology have given us proven facts about the development of the child before birth. The information is not hidden: it is available to anyone who can or will read it or look at it. Those who do not wish to read might well visit the Boston Science Museum to see the exhibit called: "The Story of Life."

The egg and the sperm are living cells that carry life potential. If they do not unite, their natural end is death. The sperm has already left the man's body, the egg cell is on its way out of the woman when they meet. These cells carry special hereditary markers, known as chromosomes, which identify them as of human origin and these cells can give rise only to other human beings. Approximately one hour after the sperm has entered the egg, their life centers, called nuclei, fuse. This is the beginning of a new human being which is already different from its mother or father. The fertilized egg, or ovum, is now called zygote. It is about 36 hours from conception that the first cell division is completed. This continuous cell division, which may last only hours or more than 99 years is all we know as the life process. The one composite cell divides into two, two into four into an infinite number with a different name for each developmental stage. During the 5–9 days required for the trip down the Fallopian tube to reach the inside of the uterus (or womb) going from one cell to berry-shaped multi-celled morula, to hollow-ball many-celled blastula, the new human being is never a formless blob.

In the uterus, it burrows under the lining prepared for its protection and early nutrition, a process called implantation, the beginning of the medical definition of pregnancy. The newly developing baby makes everything it needs from its own cells: the root system (or placenta) by which it receives nourishment from the mother, its space capsule and the fluid that it swims in. However, before the woman even knows she is pregnant, before the brain, heart or lungs are formed, the hereditary gift for the next generation is laid down in the baby. Cells become tissues, the tissues become organs. Every organ system forms in the first eight weeks after conception. From then on, it is only a matter of growth, maturation, refinement of function or escaping an extermination team or other noxious agent.

Our scientific terms are convenient ways of describing an unborn baby. We use "embryo" in the first 6 to 8 weeks, the term "fetus" after that. But what do they mean? The Greek "embryo" for "organism swelling or teeming within": the Latin "fetus" meaning "offspring" or "young one". We call the newborn a neonate but it is still a baby. The unborn baby at 4 weeks does not look as it will at 4 months; the infant 4 months old does not look as it will at 9 years. But it is no less a human being at any point on the line. It is simply more vulnerable the younger and smaller it is.

Let us take a closer look at this developing baby in the first 12 weeks. By the end of the first month, when it is still less than one-half inch long, it is already forming its blood cells, the simple tubular heart has already started its rhythmic beat. The early brain is present, eyes, ears and nose have started to form. By 43 to 45 days, a brain wave tracing can be made. By the end of 6 weeks the soft skeleton is completely developed. Sex has already been determined although the external sex organs will not be fully formed until 12 weeks. By the end of the 7th week, this new human being is a well-proportioned, small-scale baby less than one inch long and weighing only about 1/30 ounce. The child becomes very active in the third month. By the end of 12 weeks, he or she can kick its legs, turn its feet, curl and fan its toes, make a fist, move its thumb, turn its head, squint, frown, open its mouth or press its lips firmly together. It can also suck its thumb and swallow the fluid it swims in. Breathing movements are started taking in fluid, of course, instead of air. The mother feels the baby's movements as "quickening" at a varying time around 16 to 20 weeks when the baby is bigger, but it has been moving actively for 8 to 12 weeks before she might notice.

These observations have not been made by armchair deduction. Technological advances and obliging mothers have made possible the studies of the unborn

baby in its warm, wet world. The X-ray machine permitted many of Liley's early studies (Liley, A. W.: The Foetus in Control of His Environment. In Hilgers and Horan (ed.) *Abortion and Social Justice*. New York: Sheed & Ward, 1973). Maudelbaum of Detroit has developed a miniature camera connected to a needle of optical fibers that refracts light into the camera's lens (Medical World News, June 7, 1968) for studying the child within its mother. Donald and others introduced ultrasonic scanning for diagnosis in obstretrics and gynecology in 1958 (Lancet 1:188, 1958) and in 1972 Robinson in Scotland reported picking up the heartbeat of the unborn offspring reliably at 48 days. He or she is not a passive passenger but a dynamic resident of its only natural home, the uterus of the woman whose ovary released the egg. It is tragically unjust and monstrously unfair that this youngest of our kind must somehow escape the extermination team of its mother and her doctor for six months before it even has a chance at the protection of laws that the rest of the human family enjoys.

The extermination of the unborn offspring is called abortion. Abortion is the term applied to any process by which a pregnancy is interrupted before term to prevent the birth of a living baby. Although obstetrical journals catalog an astonishing array of physical, chemical and mechanical abortion techniques (Wentz, A. C. et al: Methodology in Premature Pregnancy Termination. Obstetrical and Gynecological Survey. 28:1, 1973), most abortions involve four commonly used methods: (1) Dilation and Curettage (known as "D & C") and (2) Dilation and Vacuum Aspiration, known as "suction" or "D & E" done up to 12 weeks; (3) Injection of Hypertonic Saline Solutions, known as "salting out" or "saline amniocentesis" done after 16 weeks when there is enough fluid around the baby to enable piercing the sac in which he or she swims and (4) hysterotomy, known also as "junior Caesarian section", in which the uterus is opened and the baby removed through an abdominal incision. This approach is used when it is to be combined with sterilization or when the unborn offspring are to be used for scientific experimentation or investigation (New England Journal of Medicine 288:1219, 1973 and 289:58, 1973). It is also used between the twelfth and sixteenth week when the other three methods cannot be used (Clinical Obstetrics and Gynecology 14:23, 1971). In the first older method of early abortion, the opening of the uterus is stretched by surgical instruments of increasing size and the small body within scraped out with an instrument resembling a small, sharp-edged spoon. The suction is a newer method (not completely new as advertised as such technique was described in the Russian journals in the 1920s) in which a small tube attached to a vacuum bottle (pump) is inserted in the uterus and the contents, the small body, its attachments and varying amounts of the lining and wall of the uterus are sucked out as if by a vacuum cleaner. In the "salting out", a needle is inserted directly through the mother's abdominal wall, through the uterus, into the fluid-sac in which the unborn baby swims. As much fluid is removed as is possible and an equal amount of very concentrated salt solution (20 percent) is injected. Each method is intended to end the pregnancy without a living child.

In receiving Court permission to comply with a woman's request to end her pregnancy without interference of the state, the doctor has been granted the license to kill. It is suspected or known that the unborn offspring is alive or the abortion would not be sought or done. In accepting this license to kill, doctors forsake a medical tradition more than 2000 years old based on the Hippocratic Oath. Its significance is not diminished by the observation that all physicians may not adhere to it; its value lies in the obligation that the physcian accepts to require of himself or herself a standard of "purity and holiness". Dr. Herbert Ratner recalls Margaret Mead's reminder that the Hippocratic Oath marked the "first time in our tradition there was a complete separation between killing and curing . . . it was the Greeks who made the distinction clear and delegated to one profession, medicine, a complete dedication to life under all circumstances". (New York Times Letters to the Editor, February 14, 1973). More cynical societies of Europe and Asia had assigned abortion-killing functions to medicine years ago and now have reasons to regret such move (Hayasaka, Y. et al: Japan's 22 Year Experience With A Liberal Abortion Law. Marriage and Family Newsletter. Vol. 4, May-June, 1973). The United States of America has no need to take such a backward step.

By deserting the high traditional ethical standards of medicine, doctors who become social engineers or social executioners jeopardize the health and welfare of all. When operations are done without medical indications, they become another means of patient exploitation. If a society can accept requesting a doctor to do an abortion for the mother's economic relief, it will have no

grounds on which to object if the doctor decides to do abortions for the economic relief of his income.

In order to promote acceptance of the doctor's license to kill the unborn child, it has been necessary to disseminate consciously (and possibly unconsciously) inaccurate, incomplete or misleading information about abortion. By stressing the catchphrase "safe, legal abortion" the deaths and complications from such procedures are ignored or minimized while the results of older "illegal abortion" experience are grossly exaggerated. The selection of Hungarian mortality rates (reportedly 1.2/100,000) and comparing them to maternal mortality rates in the United States (28.0/100,000) resulted in the campaign directive that "the medical procedure of induced abortions is potentially 23.3 (28.0/1.2) times as safe as the process of going through ordinary childbirth" (Hilgers, T. W.: The Medical Hazards of Legally Induced Abortion. Hilgers and Horan (ed) *Abortion and Social Justice*. New York: Sheed & Ward, 1973). This somehow became the medically established fact that "abortion is safer than childbirth".

In the first two years of New York City's abortion experience, according to the October, 1972 report released by their Public Health Department, an estimated 402,059 abortions were performed in New York City. That experience has been the basis for the most enthusiastic promotion of abortion.

According to the March, 1972 Bulletin on Abortion Program (Department of Health, Health Services Administrator, City of New York) 68 percent of abortions done under legal auspices were difficult or impossible to follow up. There are no complete or accurate figures on New York abortions or their complications either inside or outside New York. It is interesting that of 16 abortion deaths reported July 1, 1970 through June 30, 1971, 9 occurred under legal auspices; of 15 in July 1, 1971 through June 30, 1972, 9 occurred under legal auspices.

The health of the people is seriously jeopardized by the abortion guidelines written by some Public Health departments. Pregnancy involves two patients, the woman and the child growing within her. Somehow, abortion to the New York City Board of Health (Clinical Obstetrics and Gynecology 14:25, 1971) and the Massachusetts Department of Public Health (Boston Globe, Feb. 14, 1973) involves only the woman as each established standards with not one mention of the offspring, even as a pathology specimen. That leaves the fate of the child who survives the abortion effort entirely up to his or her luck in being rescued by a compassionate nurse who would find refuge.

The problem of the child is not present in early surgical abortion, the small body is dismembered by the curet or homogenized into the suction tube. Any late abortion is likely to result in a child who is still living when delivered. In the salting out, according to studies of monitored heart action (Clinical Obstetrics and Gynecology 14:137, 1971) it takes about 1 to 2 hours for the baby to die. Labor ensues in 36–48 hours, sometimes more, sometimes less and delivery takes place from below. With some miscalculations, live births do occur, for example one delivered at 16 weeks weighing 8½ ounces which lived 5 minutes (Clinical Obstetrics and Gynecology 14:290, 1971) in New York. The child removed by hysterotomy will usually still be alive on delivery unless killed by a previous abortion attempt or overmedication of the mother. Salvation depends on a compassionate nurse; otherwise it is allowed to die. (Brody, J. A.: Nurses and Therapeutic Abortion. Centerscope 5:18, 1972).

The health of women is jeopardized as long as the doctor does not reveal that no one can truthfully say what the consequences of an abortion are to a given woman until she has completed a full-term normal delivery. The immediate hazards—hemorrhage, infection, perforation of uterus or bowel (with the suction catheter), shock, anesthetic complication, retained tissue, lacerated cervix or failure of the abortion method—are not prevented by the label "safe, legal". Since the state cannot observe the procedure in the first 12 weeks, the butcher in the back room can now move to the drawing-room and pay no penalty if his victim dies (as long as said butcher is a licensed doctor of some kind). With poor follow up reported throughout the country no one can begin to assess the late consequences of America's loose abortion experience. The consequences reported by Wynn and Wynn (Some Consequences of Induced Abortion to Children Born Subsequently. Marriage and Family Newsletter Vol. 4, February, March, April, 1978) include increased premature births and mid-trimester abortions, residium of childhood mental and physical handicap, sterility and stillbirths. This is certainly a hazard to the health and welfare of the people.

In our present condition, the state may protect the life of the unborn child in the last 3 months of pregnancy "if it chooses". As it may not choose, no life either born or unborn may be safe. If an existing biological human being can be declared not a "human being" and not a "person" before birth even though its living biological existence is proved, an existing biological human being after birth may be defined as not a "human being" or not a person if too old, too ill, or injured or poor or politically undesirable. As long as the doctor has the right to kill an unborn child on request of its mother, we no longer have a democracy. These two citizens, a woman and her doctor, have the right of the private death contract. This special privilege must be denied them or extended to all. Who next? The man and his doctor to get rid of the woman? The children and their doctor to ge rid of their choice of parent? As long as any citizen has the private right to kill, our entire system of law is in jeopardy.

APPENDIX

A. The Unwanted Child Syndrome is A Myth.
B. Japan's 22 Year Experience With A Liberal Abortion Law.
C. Complications of a New Method of Abortion.
D. Fetal Experimentation: Hemoglobin Synthesis in the Developing Fetus; Transplacental Passage of Erythromycin and Clindamycin.
E. A Famous Scientist Looks at One of Our Most Serious Ethical Dilemmas.
F. Therapeutic Abortion: Medical and Social Sequels; Euthanasia (Doctor's letter).
G. New York City Abortion Report: The First Two Years.
H. Latent Morbidity after Abortion.
I. Some Consequences of Induced Abortion to Children Born Subsequently.
J. Table 14. Live Births After Saline Instillation.

[From Marriage and Family Newsletter]

THE UNWANTED CHILD SYNDROME IS A MYTH

The "unwanted child" syndrome has been used so often by Planned Parenthood and by many others that it has become accepted as part of our vocabulary, and yet, there is very little foundation for the use of such a term.

In essence the term "unwanted child" is a contradiction. The "unwantedness" is a term that does not describe any characteristic of the child but rather of the society in which the child lives, or the feelings of his parents, or the feelings of some other person in society.

Edward Pohlman, Ph. D.,[1] found that it was impossible to define unwantedness; this study was funded by grants from the Social Science Committee of the Planned Parenthood Federation of America.

It is appropriate to quote several passages from the above-mentioned article by Pohlman:

"The present article reviews literature bearing on the general hypothesis that unwanted conceptions have undesirable results, for parents and children. Relying primarily on case study evidence, a number of authors have sugggested or assumed that this hypothesis was correct.[2][3][4][5][6][7] The present writer[8] has elaborated

[1] Edward Pohlman, Ph. D., "Unwanted Conceptions: Research on Undesirable Consequences," *Eugenics Quarterly* 14:2, 1967, pp. 143–154. Reprinted in *Child and Family*, Summer, 1969, pp. 240–253.
[2] E. Chesser, *Unwanted Child*, Rich and Cowan, London, n.d. (circa 1945). Cited in Pohlman, *supra*, n. 1, p. 240.
[3] H. de J. Coghill. "Emotional Maladjustments from Unplanned Parenthood," *Virginia Med. Monthly*, 68: 682–687, 1941. Cited in Pohlman, *supra*, n. 2, p. 240.
[4] K. Menninger, *Love against Hate*, Harcourt, Brace, New York, 1942, pp. 219–233. Cited in Pohlman, *supra*, n. 3, p. 240.
[5] K. Menninger, "Psychiatric Aspects of Contraception," *Bull. Menninger Clinic*, 7: 36–40, 1943. Cited in Pohlman, *supra*, n. 4, p. 240.
[6] K. Soddy, "The Unwanted Child," *J. Family Welfare*, 11: 1, 39–52, 1964. Cited in Pohlman, *supra*, n. 5, p. 240.
[7] A. H. Vander Veer, *The Unwanted Child*, League for Planned Parenthood, n.d. Cited by Sloman, 1949, "Emotional Problems in 'Planned for' Children," *Amer. J. Orthopsychiat.*, 18: 523–528, 1948, and in Pohlman, *supra*, n. 6, p. 240.
[8] E. Pohlman, "Results of Unwanted Conceptions: Some Hypotheses up for Adoption," *Eugenics Quarterly*, 12: 11–18, 1965. Cited in Pohlman, *supra*, n. 7, p. 240.

this general hypothesis into a number of much more specific hypotheses. Psychoanalytic theory underlies the hypotheses; in particular, it seems possible for parents to repress their feelings of rejection toward an unwanted conception, so that they consciously want it, but for repressed feelings still to affect parental behavior.[9] Hence observable differences in parents and children are predicted.[10]

"There is a common psychoanalytic hypothesis that morning sickness is often produced by unwanted pregnancies.[11] [12] [13] [14] No such relation was found by Poffenberger. Poffenberger, and Landis[15]; Harvey and Sherfey[16] Coppen[17]; or Robertson.[18] Despres[19] did find such a relationship, but other factors may not have been adequately controlled.[20] . . .

"Dunbar[21] distinguishes between those who are deeply, basically rejecting of a pregnancy and those for whom it is merely a temporary inconvenience. She suggests that the former readily produce a psychosomatic abortion while the latter are rarely effective to such an end. In the light of Dunbar's discussion[22] one must conclude, apparently, that the considerable numbers of women in our culture who have out-of-wedlock births, and who do not have spontaneous abortions, are not deeply rejecting toward the pregnancy. Whatever the merits of these expert opinions, we have found no systematic research that demonstrates a relationship between unwanted conception and spontaneous abortion, although such a possibility seems plausible."[23]

In the same article Pohlman finds no evidence in other areas as related below.

"In short, there is little direct evidence of a link between unwanted conception and labor and delivery problems.

"It seems plausible to believe that unwanted conception might produce psychosomatic problems for the pregnant woman. But direct evidence of such a relationship is almost completely lacking.[24]

"Klein *et al.*[25] found no evidence that unwanted pregnancies were followed by more maternal anxiety during pregnancy or childbirth."[26]

Also in the same article Pohlman alludes to physical abuse of children. This topic will be explored rather extensively in other areas of this newsletter. In the last few years more research has been done in this area. Pohlman states:

"Some parents severely abuse their children, sometimes bringing them to hospitals for the care of resulting injuries. In the last decade medical personnel have recognized more of these cases (once assumed to be accidents, as parents

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[9] S. Freud, translated as *A General Introduction to Psychoanalysis,* Garden City Publishing Co., Garden City, N.Y., 1938. Cited in Pholman, "Unwanted Conceptions: . . .," *Eugenics Quarterly;* printed in *Child and Family,* Summer, 1969, n. 8, p. 240.

[10] E. Pholman, "Unwanted Conceptions: Research on Undesirable Consequences," *Child and Family,* Summer, 1969, p. 240.

[11] H. Deutsch, *Psychology of Women,* Vol. 2, Grune and Stratton, New York, 1945. Cited in Pohlman, *supra,* n. 18, p. 241.

[12] W. S. Kroger and S. C. Freed, *Psychosomatic Gynecology,* Saunders, Philadelphia, 1951. Reprinted by Wilshire, Hollywood, Calif., 1962. Cited in Pohlman, *supra,* n. 19, p. 241.

[13] W. C. Menninger, "The Emotional Factors in Pregnancy," *Bull. Menninger Clinic,* 7: 17 ff., 1943. Cited by Kroger and Freed, 1951, p. 118; by Pohlman, *supra,* n. 20, p. 241.

[14] F. Wengraf, *Psychosomatic Approach to Gynecology and Obstetrics,* Thomas, Springfield, Ill., 1953. Cited by Pohlman, *supra,* n. 21, p. 241.

[15] S. Poffenberger, T. Poffenberger, and J. T. Landis, "Intent toward Conception and the Pregnancy Experience," *Amer. Sociol. Rev.,* 17: 616–620, 1952. Cited by Pohlman, *supra,* n. 22, p. 241.

[16] W. A. Harvey and M. J. Sherfey, "Vomiting in Pregnancy: a Psychiatric Study," *Psychosom. Med.* 16: 1, 1954. Cited in Pohlman, *supra,* n. 23, p. 241.

[17] A. J. Coppen, "Vomiting of Early Pregnancy," *Lancet,* 1: 172 ff., 1959. Cited in Pholman, *supra,* n. 24, p. 241.

[18] G. G. Robertson, "Nausea and Vomiting in Pregnancy: A Study in Psychosomatic and Social Medicine," *Lancet,* 251: 336–341, 1946. Cited in Pohlman, *supra,* n. 25, p. 241.

[19] M. A. Despres, *Favorable and Unfavorable Attitudes toward Pregnancy in Primiparae,* Unpublished doctoral dissertation, University of Chicago, 1936. Cited in Pohlman, *supra,* n. 26, p. 241.

[20] E. Pohlman, "Unwanted Conceptions: Research on Undesirable Consequences," *Child and Family,* Summer, 1969, p. 241.

[21] F. Dunbar, "Emotional Factors in Spontaneous Abortion," in W. S. Groger (ed.), *Psychosomatic Obstetrics, Gynecology and Endocrinology,* Thomas, Springfield, Ill., 1962, pp. 136, 137. Cited in Pohlman, *supra,* n. 39, p. 242.

[22] *Ibid.,* pp. 135–143.

[23] Pohlman, *op. cit.,* pp. 242–243.

[24] *Ibid.,* p. 243.

[25] H. R. Klein, H. W. Potter, and R. B. Dyk, *Anxiety in Pregnancy and Childbirth,* Hoeber, New York, 1950. Cited in Pohlman, *supra,* n. 46, p. 243.

[26] Pohlman, *op. cit.,* p. 245.

claimed); they believe that a great many such cases exist.[27] [28] It may seem obvious that parents who kill their children, or abuse them severely, do not want them, and probably did not want their conception to begin with. But in this area, as with induced abortion, there is little research that has checked on the 'obvious' by asking the parents whether conception was wanted." [29]

In regard to the plight of older children Pohlman found little evidence to support the syndrome of "unwantedness" as he states:

"But the extent to which a parent's preconception wanting or unwanting feelings are related to acceptance or rejection in the child's later life is largely conjectural. It is possible that many parents are able to 'change their minds' after an unwanted conception, with changes even in the unconscious and in their behavior, so that they treat the initially unwanted child in a way similar to the treatment received by otherwise comparable children.[30]

"Sloman [31] started with a group of problem children and found an impressive proportion of them to have been specifically planned. Some of these have been planned in an attempt to hold a faltering marriage together. Most were seen as involving children of very compulsive mothers who planned out much of life, including conception.

"There is a contention that unwanted conceptions tend to have undesirable effects. This article has implied some channels whereby such a causal relationship might operate. But the direct evidence of such a relationship is almost completely lacking, except for a few fragments of retrospective evidence. . . . It was the hope of this article to find more convincing systematic research evidence and to give some idea of the amount of relationship between unwanted conception and undesirable effects. This hope has been disappointed.

"One reason there is so little crucial evidence to bear on the hypothesis, and additional evidence will be hard to obtain, is the vagueness and remoteness of the independent variable of unwanted conception. It is extremely difficult for even the researcher to define this concept,[32] and often hard for the parent to weight his or her ambivalence and know whether a conception was or was not wanted. The very privacy of these parental judgments is hard for the researcher to conquer. Also, virtually all research that studied this independent variable has involved parents' retrospective reports. The usual problems of cloudy memory are complicated because we may assume a strong tendency for parents to rationalize after unwanted conception, so that control groups of parents who claim 'wanted' conception doubtless contain an unknown proportion misclassified. Because of these problems, research with other independent variables may be much more rewarding. Size of family, spacing and timing of births, out-of-wedlock conception, and illegitimate status of birth are much easier to define and much more open to public inspection."

In spite of Pohlman's conclusions and confession wherein he states that " 'the writer and others found it somewhat embarrassing to have to confess that there was little clear evidence that unwanted conceptions were in a worse light than other conceptions,' [33] "

Planned Parenthood and others continue to espouse the Unwanted Child Syndrome as if there was conclusive proof that such a syndrome actually exists.

Daniel Callahan, refers to a number of studies in which mothers were refused abortion, and of the subsequent effects.[34] The following are excerpts from Callahan's book *Abortion: Law, Choice and Mortality:*

" 'The results are difficult to interpret. Groups of women who had legal abortions are barely comparable to the groups whose applications were turned down. Furthermore, the pregnancy of many years ago becomes blurred with later hap-

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[27] V. J. Fontana, *The Maltreated Child,* Thomas, Springfield, Ill., 1964. Cited in Pohlman, *supra,* n. 106, p. 248.

[28] C. H. Kempe, F. N. Silverman, B. F. Steele, W. Droegemueller, and H. K. Silver, "The Battered-Child Syndrome," *JAMA,* 181: 17–24, 1962. Cited in Pohlman, *supra,* n. 107, p. 248.

[29] Pohlman, *op. cit.,* p. 248.

[30] *Ibid.,* pp. 248–249.

[31] S. S. Sloman, "Emotional Problems in 'Planned for' Children," *Amer. J. Orthopsychiat.,* 18: 523–528, 1948. Cited in Pohlman, *supra,* n. 110, p. 249.

[32] E. Pohlman, " 'Wanted' and 'Unwanted': toward Less Ambiguous Definition," *Eugenics Quarterly,* 12: 19–27, 1965. Cited in Pohlman, *supra,* n. 9, p. 250.

[33] Pohlman, *op. cit.,* p. 250.

[34] Daniel Callahan, *Abortion: Law, Choice and Morality,* Macmillan, New York, 1970, pp. 75–79.

penings and later pregnancies in the memories of the studied women, making it often very difficult to isolate the effect of the topical pregnancy.' [35]

"With that caution in mind, a number of studies can be cited. Hoffmeyer himself mentions the results of a follow-up study conducted by the Mothers Aid Institution in Denmark, of 180 women, whose applications for abortion were refused: 31 women reported themselves as happy; 40 said they were only moderately happy because of serious troubles in managing their children; another 40 reported themselves as only moderately happy because of difficulties during pregnancy; 29 said they could not make up their minds because their children had been placed elsewhere after their pregnancy; finally, 'The number of mothers who affirmatively stated that they did not care for their babies and did not feel anything for them was only 13. Most of these women were psychopathic or mentally defective.' [36] Hoffmeyer also reports that the same study included 126 women who had had a legal abortion. After five years, 112 reported they were absolutely happy, five reported they regretted the action and nine had mixed feelings. Hoffmeyer's conclusions from both studies is worth quoting: 'The conclusion was that about 80 percent are satisfied in all groups (abortions refused and granted), and around 20 percent are dissatisfied. Those who were turned down, however, seemed to (have) certain reservations. It must be remembered also that the natural attachment to the child, even though unwanted originally, may overshadow later complications.' " [37]

Far too often in pro-abortion propaganda the unwanted child syndrome is linked to the battered or abused child syndrome. Even a cursory review of the literature concerning abused or battered children would indicate that in most cases children who are battered or abused have been wanted children; that the essence of the problem rests with the parent or someone else; certainly not the child.

Dr. Edward F. Lenoski, trauma consultant for the Pediatric Pavilion, Director of Children's Emergency Service at the Los Angeles County/USC Medical Center and assistant professor of pediatrics at USC School of Medicine discussed some of the characteristics of the Battered Child when he spoke to a meeting of CARES, the Los Angeles County/USC Medical Center Auxiliary. Some excerpts from his speech are given below:

"He posed the question: 'Which babies do you think are most often abused—planned or unplanned?'

" 'There's the group which says,' 'We're going to get the car paid for. We'll get all that French provincial furniture. We're going to get everything paid for, and then we're going to have a baby . . . and we'll have one of those frilly bassinets.' Then there's another group: 'I missed a period. Whoops, a mistake, another baby.' The unwanted pregnancy.

"Anyway, it turns out that 90% of the beaten children are planned pregnancies . . . because, you see, it's one short step to say, 'Look, you little fink, I saved and saved to buy this bedspread, and you just moved your bowels on it.' Whack. You see, it's easy to blame the baby.

" 'The Planned Parenthood [sic] is scared about this, because since the introduction of the Pill, child beating has gone up threefold.' " [38]

Dr. David G. Gil of Brandeis University analysed 13,000 child beating reports in all 50 states during a 2-year study. The following excerpts from a New York *Times* report indicate the role that violence plays in child abuse:

"A major nationwide study has traced the high level of child beating in this country to a widespread acceptance among Americans of the use of physical force as a legitimate procedure in child rearing.

"This conclusion was reached by Dr. David G. Gil of Brandeis University after an analysis of 13,000 child beating reports in all 50 states. It conflicts with past interpretations, which have generally attributed the abuse to the mental illness of the beater.

" 'The context of child rearing does not exclude the use of physical force toward children by parents and others responsible for their socialization,' Dr. Gil said. 'American culture encourages in subtle, and at times not so subtle,

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[35] Henrik Hoffmeyer, "Medical Aspects of the Danish Legislation on Abortion," in *Abortion and the Law*, David T. Smith (ed.), Western Reserve University Press, Cleveland, 1967, p. 201. Cited in Callahan, *supra*, n. 104, Chapt. 3, p. 75.

[36] *Ibid.*, p. 89.

[37] *Ibid.*, p. 202.

[38] Los Angeles *Times*, October 12, 1970, p. 1.

ways the use of "a certain measure" of physical force in rearing children in order to modify their inherently nonsocial inclinations.'

"But, however bad child beating may be, Dr. Gil said that it constituted only a minor social problem in comparison with what he calls the 'collective societal abuse' of the offspring of the poor.

"These findings are outlined in a new book, 'Violence Against Children,' just published by the Harvard University Press. . . .

"The 'battered child syndrome,' as the more severe forms of abuse are known, is one of the most perplexing problems facing health officials. Dr. Gil, who is a professor in social policy, estimated in an interview that as many as 2.5 million children are abused every year. However, reliable statistics are hard to obtain.

"Dr. Gil's study encompasses a survey of every incident of child abuse reported nationally through legal channels in 1967 and 1968, as well as detailed analyses of incidents in selected cities. In addition, samples of public attitude were taken by the National Opinion Research Center at the University of Chicago.

"Dr. Gil's belief that child abuse stems from society's sanctioning of corporal punishment is based upon the very low incidence of abuse in cultures that have strong taboos against striking children, such as the American Indians. The Indians disciplined their young mainly through example and shame.

" 'Rarely, if ever, is corporal punishment administered for the benefit of the attacked child,' Dr. Gil wrote, 'for usually it serves the immediate needs of the attacking adult who is seeking relief from his uncontrollable anger and stress.' " [39]

Very often too, over-zealous family planners leave the impression that every child born must be perfect and that unless he is perfect, he will not find happiness. Excerpts from the following report would contradict this impression:

"A team of psychologists reported Monday that new findings challenged the traditional assumption that handicapped, crippled or malformed persons were less happy or enjoyed life less than normal persons.

"Dr. Paul Cameron of the University of Louisville and Dr. D. Van Hoeck and two associates of Wayne State University, Detroit, reported their findings to the annual meeting of the American Psychological Assn.

"Their major conclusions from a study involving 144 malformed individuals and 151 normal persons were that:

"There not only was no difference between the two groups in their degree of life satisfaction, outlook on what lies immediately ahead or vulnerability to frustrations, but also:

" 'A higher proportion of normals claimed to have contemplated suicide . . . There is also a suggestion that normals who contemplated and/or attempted suicide may have done so more frequently than the malformed subjects.'

"The malformed judged their lives more difficult than those of normals, but this did not make them less happy.

"The researchers said that 'while life satisfaction was positively associated with income, no difference between the two groups was evident once they were divided into varying income groups . . .'

" 'The degree of looking forward to next month was not different between normals and malformed within income groups,' they added.

" ' The degree of frustration with life reported by the two groups was essentially the same within income groups.'

" 'Though it may be both common and fashionable to believe that the malformed enjoy life less than normals, those that believe and/or contend that this is the case appear to lack both empirical and theoretical support,' the researchers concluded.[40]"

In December, 1971, Dr. E. F. Lenoski, Director of the Pediatric Evaluation Center at County-USC Medical Center, Los Angeles reported that parents who beat their children have planned the birth of the child. The following are excerpts from Dr. Lenoski's remarks as reported in the Los Angeles *Times:* [41]

" 'One hundred percent of child beaters are isolationists,' said Dr. E. F. Lenoski. 'They were brought up not to trust anything or anybody who is not their flesh and blood.'

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[39] New York *Times*, December 13, 1970, p. 54.
[40] Los Angeles *Times*, September 7, 1971, p. 5.
[41] Los Angeles *Times*, December 12, 1971, section 5.

"For one thing, he said, there is conclusive proof that most child beaters have been beaten themselves as children. And because they have learned violence as a way of life, they often commit suicide as a solution to their self-hatred.

"Child abuse also may be triggered when the parent sees in a child a resemblance to a person he hates.

" 'It has been found that 85% of people who abuse their child recognize a hate figure in the child they beat,' he said.

"Excessive expectations for the child also may set the parent up for disappointment and anger when the child cannot live up to them.

" 'Child abusers are people who have done all the right things. Nine out of 10 say they planned the conception of the child they beat,' he said.

" 'But love borders on hate, and the emotions can change in an instant.' Parents expect all their planning will pay off, and when something goes wrong they explode, he said. Excessive high expectations also may lead adoptive parents to beat their children, he said."

In a study reported in *Pediatric News*[42] it was found that the child beater was often abused in his own youth. The following excerpts from the report:

"Personality disorders related to a history of childhood assault and violent home atmosphere can be found in 95% of the adults who actively beat their own children, Dr. J. A. Guido said at the American Psychiatric Association meeting.

"Active child beaters often take out on their children the anger or hostilty they felt for their own parents or spouses, said Dr. Guido, director of psychiatric services, Orange County Medical Center, Calif.

"Potential child beaters express aggression in an attempt to solve situationally frustrating inconveniences or in situation reaction to a child they feel rejects them, Dr. Guido said.

"In a study of 100 adults who abused their children, active child beaters seemed to have internalized aggression in early childhood and were unambivalent in expressing anger toward their own offspring.

"Among all active or potential child abusers, there was high incidence of marital discord, conception before marriage, and previous history of parental abandonment.

"Of the 100 adults studied, 84 were female, 98 were Caucasian, and 2 were Negro. Use of the open hand, fist, or belt were the major means of abuse, Dr. Guido said."

The "unwanted child syndrome" is discussed at some length in an article by Samuel A. Nigro, M.D. The following excerpts are taken from this very excellent article:

"It is amply documented that parental attitudes such as unwantedness can affect a child,[43] [44] [45] but postpartum parental attitudes cannot be predicted in the prepartum interval. Assessing genuine attitudes is difficult in the first place, and what these attitudes actually mean in terms of actions and outcome is something else again.

"Ferreira[46] found evidence of newborn babies' deviancy in the nursery correlating with their mothers having obtained high prepartum scores on a Fear-of-Having-a-Baby Scale but not on a Rejection-of-Pregnancy Scale. He also found no relationship between unplanned pregnancies and newborn deviant behavior; in fact, there were more deviant babies of mothers who had planned their pregnancy than of those who had not. Zemlick and Watson[47] conclusively demonstrated a spontaneous change from prepartum rejection to postpartum acceptance of their children by a group of mothers.

"How does one account for 'unwantedness of pregnancy' being unrelated to later adverse problems? This may be explained by the remarkable finding of

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[42] "Child Beater Often Abused in Own Youth," *Pediatric News*, September, 1972, p. 61.

[43] Samuel A. Nigro, M.D., "A Scientific Critique of Abortion as a Medical Procedure," *Psychiatric Annals*, 2 : 9, September, 1972, p. 22 ff.

[44] D. P. Ausubel, E. E. Balthazaar, I. Rosenthal, L. S. Blackman, S. H. Schpoont, J. Welkowitz, "Perceived Parent Attitudes as Determinants of Children's Ego Structure," *Child Development*, 25, 1954, p. 173. Cited in Nigro, *supra*, n. 17, p. 30.

[45] D. MacCarthy and E. M. Booth, "Parental Rejection and Stunting of Growth," *J. Psychosom. Res.*, 14, 1970, p. 259. Cited in Nigro, *supra*, n. 17, p. 30.

[46] H. M. Wallace and E. M. Gold, "Relationship of Family Planning to Pediatrics and Child Health," *Clin. Pediat.*, 9 1970, p. 699. Cited in Nigro, *Supra*, n. 27, p. 30.

[47] A. J. Ferreira, "The Pregnant Woman's Emotional Attitude and Its Reflection in the Newborn," *Amer. J. Orthopsychiat.*, 30, 1960, p. 553. Cited in Nigro, *supra*, n. 10, p. 30.

Klaus *et al.*[48] that a sensitive period exists in human mothers shortly after delivery of full-term infants, and contacts between mothers and offspring during this period greatly foster the development of adequate mother-offspring interaction. The researchers found that affectional bonding between mother and child was greatly enhanced by nothing more than exposure of the mother to her child for one hour in the first three hours after birth and also for five extra hours each afternoon of the three days following delivery. The standardization of this early exposure as routine policy for hospitals may have profound mental health-fostering effects and make the concept of unwantedness of pregnancy more irrelevant than it has already been shown to be.

"In summary, 'unwantedness of pregnancy' is a condition with unknown implications for the future outcome of an unborn child and the mother; it does not carry automatic adverse consequences, and it does not require surgery to be changed. Unwantedness is a symptom that rises from problems in the society and in the parents.

"Why does a woman not want her child? Helper *et al.*[49] have studied the acceptance of pregnancy and life events, and found that a woman has the greatest difficulty in accepting a pregnancy when she faces circumstances that represent a major rejection of the pregnancy by society as a whole or by the father of the child. These observations seem to be confirmed by contemporary circumstances.

"First, society as a whole is creating unwantedness in pregnancies by the newest psychosocial disease, population hysteria. This refers to the emotionality and emotional conclusions that accompany population statistics and figures. It is a disease for a number of reasons:

"It can be studied in the same manner as any other well-defined social attitude or anti-life syndrome (polio, paranoid schizophrenia or prejudice).

"It has certain noxious stimuli[50] that can be identified as etiological factors.

"It has a primary symptom of misanthropy, which is a psychological tetrad of human antipathy, resistance to unforeseen change, pessimistic preoccupation with present technological difficulties and an inability to trust life.[51 52] Such misanthropy enables the mental detachment necessary to dehumanize people by enumerating them as if they were nonpersons in much the same manner as the military analysts estimate nuclear war casualties.

"It is mediated by the central nervous system's ability to respond by external social rejection as well as by internal biological anxiety.

"Its pathogenesis involves environment and object relationships with people.

"The second external circumstance[53] is less characteristically contemporary but more accessible to direct intervention. This is the father's rejection of his unborn child. Certainly no remedy will be found for the father who causes both the pregnancy and the unwantedness unless efforts are made to promote paternal behavior as a way of life for men in society.

"In general, data on fathering is somewhat more firm than data on unwantedness, and helping fathers by paternal training seems a constructive course. Finding men for whom paternal training is warranted (for the benefit of themselves, their partners and their children) would appear relatively simple: find the unwanted pregnancies. Efforts to retrain a father appear at least on the surface to be crucial in solving the fundamental problems that underlie an unwanted pregnancy.

"'When both society and the father reject a pregnancy, it is little wonder that the potential mother finds it hard not to join in the general negativism, especially when her physician knows of no alternative to abortion."[54]

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[48] M. J. Zemlick and R. I. Watson, "Maternal Attitudes of Acceptance and Rejection During and after Pregnancy," *Amer. J. Orthopsychiat.*, 23, 1953, p. 570. Cited in Nigro, *supra*, n. 28, p. 30.

[49] M. H. Klaus, R. Jerauld, N. C. Kreger, W. McAlpine, M. Steffa, J. H. Kennell, "Maternal Attachment: Importance of the First Post-partum Days," *N. Eng. J. Med.*, 286, 1972, p. 460. Cited in Nigro, *supra*, n. 16, p. 31.

[50] M. M. Helper, R. L. Cohen, E. T. Beiterman, L. F. Eaton, "Life-events and Acceptance of Pregnancy," *J. Psychosom. Res.*, 12, 1968, p. 183. Cited in Nigro, *supra*, n. 15, p. 31.

[51] P.R. Ehrlich, *The Population Bomb*, Ballentine Press, Chicago, 1968. Cited in Nigro, *supra*, n. 9, p. 34.

[52] P. R. Ehrlich and J. P. Holdren, "The Negative Animal," *Saturday Review*, June 5, 1971, pp. 58–59. Cited in Nigro, *supra*, n. 8, p. 34.

[53] M. J. Spiger, "Anti-population Sabbatical," *N. Eng. J. Med.*, 284, 1971, p. 284. Cited in Nigro, *supra*, n. 25, p. 34.

[54] M. M. Helper, et al., op. cit. Cited in Nigro, *supra*, n. 15, p. 34.

Spinetta and Rigler have reviewed the psychological literature on the abused child and have not found that the abused child is unwanted but that the abuse is due to other reasons. The following is a review of Spinetta and Rigler's article:

A review of professional opinions in the literature on the child-abusing parent reveals the following: (1) The abusing parent was himself raised with some degree of deprivation. (2) He brings to his role as parent mistaken notions of child rearing. (3) There is present in the parent a general defect in character structure allowing aggressive impulses to be expressed too freely. (4) Although socioeconomic factors might sometimes place added stresses on basic personality weakness, these stresses are not of themselves sufficient or necessary causes of abuse. A critique is made of a recent demographic survey in light of the foregoing data.[55]

LIVES DEVOID OF VALUE

The historical game of defining certain human beings as being non-legal persons, in order to annihilate what society or certain individuals in society consider as unwanted, continues to plague civilization. Ethnocentrism, the tendency to view a group, race, or civilization other than your own as being inferior, has contributed to annihilation of some groups of human beings. In order for civilization to mature it is necessary that we extend equal protection to all human beings from the moment of conception on. If this is not done, the rights of all will be severely jeopardized.

In this century, which is noted for man's inhumanity to man, one book which was published in Leipzig in 1920, seems to have contributed to the philosophy that some human beings may be annihilated. The title of the book by Karl Binding and Alfred Hoche is *The Release of the Destruction of Life Devoid of Value.* David Granfield in *The Abortion Decision* states:

". . . The title, *The Release of the Destruction of Life Devoid of Value,* awkwardly but accurately summed up the argument: The law should not penalize the killing of those whose lives are worthless. . . ." [56]

Granfield summarizes the gradual procession from a theory of worthlessness to the implementation of an effective annihilation program for certain individuals when he states:

"The sterilization law of July 14, 1933, was a crucial step in this creeping legislation which lead to the death camps.[57] The title, 'Law for the Prevention of Offspring with Hereditary Diseases,' gave little hint of the lethal techniques of 'prevention' that would eventually be devised and the broad interpretation that would be given to the words, 'hereditary diseases.' The pattern, however, has been set. The grounds for sterilization were broad and flexible: mental deficiency from birth, schizophrenia, circular (manic-depressive) lunacy, hereditary epilepsy, hereditary St. Vitus's Dance, hereditary blindness or deafness, serious hereditary physical malformation, and severe alcoholism. The diseased person himself, or more significantly, a civil service doctor or the head of a sanitorium or nursing home for its inmates, could make application for sterilization. A Eugenics Court and a Eugenics High Court were to hold hearings and consider appeals. The strength of the law was in Paragraph 12: 'Once the court has finally decided on sterilization, it must be carried out even against the will of the person to be sterilized.' This law was signed by Adolph Hitler and by Wilhelm Frick, the Minister of the Interior, who was to be primarily responsible for the 'mercy killings.'

"The eugenic program quickly moved from those unfit to produce life to those unfit to enjoy life. The monstrous step to euthanasia followed the pattern established by the sterilization law: a eugenic purpose—the sociomedical betterment of the nation; a broad classification of the unfit; institutional facilities already established for sterilization; and psychiatrists willing to determine the value of human lives. In the very beginning, Jews were not allowed to enjoy the 'benefits' of this euthanasia program, but shortly the machinery of mercy killing was put to work on the 'final solution to the Jewish problem.' Once a judgment of worthlessness could justify eugenic killings, the move from medical to sociomedical and socioeconomic indications demanded only a minor rationalization. Racial

[55] J. J. Spinetta and D. Rigler, "The Child-abusing Parent: a Phychological Review," *Psychological Bulletin,* 77(4):296–304, 1972; reviewed in *Abstracts for Social Workers,* 8:3, Fall, 1972, p. 16.

[56] David Granfield, *The Abortion Decision,* Doubleday, Garden City, N.Y. 1969, p. 168.

[57] *Ibid.,* pp. 168–169.

extermination was as logical as sterilization, and certainly on an ethical par with the killing of 'useless eaters.' [58]"

Callahan [59] discusses the relationship between 'being wanted' and 'having value' and states that: "the implication seems to be that, in itself, the conceptus is of no value; it awaits someone's wanting it—then and only then is it of moral interest or human worth. There are also two further ambiguities. First, is the case that if the conceptus is not wanted by the mother, then it is an object of disvalue, something which ought to be destroyed? Second, if it can be shown, or at least statistically supposed, that an unwanted conceptus poses an eventual 'danger to society,' then ought not that conceptus to be aborted even if the mother does not want or cannot in conscience abide an abortion? [60]"

This is the most frightening aspect of the pro-abortion propaganda. This type of rhetoric leads to defining anyone whom society decides, out of existence. It allows for a 'final solution' to any problem which might threaten society. The same type of reasons given by the anti-life propagandists for allowing abortion will also be used to justify 'mercy-killing' or what some call active euthanasia.

In a recent article in *Northwest Medicine*, Dr. Williams expresses a view which is not too far removed from that expressed in *The Release of the Destruction of Life Devoid of Value*, when he states:

"Therefore, since we must restrict the rate of population increase, we should also be giving careful consideration to the quality as well as the quantity of people generated.

"We should use kinder and more sympathetic approaches, recognizing that potential suicide victims have a true illness; we must help them more actively in solving their problems. However, we should give assurance that their wishes for euthanasia will be granted if success is not encountered within a period considered reasonable by experts.

"At least initially it seems desirable to deal predominantly with individuals with great mental or physical suffering, or both, who desire euthanasia and who, after full and due consideration, seem to be incurably ill.

"Others who should be carefully considered for euthanasia are individuals who have reached a vegetative stage, and who seem incurable, particularly ones who offer certain major problems. In these, euthanasia seems justified, in properly selected cases, after due consideration and approval by relatives and others in responsible positions.

"It seems unwise to attempt to bring about major changes permitting positive euthanasia until we have made major progress in changing laws and policies pertaining to negative euthanasia." [61]

In spite of the traditional ethic of medicine and the plea of a pro-euthanasia promoter, some groups have secretly and in anticipation of changes in euthanasia laws, been promoting positive euthanasia for certain persons in our society whom others feel should be eliminated. These groups are composed of physicians, attorneys and others who express their concern to be of assistance in a time of need.

Unwantedness might also be closely related to what most people feel as rejection. The majority of people have experienced rejection. Rejection has been acutely felt by people in our society who have been recipients of public welfare, people who are chronically ill, by the old and the infirm, and rejection has certainly been felt by children and adults who are mentally retarded. These people perhaps cannot make as great a contribution to society as those who are well in body and in mind. Again we must ask the meaning of the term "contribution." Perhaps every person in the world makes his own unique contribution to society no matter how much or how little he contributes to the gross national product.

David Granfield discusses the "unwantedness" argument when he states:

"The 'unwanted child' argument proceeds, however, on the basis of several slippery assumptions. One is the ethically questionable proposition that something as irrevocable as the death of a child can be balanced against something as chancey and changeable as the emotional state of a woman in early pregnancy.

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[58] Office of U.S. Chief of Counsel for Prosecution of Axis Criminality, *Nazi Conspiracy and Aggression*, U.S. Government Printing Office, Washington, D.C., 1946, Vol. V, pp. 880–883. Cited in Granfield, *supra*, n. 45, chapter 5 p. 168.

[59] Callahan, *op. cit.*, p. 456.

[60] *Ibid.*, p. 457.

[61] Robert H. Williams, M.D., "Number, Types and Duration of Human Lives," *Northwest Medicine*, July, 1970, pp. 493–496.

The other is the psychologically indefensible notion that parental attitudes during the customarily more or less tense and difficult period of pregnancy are a true reflection of what the attitudes of the same parents will be after the birth of their child. . . ." [62]

The anti-life proponents have little regard for the "unwanted child." As Garrett Hardin states:

"How then does society gain by increasing the number of unwanted children? No one has volunteered an answer to this question. . . . If [a woman] is pregnant against her will, does it matter to society whether or not she was careless or unskillful in her use of contraception? In any case, she is threatening society with an unwanted child, for which society will pay dearly." [63]

Another enemy of the unborn child, or of the child undesired by society, is John D. Rockefeller III. In discussing illegitimacy, family size, health of existing children, and economic condition of the family, he favored the outright elimination of abortion laws because: . . . it would give us a true basis for eliminating the social evils I have discussed.[64]

It is easy to move from the elimination of "unwanted" children to the elimination of "wanted" children, as Mrs. Rossi stated, when she expressed the view that it is wanted children, not only unwanted ones, who constitute "excess" population.[65]

For some it is also easy to move from unwanted and wanted children to "unintended" children as Joseph Fletcher states:

"It is even likely they would favor abortion for the sake of the victim's self-respect or reputation or happiness or simply on the ground that no unwanted and unintended baby should ever be born." [66]

Joseph Fletcher even approves of mass abortions when he states in reference to pregnant women being put to death in a concentration camp:

"Even accepting the view that the embryos were 'human lives' (which many of us do not), by 'killing' three thousand the doctor saved three thousand and prevented the murder of six thousand!" [67]

Dr. Alan Guttmacher, President of Planned Parenthood-World Population, states: "We are trying to stimulate the creation of wanted children and wanted children only." [68]

Abortion is the final solution for unborn children as Granfield states: "The operative idea in liberal abortion is to eliminate the problem by eliminating the problem child. The oldest expedient of all, destruction, is the 'final solution' to the perennial problem of the unwanted, those persons who are judged to be harmful or useless to society." [69]

In order for civilization to survive it is necessary that all who care for life, all human life, must be willing to care for those in our society who are not desired by some, but who are wanted and desired by those who respect and love life.

BOOK REVIEW

"The Death Peddlers—War on the Unborn by Paul Marx, O.S.B., Ph. D., Saint John's University Press, Collegeville, Minnesota 56321, 1971. 191 pp., paper, $2.00 ($1.50 each in quantities of 10 or more).

Anyone who still needs proof that humanism is misanthropic should read *The Death Peddlers.* There has never been a more shocking expose of the abortion scene.

Dr. Marx, a professor of sociology, attended the Symposium on Implementation of Therapeutic Abortion in Los Angeles in 1971. Working from his tape-recordings, he has recreated the cold-blooded atmosphere of the Symposium, a gathering

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[62] Granfield, *op. cit.*, pp. 120–121.

[63] Garrett Hardin, "Abortion—Or Compulsory Pregnancy?" *Journal of Marriage and the Family,* 30 May, 1968, p. 249. Cited in Callahan, *supra,* n. 14, chapter 14, p. 454.

[64] John D. Rockefeller III, "Abortion Law Reform—the Moral Basis," mimeograph used at the A. S. A. Conference, Hot Springs, Virginia, November, 1968. Cited in Germain Grisez, *Abortion: The Myth, The Realities, and the Arguments,* Corpus, New York, 1970, n. 297, chapter 5, p. 260.

[65] Alice Rossi, "Paper on Abortion Prepared for the Task Force on Family Law and Policy," mimeograph, March 8, 1968. Cited in Grisez, *supra,* n. 305, chapter 5, p. 262.

[66] Joseph Fletcher, *Situation Ethics: the New Morality,* Westminster Press, Philadelphia, 1966, p. 39. Cited in Grisez, *supra,* n. 16, chapter 6, p. 281.

[67] *Ibid.,* p. 133. Cited in Grisez, *supra,* n. 38, chapter 6, p. 292.

[68] A. F. Guttmacher and Harriet F. Pilpel, "Abortion and the Unwanted Child," *Family Planning Perspectives,* Vol. II, No. 2, March, 1970. Cited in Randy Engel, *A Pro-life Report on Population Growth and the American Future,* n. p., 1972, n. 6, section II, p. 23.

[69] Granfield, *op. cit.,* p. 167.

of doctors, nurses, social workers and hospital staff members involved in making abortion universally available.

The book sheds a great deal of light on the darker, little-publicized aspects of the abortion nightmare, including: the staggering, true statistics on abortions; the boom in campus abortions; the growing use of tax monies to finance abortions; abortion as a big business; the grisly details of the four common techniques; the rarely-mentioned dangers of abortion to the mother; how "model" abortion laws work in practice; "clergymen" who boost abortion; the mass abortions of tomorrow; what to expect when the long-awaited "abortion pill" arrives and the deceitfulness of the abortion-mongers.

The Death Peddlers would be disturbing enough had the author merely reported what occurs in the hospitals, but since his evidence comes from the very mouths of the abortionists, the book is truly chilling.

Listen to Dr. Irwin H. Kaiser, a pioneer in his field: ". . . at $160 per patient this is a substantial money maker for the hospital and, obviously, if we were prepared to step into the competitive New York market, where abortions go for as high as $1500, we probably would make a substantial killing, if I may use that expression. [Great laughter!]"

Even more thought-provoking than the purely factual passages are the author's remarks on the implications of our society's casual acceptance of promiscuity, contraception and abortion.

Writing from a solid Christian perspective [he does not hesitate to use the word "satanic" in discussing his subject], Dr. Marx diagnoses spiritual bankruptcy and self-destructive nihilism as the roots of the neo-pagans' rejection of their offspring.

Even now the enemies of Creation clamor for contraceptives for children, the legalization of euthanasia and infanticide, the "painless elimination" of the "unfit" [à la Hitler], and compulsory abortion and sterilization. Worse evils will follow. Dr. Marx's call for rediscovery of our nation's Christian values deserves the widest possible audience.

MICHAEL ENGLER.

[From Marriage and Family Newsletter]

JAPAN'S 22 YEAR EXPERIENCE WITH A LIBERAL ABORTION LAW

(By Dr. Yokichi Hayasaka, Dr. Hideo Toda, Rev. Anthony Zimmerman, SVD, Dr. Tasuke Ueno, Dr. Mineko Ishizaki)

The Japanese press carried a statement recently that we should reflect on responsibilities towards the 50,000,000 fetuses which have been aborted in the last two decades. The statement was made by Father Pedro Arrupe, Superior General of the Society of Jesus, who was formerly a missionary in Japan. The attention of the press to this statement is one of many signs that our nation is moving towards a stricter policy in regard to abortion.

A liberal abortion law was passed by the Diet in 1948; it was amended in 1952 to eliminate the requirement that the reasons for performing an induced abortion be examined, thus permitting the "designated" physician to perform the operation at his own discretion. The stated conditions are that the fetus "is unable to keep its life outside of the mother's body" (Art. 2) and that the physician judges that "the mother's health may be affected seriously by continuation of pregnancy or by delivery from the physical or economic viewpoint" (Art. 14,4). The consent of the person in question or of the spouse is required (Art. 14).

The purpose of the Eugenic Protection Law which provides for easy legal abortion, is "to prevent the increase of inferior descendants from the eugenic point of view and to protect the life and health of the mother as well" (Art. 1). The Government has never promoted abortion for reasons of health or for the sake of decelerating demographic growth.

Physicians can receive a "designation" to perform the operation from the Medical Association which is a corporate juridical body established in the Prefectural district as a unit (Art. 14); a two-year apprenticeship is normally required. The designated physicians file reports on the operations on the 10th of

each month; the report states the number of operations performed, the reason, the month of pregnancy, etc. It is presented to the Prefectural Governor (Art. 25) who forwards it to the Welfare Minister. The designation of physicians and the filing of reports is therefore not under control of a public agency.

There was a Cabinet Decision on October 26, 1951 calling attention to the increase of abortions and possible damage to health:

> The number of abortions is increasing each year. They are often necessary to protect the life and health of the mother. Occasional damage to the mother's health, however, makes the dissemination of the knowledge of contraception desirable to eliminate the bad influence of abortions on the mother's health . . ." (See Minoru MURAMATSU "Some Facts about Family Planning in Japan" The *Mainichi Newspapers*, Tokyo, 1955, p. 35).

There was another warning about danger to health by the Advisory Council on Population Problems, Ministry of Welfare, on August 24, 1954:

> Induced abortion, which is widely prevalent today, very often is followed by another pregnancy. Therefore, the operation usually must be repeated frequently if it is to be effective for the limitation of births. This necessarily incurs undesirable effects upon the health of the mother. (M. MURAMATSU, *op. cit.*, p. 38.)

The Council recommended popularization of the practice of conception control in order to prevent abortions, and in order to help decrease the birth rate.

One must say, however, that government opposition against abortion has never reached a high decible level. Propaganda for birth control fairly saturated the nation, but opposition to abortion was weak. The fact that physicians were controlling the practice rather than government officials made it all the more difficult for the government to launch effective countermeasures against abortion.

The masses, on the grass roots level, appear to have gotten the message that they should not have any babies; but it was not so clear to them that the method should be conception control rather than induced abortion. One person expressed the apparently prevalent mood at the time as follows:

> Unless we are given more space or food, we are forced to control birth. Every man or woman loves to see smiling babies. We are compelled to resort to abortion or contraception against our will.
>
> I write this opposition against Mr. Hyatt (Father Hyatt, M.M.) with tears. Give us more space. Give us more food. Or give us grant to abortion or contraception. Malthus' theory is the truth in the case of Japan. (Letter of T. Omori, *Mainichi Newspaper*, Aug. 10, 1956.)
>
> Mr. Ryo Omura, a popular writer, expressed the thinking of villagers as follows: Villagers are also saying: "Over there, in that house, they are having one baby after another, though the family is poor, and despite all that the higher-ups have been telling us: we have been told exactly what not to do; what do they mean by disregarding such orders?" (*Mono iwanu Nomin*, p. 195).

In retrospect, it is not surprising that abortions have become a major problem in our nation. There were perhaps 100,000 a year before World War II, and 50,000 during the later war years. Following armistice, the families were reunited, and many new families were formed; this created the famous baby boom in 1946–48. By that time propaganda for birth control was becoming strong, since the nation was in very desperate straits in regard to food, clothing, fuel, shelter. When the liberal abortion law was passed in 1948, it had almost the effect of detonating an explosion of abortions. Drawing on information which is presented in the Appendices, and on experience, we believe that the following observations can be made about the working of the liberal abortion law in Japan.

1. THE PRACTICE OF INDUCED ABORTION SPREAD VERY RAPIDLY AFTER IT BECAME LEGAL

One year after passage of the law, 246,104 legal operations were reported; five years after passage, 1,068,066 were reported. The actual count was probably at least twice as high. (See Appendix I)

National surveys made every two years by the Mainichi Newspapers indicated that 15.4% of the wives in child-bearing ages had experienced abortion by 1951, 26.5% by 1955, 40.8% by 1961, and, decreasing slightly, 37.4% in 1969. Not included is a further percentage to be added for those who did not answer, so that the answers look more like 50%. When we compensate for the well-known fact that women under-report because of bashfulness, even in the anonymous surveys, we get an even higher figure. The Women's Association got a figure of 62% in the Nagoya area; gynecologists got a figure of 62% in the Nagoya area among non-

patients, 63% among clients of other medical departments, and 72% among their own patients, an average of 67%. But among women with at least 4 children, 80% had at least one abortion. (See Appendix I, p. 9.) We may also note that statistics indicate that women in the 35–39 age bracket abort 2 out of 3 pregnancies, those in the 40–44 age bracket abort 7 out of 8, and those age 45–49 abort 14 out of every 15 pregnancies. (See Appendix I, p. 9.)

We do not know how many abortions are performed annually, as the reported figures are not very helpful. (See Appendix I, p. 9.)

At any rate, there are entirely too many. Once our people were deprived of the support of a solid law prohibiting abortion, which is supported by police, courts, and public opinion, they fell victim to the vicious habit.

2. LEGAL ABORTION BECAME A SUBSTITUTE FOR CONCEPTION CONTROL

Public opinion surveys indicate that approximately half of those who resort to induced abortion were not attempting to prevent the pregnancy. (See Appendix II, p. 12.) Apparently easy access to legal abortion has become a substitute for efforts at conception control for them.

Furthermore, the failure rate of those employing rhythm and contraception is abnormally high; the 1965 Mainichi survey indicates 43.1% failure of the Ogino rhythm method, 34.9% of the basal temperature rhythm method, 40.6% failure among those depending on the condum, 47.5% among those using the pessary. Easy availability of legal abortion has perhaps made them careless; their "backs are not against the wall" and they take chances. (See Appendix II, p. 12.)

Dr. Tatsuo Honda, Institute of Population Problems, Ministry of Welfare, has estimated that abortion accounted for ¾ of the births prevented in 1950, contraception for only ¼; the rate changed to ⅔ by abortion and ⅓ by contraception by 1955. (Honda, "Population Problems in Post-War Japan", Ministry of Welfare, 1957, p. 19). We have no good estimate of the comparative values today.

Incidentally, oral contraceptives and intra-uterine devices are not permitted as contraceptives in Japan except for research purposes. Several medicines on the market are being sold for the advertised purpose of controlling the menstrual cycle and can actually be used as contraceptives, but their use is certainly not as extensive as that of the oral contraceptives in America. The Japan Family Planning Association went on record as opposed to the legalization of the sale of oral contraceptives in 1964, and remains opposed today. The reasons given are medical, social, and demographic. Medical, because too much remains unknown about the effects of their usage: social, because it would invite easy sex among the young; demographic, because the birth rate is too low even now in the country and the government will have to do something to raise it for the welfare of the nation. (See Appendix V, p. 16.)

Apparently the legalization of abortion has weakened incentives to employ effective measures to prevent conception in our nation.

3. INDUCED ABORTION HAS BECOME QUASI-COMPULSORY FOR MANY PEOPLE AT THE GRASS ROOTS LEVEL

Not-very-subtle pressures to visit the abortionist weigh so heavily upon many ordinary housewives in Japan that they feel "it cannot be helped." Apartment managers frequently enforce a policy of no more than two children. Company apartments are tailored for the small size family. Neighboring women offer "help" and "advice" to a mother who is pregnant too soon or too often. Pregnant mothers who visit the gynecologist are asked casually "Umimasu ka?" (are you intending to bear it?). Wives can find jobs to increase family income if they finish bearing children early, get their two or three children into the nursery, kindergarten, and school, and so be free. The national economy has hardened its cast around the small size family—in contrast to prewar years—and public opinion simply demands it. Support of large families in the form of family allowances, birth allowances, housing, etc. is non-existent for most. Once the law permitted the Japanese woman to abort her child, she did not find herself very free not to abort it.

The extent to which the small size family has become standardized can be judged from these figures: in 1950, 17.8% of the children born were number four or above in the family; but in 1968 the figure had dropped to 3.1%. (*NIHON NO JINKO KAKUMEI, Japan's Demographic Revolution*, Mainichi Newspapers, 1970, p. 243. The 1950 figure is for children already born and for pregnancies in their sixth month or above; the 1968 figure is for children actually born. Apparently the census-takers are not taking chances on counting pregnancies any more.)

One might say that there are not enough large families around to exert pressure for legislation in their favor; and because legislation is not favorable, large families do not come into existence; it is a vicious cycle. If pregnant mothers had no choice except to bear their children, this circle would probably be broken, and legislation in favor of large families, such as housing concessions, tax exemptions, child allowances, birth allowances, would also be introduced in Japan, as in so many other countries.

4. MOST JAPANESE ARE ASHAMED OF COMMITTING INDUCED ABORTION

The public opinion surveys indicate that most women with abortion experience do not approve of it without reserve. The 1963 survey by the Aichi Committee on the Eugenic Portection Law indicates that 73.1% of the women who experienced abortion felt "anguish" about what they did. In the 1964 survey of Dr. Kaseki, 59% responded that they felt abortion was something "very evil" and only 8% said they don't think it should be called something bad. In Gamagori City survey, 65% had some reason to be sorry. In the 1968 survey of the Nagoya City Area, 67% of the women responded that they felt the fetus is an individual human being from the beginning, not a part of the mother. 42% of the women in the survey responded that abortion is not good; 57% that it is not good but it cannot be helped; and only 1% didn't know whether to call it bad or good. In the 1969 survey by the Prime Minister's Office, 88% answered that abortion is bad, or it is not good but cannot be helped. (For details see Appendix III, pp. 15–16.)

In the 1965 Mainichi survey, only 18% responded that they "did not feel anything in particular" when they experienced abortion for the first time; 35.3% felt "sorry about the fetus"; 28.1% felt they did something wrong; 4.3% worried about fecundity impairments; 6.5% had other answers, and 7.9% did not answer The editors comment as follows:

"No one would deny that abortion is brutal in the light of traditional moral values. More important is that it is the voluntary negation of maternal instinct. It may be interesting to study what has motivated Japanese to openly resort to such a means for fertility limitation. But, it was not the purpose of our study. The only thing we can point out here is that those who have ever experienced abortion did not undergo the operation without any moral or psychological conflict." (*Summary of the Eighth National Survey on Family Planning*, p. 73.)

Legal abortion induces many women in Japan to do something which they cannot approve from their maternal and moral perceptions. But it does not alter their perceptions profoundly.

5. EASY PROFITS MADE BY INDUCED ABORTION TENDS TO INTENSIFY AND PERPETUATE JAPAN'S ABORTION EPIDEMIC

A woman wrote recently in the "Voice of the People" section of *Asahi* newspaper (circulation 6.5 million) that you just can't go to a doctor anymore in a pregnant condition without being asked routinely "Umimasku ka?" (are you intending to bear it?). The only place where doctors don't confront you with that easy suggestion for an abortion is a Catholic hospital, she wrote. She was asked the same question ten years ago. If she had not been so determined, she would have followed the doctor's suggestion then and there, as so many do. Now she is happy that she has a nice child instead.

Huge signs advertising "designated physicians," with directions on how to get there, crowd the bill board spaces around subway stations and on street corners.

One doctor, trying to explain in simple terms why the present liberal abortion law cannot be reformed, said that university hospitals are usually strict in abortion policy; some permit no operations at all, saying that the doctor's business is to save life, not to dispose of it; others have few. To make their living, gynecologists of such university hospitals work intensely at other hospitals and clinics several days a week. "So you see, it's just impossible to think of changing the law," the doctor explained.

If the 13,000 designated physicians perform 2.6 million abortions annually, and charge 10,000 yen each ($28.00) which is the present Nagoya price, the average income is $5,600 annually; that is besides extras, and subsequent calls. Much of it is pure income, tax free because not reported.

We cannot completely shake off the suspicion, therefore, that the strong and determined fight against any reform of the present abortion law, which is being waged by the designated physicians, is only imperfectly sterilized of infection by commercialism.

6. WHEN ALL IS SAID, LEGAL ABORTION IS NOT REMARKABLY SAFER THAN ILLEGAL ABORTION

All public opinion surveys taken indicate that several million women in Japan believe that their health has been harmed by abortion; that is, legal abortion. The surveys cover a total of 16–17 million married women, not counting the unmarried. among whom many have also experienced abortion. If roughly half of them have experienced at least one abortion which is conservative estimate); and if 30% of them have adverse health effects as a result, the number of women affected is already above 2.5 millions; there are more if we also count the unmarried, and those who have moved into the higher age categories.

This appears to be the picture which emerges from the public opinion surveys. In the 1959 Mainichi survey, 28.4% of those who had abortion reported 'some kind of bad effect;' in the 1963 Aichi survey, 13% indicated damage from the operation; in the 1964 Welfare Ministry survey, 24.1% indicated that they were physically unwell since the operation; in the 1965 Mainichi survey, 18.5% indicated that they were physically unwell after the operation; in the 1968 Nagoya survey by Women's Associations, 59% indicated that they were severely troubled with adverse after-effects, or in less good health; and in the 1969 survey of the Office of the Prime Minister, 31% indicated that some kind of physical abnormality came about as a result of abortion; this averages to 29% in the six surveys; not counting those who did not reply to this question. (See Appendix IV. pp. 14–15.)

In the 1965 Mainichi survey, the percentage of complaints is seen to rise with the number of abortions experienced: 18.5% indicate that they were physically unwell after one operation; 22.7% after two; 40.4% after three; 51.7% after four operations, etc. This has grave implications in view of the statistics that there are so many women who experience more than one operation, especially in the later years of marriage. Pregnancy tends to follow abortion swiftly for some reason or other, as though the women were imprisoned in a non-stop merry-go-round.

PREGNANCY AFTER ABORTION AND AFTER NORMAL CHILDBIRTH

	Percent pregnant	
	After abortion	After childbirth
Months:		
3	(448) 19.2	(354) 0
6	32.8	2.5
9	43.5	8.5
12	50.0	16.9
15	60.0	26.3

Note: (Koya, Muramatsu, "Bulletin of the Institute of Public Health," IV, No. 1–2, September 1954. The women observed were not using contraceptives.)

The 1969 survey of the Office of the Prime Minister indicates the following list of complaints: 9.7% sterility (after three years); 14.8% habitual spontaneous abortion; 3.9% extra-uterine pregnancies; 17.4% menstrual irregularities; 20% abdominal pains; 19.7% dizziness; 27.2% headache; 3.5% frigidity; 13.5% exhaustion; 3.6% neurosis.

Even though the operating physician performs everything normally, the woman experiences a sudden change from the pregnant state to the non-pregnant state. Her body has been functioning at high capacity to provide nourishment for the developing fetus and to dispose of wastes. When the fetus is wrenched out of her body, the reason for this prodigious physical activity is suddenly removed. Dr. Y. Moriguchi compares it to slamming emergency brakes on a train which is going at full speed (*Katorikku Shingaku*, Jochi University, II, II, 4, pp. 353–362). As a result of the syndrome of the unbalanced sympathetic nervous system may appear (see Dr. Nakatsu "Mistakes in Abortion and Prognosis" in *Obstetrics and Gynecology*, Sept. 1960, pp. 53–59).

The list of after effects includes menstrual irregularities, cramps, headache, dizziness, exhaustion (see e.g. *The World of Obstetrics and Gynecology*, Oct. 1954, pp. 1107–9); also sterility, habitual spontaneous abortion, extra-uterine pregnancies, adnexitis, placenta praevia, and placental adhesion (see Dr.

Makatsu, *op. cit.;* also, e.g. *The Japan Journal of Sterility*, Nov. 1958, p. 292; *The World of Obstetrics and Gynecology*, April, 1953, pp. 411–2; Clinical Gynecology Conference, Jan. 1964, pp. 37–42).

But every operation does not proceed smoothly, even under legal conditions. Dr. Nakatsu gives various reasons for this, and statistics, in the above-mentioned article. He presents a study made by Dr. Kojima in 1950 of damages inflicted by the physician; Dr. Kojima gathered the list by means of a questionnaire and published the results at the 1950 Conference of Gynecologists:

List of damages from faulty operations

Damage:	*Cases*
Perforation of uterus	194
Lesion of cervix	50
Retention of parts of pregnancy	61
Still pregnant	24
Infection	50
Bleeding	17
Failure due to use of laminary instrument	21
Others	10
Total	427

Dr. Majima's list of damages is also presented, from his summarized Report of 1957:

Damages from abortion, 1957

Side effects from anesthesia (percent)	4–10
Perforation of uterus	336
Lesion of cervix	291
Infection	166
Bleeding	90
Retention of parts of pregnancy	75
Still pregnant	30
Damage by laminary instrument	41
Deaths	161

Dr. Makatsu made a study of reports by designated physicians during December 1953–June 1954; the results indicated that there were damages in 8.0% of the operations; percentage distribution was as follows:

	Percent
Long term bleeding	5.1
Abdominal pains	2.7
Severe bleeding	1.6
Rise of temperature	1.5
Retention of part of pregnancy, adnexitis, pollakiuria, sleeplessness, perforation of uterus, lesion of cervix	.5

Dr. Nakatsu concluded that the increase of abortions in our nation after the war, and the many mistakes made in operations, are regretful experiences, deserving attention and counter-measures.

We may hope that conditions have improved within Japan since these reports were made. It is most difficult to get a clear picture through clinical studies because the doctors who would make the studies are not interested in advertising damages; besides, since abortion is now so prevalent, it is relatively difficult to find a suitable control group of women who are bearing children without having abortions.

Certain characteristics of the whole abortion phenomenon make this operation more dangerous than others.

The relationship between the doctor and patient leaves much to be desired even when abortion is legal. As the public opinion surveys indicate, the vast majority of Japanese women feel that abortion is something wrong; the average of the six surveys listed is 80% (see Appendix III, p. 13). Many women therefore go to strange doctors who do not know them. Nagoya women are known to go to Tokyo; unmarried Nagoya school girls dress as adults and go to Okazaki. Unmarried girls under age 20 can go to the Seiyakusho section in hospitals and get an abortion anonymously. It is estimated that 30–40% of the induced abortions are on unmarried mothers; prostitutes and bar girls learn to abort each other. The doctor feels less responsibility for a strange patient than for one of

his own; this trust is further weakened by the mutual awareness of doctor and patient that something shameful is being done; and the patient is not likely to go back quickly, even though a complication demands attention. Furthermore, health insurance does not cover expenses, so women have to pay cash before they leave the clinic or hospital, whereas practically everything else is covered by insurance; this again strains relations of trust.

We ask ourselves, then, how the picture would change if abortions were restricted again. Perhaps as follows. Married women would not entrust themselves to quacks and unskillful operators; they would go to the same doctors and the same places as at present, or not at all. These doctors, however, would have to charge more, to pay for fines, suspensions, bribery, etc. The higher price would gradually erode the present peak of abortion statistics. The danger would be greater among school girls, and ordinary unmarried young women. For them special provisions should be made, so that they can have the baby with some dignity, and that the baby be taken care of through adoption or at special orphanages. The old Japanese tradition of adoption would probably swing into life again, taking care of practically all the cases. Moreover, public pressure to observe chastity before marriage or to take the consequences would very likely increase. Again, this would be instrumental in eroding the mountain of abortion statistics.

We believe that more damage is now inflicted on women in Japan by legal abortion, when total figures are tallied, than when abortion was restricted by law and was a relatively rare experience. Dr. Moriyama's figures indicate that only 0.3%–0.2% of the mothers experienced abortion in the prewar years (see Appendix I, p. 11). Now it appears to be over 50%. Damage mounts to staggering heights even when operations are legal, because an unhealthy operation is repeated on so many persons. We believe that the health of Japanese women, as a whole, will be preserved better if abortions are again severely restricted by the law and in its application.

7. ABORTION IS NOT NECESSARY TO SOLVE JAPAN'S SO-CALLED OVERPOPULATION PROBLEM

In the immediate postwar years the arguments advanced in favor of birth control (and abortion) as a means of solving Japan's so-called overpopulation problem sounded convincing to many. Our papers carried the report about conclusions reached by Dr. E. A. Ackerman after a two-year study of Japan's natural resources in 1949; he is reported to have concluded that Japan's population should be held down to 80,000,000 by means of birth control activity on an unheard of scale; else Japan would perpetually depend upon America for life support, or be forced to struggle at sub-human levels of subsistence.

Developments since then have been quite different than was foreseen. There are now 103,000,000 people, increasing at the rate of about 1,000,000 per year, and the living standard is very high.

The food problem is solved partly by better production, partly by trade. In fact, we have a chronic problem now with rice surpluses. Seven million tons of old rice will be left when this year's crop is harvested. We don't like old rice, and women are against mixing the old with the new. Koreans complained when we exported old rice there, even though they were short. When the government tries to solve the problem by lowering price supports, angry farmers descend on Tokyo to protest. This was certainly not foreseen in 1948.

There was much talk about chronic labor surpluses in the postwar days. Now the picture is entirely different. The White Paper on Labor issued in July, 1970 stresses the extreme gravity of the labor shortage and warns that Japan's continued economic growth may be seriously affected. And the situation is deteriorating. Until now the new labor supply was not decreased much by the lower birth rate which began in the 1950's. But now the peak has been passed in the number of youngsters who were born in the postwar baby boom, who have been entering the labor force.

In April, 1969 there were 5.7 job opportunities available per single high school graduate; in 1970 there were 6.5 times as many jobs as available graduates. As a result of the labor shortages, 20 to 40 percent of Japan's enterprises have been forced either to curtail operations, send out orders to outside firms, hold down sales, or to drastically increase overtime work. See report in Japan *Times*, July 26, 1970.) This is the very opposite of what was foreseen in 1948.

It has also been stated that the Japanese people are too densely crowded on their islands, hence birth control is needed as an assurance that future persons will have enough living space. In fact, with 103 million people living in an area of 369,661 square kilometers, the population density is 279 persons per square kilometer; whereas the United States has an average of 25, and the world 27. Moreover, five-sixths of Japan's area is too steep for farming, hence also difficult for settlement. As it turns out, however, it appears that we Japanese are not overly concerned with the problem of crowding.

In fact, emigrants leaving Japan in order to seek wider living spaces are few. During 1955–65 there were more immigrants than emigrants in eight out of the eleven years.

Within Japan, the movement of the population is not away from the crowded cities but quite the opposite. Greater Tokyo, has already 26 million people, and 400,000 more are coming from the countryside annually. Everywhere, people are migrating away from the scarcely populated areas, towards the densely inhabited districts. Mr. Toshio KURODA of the Institute of Population Problems told participants of the XIth Pacific Science Congress (Tokyo, Aug. 1966) that Japan is polarizing in the following manner: The land area of Japan seems to have shown a polarizing trend, namely being polarized to two extreme patterns of area of increasing population and that of decreasing population. The decreasing pattern is found in local towns and villages. Eighty-three percent of total towns and villages shifted to the pattern of decreasing population during the latest censal years (1960–65). (Paper No. 8: Migration).

Great social problems are developing in towns and villages which are losing population. Up to 85% of the middle and high school graduates migrate to the cities. The countryside is becoming ever more conservative because of the preponderance of older people; there are not enough workers to clean streets, keep up river dikes, collect garbage. School teachers, doctors, professionals, leave for greener pastures. Some places have become completely depopulated by "population implosions."

Population in towns of 10,000–19,999 decreased from a total of 16.5 million to 13.9 million during 1960–65; in towns of 20,000–29,999 the decrease was from 7.0 million to 6.6 million; the next two categories also decreased; but in cities of 100,000–499,999 there was an increase from 19.3 to 22.9 million; and in those from 500,000 up there was an increase from 18.5 million to 22.8. (*JAPAN STATISTICAL YEARBOOK*). The great Todaido Megapolis stretching along the axis of the bullet train and down into North Kyushu contained over half of the national population in 1965 (53.3%) and is growing at the expense of the rest of Japan; it has been projected to contain 59.5% in 1975, and 65% in 1990. There is no real reason why people cannot also populate the countryside densely which is now emptying out, if ever there should be need.

The problems created by such concentration of population are huge indeed. But if the people are going to places where people already are, the advantages apparently outweight the disadvantages. They will have to cope with the problems of pollution, noise and crowded facilities as they arise. Our people have been living close together for many generations in Japan, and may have developed certain techniques, manners, etiquette, and ways of organization which make life quite bearable and even pleasant. Even under the most crowded conditions, the people manage somehow. For example, there were 64 million visitors to the World Fair at Osaka during 1970. On a number of days there were over 600,000 people on the 1.27 square miles of fairgrounds. Once 830,000 attended @ 4.7 sq. yds. per person.

The concentration of Japan's population around harbors, river valleys, and the main lines of communication cuts down drastically the cost of manufacturing production, in contrast to conditions of America, where long hauls and expensive communications and transportation facilities add so much to the cost of production. This is a precious advantage for Japan when engaged in competitive international trade.

Comparative full use of facilities renders it possible for the Japanese to enjoy many social advantages at relatively low cost. The fast train carries 300,000 passengers on good days, and is in the black. One can tune into several television channels almost anywhere in Japan, up to 10 in good places, besides the Ultra-High-Frequency wavelengths. Excursion buses to parks and hot springs do a fluorishing business. Food is fresh, fruit delicious, carefully cultivated to be on the table the year around. We believe that an additional number of people can enjoy the same, and even help to enhance the standard of living further. But this will require vision and determination to make life in the cities pleasant and humane, will require peaceful living together in Japan, plus international peace and a consolidated international economy.

When the Governor of Kagoshima Prefecture announced recently that he wants families to have three children rather than two, some newspapers raised eyebrows asking: "What! Again?" That is, are we in for another round of "Increase and multiply?" Probably not. But we believe that Japan's intensive pre-occupation with population control is on the wane. Prime Minister Ikeda said already in 1963: "I wish that people would realize that when population is increasing the nation is also prospering. I believe there are other ways of solving the over-population problem (than preventing the unborn from entering the world.) (Asahi, January 1, 1963.)

Prime Minister Sato asked the Cabinet three years ago to take steps to curb the large number of abortions in the nation. Again, on March 23, 1970, Prime Minister Sato declared at a public hearing of the Diet, televised throughout Japan, that it will be necessary to restrict abortion in order to provide a sufficient labor force, and to insure Japan's survival; but more necessary still because we must respect human life: "Whether a life has already been born, or whether it still exists as a fetus, our way of thinking about that life must be one of profound respect." (See Appendix X.)

SUMMARY AND CONCLUSIONS

Twenty two years of experience with a liberal abortion law in Japan has given us many reasons for regret. There is more and more criticism of the practice in newspapers and on television as time goes on. There is a strong move within the Liberal Democratic Party to curb abortion practice; gynecologists who make a living from induced abortion are opposed, but even they seem to see the handwriting on the wall. A major effort to impose restrictions on legal abortion will be made in the Diet shortly.

During these 22 years we have learned that our people adopted abortion very rapidly and on a mass scale almost as soon as they were deprived of the solid inhibiting supports of a strict abortion law. We also learned many other things: abortion became a substitute for conception control for very many; failures in conception control were surprisingly frequent when the escape hatch of legal abortion was opened; some doctors are ready to operate on almost anybody because profits are high; several million women now claim that legal induced abortion has made them physically unwell; finally, we have become more confident that Japan's population can keep right on growing without creating insuperable problems.

Much as we need guard rails, signal lights, speed laws, food and drug laws, and tax regulations, so also we need precise laws about abortion which will not be eroded off the map by human passion, or by liberal interpretations in court; we need such laws to save us from ourselves; we need them to stop the terrible discrimination against our most defenseless fellow human beings.

APPENDIX I

STATISTICS ON ABORTION IN JAPAN

Year	Total	In 2d month	In 3d month	In 4th month	In 5th month	In 6th month	In 7th month	Not clear
1949	246,104							
1950	489,111							
1951	638,350		[1] 80.8	[1] 12.2		[1] 6.9		[1] 0.1
1952	798,193		[1] 86.4	[1] 8.7		[1] 4.8		[1] .1
1953	1,068,066		[1] 90.1	[1] 6.6		[1] 3.3		
1954	1,143,059		[1] 91.2	[1] 5.9		[1] 2.8		[1] .1
1955	1,170,143		[1] 91.7	[1] 5.6		[1] 2.6		[1] .1
1956	1,159,288	571,713	497,533	35,397	26,788	20,002	7,461	404
1957	1,122,316	555,109	483,594	32,094	24,846	18,815	7,432	426
1958	1,128,231	562,980	481,345	32,193	24,061	18,893	8,312	447
1959	1,098,853	553,648	463,930	30,723	22,619	19,061	8,373	499
1960	1,063,256	545,000	443,979	29,183	20,592	17,081	6,846	575
1961	1,035,329	538,370	429,064	27,131	19,050	15,064	6,009	641
1962	985,351	519,439	404,678	25,068	16,881	13,392	5,256	637
1963	955,092	508,911	388,592	23,387	15,933	12,578	4,856	885
1964	878,748	476,576	351,480	20,826	14,282	10,603	4,139	842
1965	843,248	460,013	335,920	19,028	13,282	10,063	3,910	1,032
1966	808,378	442,992	320,488	18,460	12,584	9,300	3,728	826
1967	747,490	412,576	295,161	16,119	11,002	8,393	3,446	793
1968	757,389	417,847	300,980	15,899	10,714	7,895	3,155	899
1969	744,451	411,446	296,670	15,793	9,877	7,223	2,848	594

[1] Percent.

Note: Ministry of Welfare, Bureau of Statistics, "Eugenic Protection Statistical Report 1969", June 1970, p. 23.

REPORTED REASONS FOR INDUCED ABORTION, 1

	Total	In 7th month
Total reported	744,451	2,848
Personal heredity	325	14
Heredity of relatives	212	1
Leprosy	93	1
Rape	221	10
Reason not clear	1,232	14
Not clear	594	
Mother's health	741,774	2,808

Note: Ministry of Welfare, Bureau of Statistics, Eugenic Protection Statistical Report 1969, June 1970, p. 24.

RATE OF INDUCED ABORTION BY AGE OF WOMAN, 1965

Age	Number of wives	Number of births	Number of abortions	Abortions per 100 births
Total	16,633,700	1,823,697	843,248	46.2
35 to 39	3,282,200	72,355	145,583	201.2
40 to 44	2,742,100	9,828	68,515	697.1
45 to 49	2,131,300	462	6,611	1,431.0

Note: Annual Statistics Concerning Eugenic Protection, Ministry of Welfare.

HOW COMPLETE ARE OFFICIAL REPORTS OF INDUCED ABORTIONS?

Designated physicians file reports on the 10th of each month for the Governor, on forms which indicate the following:

Name of physicians; date; place.

1. The serial number of the patient.
2. Her age.
3. Her location: the prefecture; whether she is from the countryside, a town, or a city.
4. Age of the pregnancy.
5. Date of operation.
6. Under which paragraph of Article 14 does the case fall?
7. Reason for the operation.
8. Does social insurance apply or not?
9. Does government livelihood or medical support apply or not?

Another sheet is provided for total statistics of the month, giving the paragraph of the law which applies, the age, whether from city or country.

The doctor who files higher statistics, will be assessed higher income tax, of course. Who can check on whether each case is reported? Word has leaked out from one location that the doctors have agreed to report one out of three operations.

Statistics fluctuate wildly from prefecture to prefecture:

Number of Registered Abortions per 100 Births by Prefecture, 1962

Tokyo	36.8
Kyoto	136.1
Saitama	25.4
Kagawa	144.6
Hiroshima	53.0
Okayama	127.3
All Japan	61.0

Do the differences reflect degrees of completeness in reporting, or degrees of differences in operations performed, or both? Who knows except individual doctors insofar as their own reporting is concerned?

Parallel reports are filed by the designated doctors on eugenic operations for sterilizations. We have been able to check them against the latest public opinion survey. The 1969 survey of the Prime Minister's Office, Bureau of Public Information, indicated that 7.8% of the women and 1.7% of the men had received the operation, 9.5% together. Since there are over 30,000,000 married persons in the age category of the survey (31,156,540 married persons age 20–49 in 1965) we

should expect a report on at least 2,960,000 operations. The doctors reported only 616,572 operations during 1949–69, which is 20.8% of those expected. (Statistics on operations are in the "Report on Statistics of the Eugenic Protection Law, 1969" Ministry of Welfare, 1970.) Apparently, only one of five operations was reported. If compensation be made for women who received the operation but have since passed the age of 50, the rate is still lower. The nature of the statistics from the public opinion survey, however, does not allow us to draw precise statistical conclusions.

PUBLIC OPINION SURVEYS ON THE PERCENTAGE OF WIVES WHO HAVE HAD ABORPTION EXPERIENCE

	Experienced	Did not experience	No answer	Total	Number of couples surveyed
Mainichi surveys:					
2d survey (1952)	15.4	68.4	16.2	100	3,195
3d survey (1955)	26.5	52.3	21.2	100	2,949
4th survey (1957)	29.7	57.4	12.9	100	3,075
5th survey (1959)	35.1	42.2	22.7	100	2,956
6th survey (1961)	40.8	35.6	23.6	100	2,811
7th survey (1963)	32.0	55.9	12.0	100	3,166
8th survey (1965)	32.7	56.3	11.0	100	3,140
9th survey (1967)	32.2	51.8	16.0	100	3,804
10th survey (1969)	37.4	52.7	9.9	100	3,461

1969, Office of the Prime Minister, Bureau of Public Information

Survey among a sampling of 3,000 married women, age 20–49. 2,597 respondents.

Experienced abortion:	*Percent*
1 time	21.9
2 times	11.9
3 times	4.8
4 times	1.1
5 or more times	.9
Forgot	.3
No indication	1.0
Did not experience	57.0
No indication	1.1

1968, Aichi Prefecture Association of Women for the Protection of Human Rights

Sampling survey conducted in and around Nagoya, among 1,500 married women, age 16 and above, representing roughly 1,500,000 women.

Question. Have you ever experienced abortion? 62% Yes. 38% No.

1963, Aichi Prefecture Committee on Eugenic Protection Law

Gynecologists handed questionnaire to visiting patients, to patients of other departments, and to other women; 1,727 (74%) responded. They indicated experience with abortion as follows: 67% had experienced abortion (including 72% of the gynecologists' patients, 63% of patients of other medical departments, and 62% of the others). Of those with four children, over 80% had experienced abortion.

1962, study of Professor Yutaka Moriyama, Tokyo University Hospital

To the question why the first birth was so late, he received the following replies: 30.2% were practicing conception control, 26.5% had experienced abortion, 7.6% had experienced a miscarriage, 35.7% had been infertile.

(Reported in *Aichi Prefecture family planning convention proceedings*, Feb. 17, 1966.) He made a comparison of birth and abortion practice between those whose first baby was born in the pre-war years, and those in the postwar, with these results:

[In percent]

Present age	Birth experience	Abortion experience
A—Over 40 years	85–86	0.3–0.2
B—30 to 39	60–70	10–20
25 to 29	46	31
Under 25	26	50–70

APPENDIX II

Public Opinion Surveys

PERCENT NEGLECTING CONCEPTION CONTROL BEFORE ABORTION. FAILURE RATE OF CONCEPTION CONTROL MEASURES

1955, Mainichi survey.—3,000 couples surveyed; 2,805 men responded, and 2,949 wives.

	Percent
Had an abortion (or abortions) before commencement of contraception or rhythm	17.0
Practiced conception control, but had an abortion (or abortions) after failure	24.0
Had an abortion after giving up conception control	2.4
Unknown	1.6
Never had an abortion	39.2
Did not respond	15.8
Total	100.0

1957, Mainichi survey.—3,800 married couples surveyed; 2,928 husbands and 3,075 wives responded. Among them, 29.7% experienced abortion, 57.4% did not, and 12.9% did not answer. Of those with abortion experience:

	Percent
Had an abortion before beginning the use of conception control	39.3
Had an abortion after failure in conception control	58.5
Had an abortion after the discontinuation of conception control	3.5
Did not know	4.2
Total	105.5

1959, Mainichi survey.—3,000 married couples were selected, with wives under age 50. There were answers from 2,716 husbands, and 2,965 wives.

	Percent
Had an abortion before beginning conception control	36.7
Had an abortion after failure in conception control	58.4
Had an abortion after discontinuation of conception control	4.3
Did not know	2.4
Total	101.8

1969, Survey of the Office of the Prime Minister, Bureau of Public Information.—3,000 married women were selected, aged 20–49, by Random Sampling Method No. 2; the women were interviewed, but the reply was confidential, returned by sealed envelope. There were 2,597 respondents, 86.6%. Among them, 42% indicated experience with abortion:

	Percent
Were not practicing conception control before becoming pregnant and aborting	50.7
Had an abortion after failure in anti-conception practice	46.5
Did not indicate either way	2.8

FAILURE RATE OF CONTRACEPTION AND RHYTHM, PUBLIC OPINION SURVEY

Survey made in 1965 by the Cabinet Secretariat of Public Opinion.—Questionnaires were delivered to 3,000 married women selected by random sampling method; there were 2,547 replies (85%). Among those practicing contraception

control, many used several methods simultaneously, so that a total of 158.4% of users is obtained. Method failed and success was reported as follows:

[In percent]

Method	Failure	No failure	No answer
Ogino method	43.1	53.2	3.7
Basal temperature	34.9	60.9	5.1
Condom	40.6	56.6	2.8
Pessary	47.5	48.6	3.9
Jelly	44.7	52.1	3.2
Foaming tablets	33.6	62.3	4.1
Withdrawal	55.7	44.3	
Douche	48.3	44.8	6.9
Others	34.2	60.5	5.3
Not clear	24.5	69.4	6.1
Total methods	37.6	58.1	4.2

Note: N.B. Oral contraceptives are banned in Japan except for research purposes.

Appendix III

PUBLIC OPINION SURVEYS ON ATTITUDES TOWARDS ABORTION

1. *1963, survey by committee on the eugenic protection law, Aichi Prefecture.*—Of the 1,163 women who indicated that they had experienced abortion, 525 responded to the question about subsequent feelings. Of these: 73.1% (384) indicated that they felt "anguished" about the abortion, 23.4% (123) indicated that they felt "lightly" about the matter, 3.4% (18) failed to respond.

2. *1964, Dr. Tatsuo Kaseki study among 253 married women.*—59% felt that abortion is something "very bad," 16% felt that it is considerably bad, 17% felt it is somewhat bad, 8% thought that it could not be called something bad. (Dr. Kaseki, report from Eugenics Protection Consultation Center, Nagoya, 1964.)

3. *1965, Mainichi survey,* 3,600 married women, aged 16–49 husband present, with 3,140 (87.2%) returns.

Question: What did you feel when you underwent the operation for the first time? (Respondents, 1,026) : 35.3% "I felt sorry towards the fetus," 28.1% "I felt that I did something wrong," 18.0% "I did not feel anything in particular," 4.3% "I was afraid of fecundity impairments," 6.5% Others, 7.9% No answer.

In this survey, of 3,140 respondents, 14% indicated that abortion should not be permitted under any circumstances; 16% that it should be allowed for any reason; and 62% for specified reasons.

4. *1965, Dr. Minori Omori, Gamagori, Aichi Prefecture, survey among 200 wives age 20–49,* made during contraception guidance courses among the farm folk. Returns by 185 (92.5%).

Dr. Omori writes that the fact that 53% did not respond to the question whether they had experienced abortion makes corresponding data unreliable; 20% responded that they had not experienced abortion, and 27% that they had experienced it. Among the latter, replies to the question "How did you feel about your first abortion?" were as follows:

	Percent
I felt that I had done something bad	20
I felt pity for the fetus	35
I was afraid that I couldn't bear any more children	10
I didn't feel anything in particular	30
I felt relieved and easy	5

Source: *Aichi Prefecture family planning convention proceedings,* 1966, p. 58.

5. *1968, Nagoya City area survey by Women's Association for the Protection of Human Rights.*—1,500 women, married, age 16 and over; 1,431 answers (95%).

Question 2: What do you think about the fetus?

	Percent
I think it is a human life from the moment it is conceived in the womb	67
It is not a human being until about the 6th or 7th month of pregnancy	4
It is part of the mother until it is delivered	22
I cannot say	7

Question 3: It is said that over 2,000,000 abortions are being performed annually in our country. What do you think about that situation?

	Percent
It is not good	42
It is not good, but it cannot be helped	57
I don't know whether it is good or bad	1

6. *1969, Survey by the Office of the Prime Minister, Bureau of Public Information.*—Married women, 3,000 age 20–49 selected by random sampling; 2,597 respondents (86.6%).

Question: What is your opinion about abortion? Please mark the answer which corresponds most closely to your opinion.

	Percent
It should be prohibited completely	11
I think it is something bad	29
I think it is not good, but it cannot be helped	48
I don't think it is something bad	2
One cannot generalize	7
I don't know	3

Appendix IV

Physical After-Effects and Damage to Health From Induced Abortion

1959, Mainichi newspapers survey.—Random sampling of 3,000 women throughout Japan, age 49 and younger, married 2,965 returned the questionnaire; 42.2% reported no experience with abortion, 22.7% did not answer, and 35.1% experienced one or more abortions; of the latter, 46% experienced one abortion, 32.1% two, 15.8% three, and 6.1% did not indicate the number of times.

Asked whether or not they experienced any bad effect on health as the result of abortion, they answered: 58.8% indicated "no bad effect," 28.4% indicated "some kind of bad effect," 11.8% no answer.

1963, Aichi Prefecture Committee on Eugenic Protection Law.—Gynecologists handed the questionnaire to visiting patients and to other women: 1,727 responded, which was 74% of the total. They indicated experience with abortion as follows: women visiting the gynecologist, 72%; women visiting other doctors, 63%; other women, 62%; average, 67%. Of those with 4 children, over 80% had experienced abortion. Of the entire group, 65% had practiced contraception and were well informed; of those practicing contraception, one-third reported success, but one-third reported two or more failures. Confidence in the effectiveness of contraception was weak.

Asked whether they had suffered damage to health after an induced abortion, 13% indicated that they had suffered such damage. The rate was twice as high among those who did not take time to recover properly, as among those who took proper rest.

1964, Ministry of Health and Welfare, Child and Family Bureau.—Conducted by the Office of the Prime Minister; Bureau of Public Information. Random sampling, 3,000 wives age 20–39, 2,456 respondents.

Among mothers in general, those who indicated that they are physically unwell constitute 10% of the total; among the age group of 35–39, they constitute 13%.

Among the 40.6% who indicated experience with abortion in this survey: 24.1% indicated that they were physically unwell, 71.4% indicated that there was no complaint, 4.4% did not respond.

By age groups, the results are as follows:

[In percent]

Age	Abortion experience	Physically indisposed [1]	No complaints [1]	No answer [1]
Total	40.6	24.1	71.4	4.4
20 to 24	21.1	22.4	71.0	6.7
25 to 29	30.5	24.9	72.1	22.6
30 to 34	43.5	23.7	71.7	4.5
35 to 39	52.0	24.4	71.0	4.8

[1] Percent of those in 1st column, who experienced abortion.

1965, Mainichi newspaper survey.—Random sampling, 3,600 married women, age 16 to 49, husband present; 3,140 returns (87.2%).

FEELING UNWELL BECAUSE OF ABORTION, BY NUMBER OF OPERATIONS

[In percent]

Number of abortions	I am physically unwell	I have no such complaint	No answer
1	18.5	78.8	2.7
2	22.7	74.8	2.5
3	40.4	57.0	2.6
4	51.7	48.3	
5	50.0	50.0	
6 and over	25.0	50.0	25.0
Don't know	41.7	50.0	8.3
No answer	6.7	50.0	43.3
Total	23.8	72.1	4.1

NOTE.—*San-Fujinka No Sekai (The World of Obstetrics and Gynecology)*, March 1966. (XVIII, 3, p. 132.) The above table was not placed into the English "Summary of Eighth National Survey on Family Planning" issued by the Mainichi Newspapers, Tokyo.

1968, Nagoya area survey by Women's Association for the Protection of Human Rights.—(Reported on Jan. 20, 1969.) A questionnaire was handed to 1,500 women age 16 and over, picked by random sampling; the sealed and anonymous results were picked up the next day for tabulation and analysis. There were 1,431 answers (95%). Among these, 62.0% indicated that they had experienced abortion, 38% indicated the contrary.

Question. What was the state of your physical condition after abortion?

	Percent
1. I was troubled severely with adverse after-effects	14
2. My health is not as good as before the operation	45
3. There is no special difference	41

1969, Office of the Prime Minister: Bureau of Public Information.—A random sampling of women of all Japan, married, age 20–49; 3,000 questionnaires were delivered to the women, who were interviewed; answers were returned sealed and anonymous. There were 2,597 respondents, or 86.6%. Of these, 42% indicated that they had experienced abortion, 57% had not, and 1% did not reply. (Note: of the 501 women age 35–39, 22% experienced one abortion, 15% two abortions, and 12% three or more abortions.)

Question directed to those who had experienced abortion: After the abortion operation, did any of the following changes occur, or did they not? And, please indicate whether any of the following changes occurred, beginning immediately after the operation and lasting for some time.

	Percent	
1. Some kind of physical abnormality occurred	31	(338)
2. There was no change	67	(729)
3. (No reply)	2	(22)
Total		(1,089)

Among these, 9.7% reported sterility after three years; 14.8% habitual spontaneous abortion; 3.9% extra-uterine pregnancies; 17.4% menstrual irregularity; 20% abdominal pains; 19.7% dizziness; 27.7% headache; 3.5% frigidity; 13.5% exhaustion; 3.6% neurosis. Among the 124 women who had 3 abortions, 43.6% indicated physical abnormalities; among those who had 4 (28) 50% indicated the same.

[In percent]

	Should be permitted	Should not be permitted	Don't know
1. When there is a fear of passing on hereditary disease, leprosy, etc	95	2	3
2. When it is feared that the mother's health would be damaged seriously	95	2	3
3. After rape or violence	84	5	11
4. When the family is so poor that it would become entitled to government aid if another child were born	52	29	19
5. When economic difficulties cause family distress, but not to the same extent as under No. 4	18	64	18
6. When the mother decides that she doesn't want to bear another child	15	68	17

Question. It is said that the number of abortions is very high in Japan in comparison with foreign countries; do you think that the high number of abortions in Japan is a serious social problem, or do you think it is not such a great problem? (If you think it is a serious problem, indicate the reason for your opinion)

	Percent
1. It is a serious social problem	52
Because of maternal health, human rights, etc	27
For moral reasons	21
Because of a population problem	12
Other reasons	1
Unclear	3
2. It is not a serious problem	9
3. One cannot say in general	25
4. I don't know	14
Total	100

Question. What do you think is the reason for the large number of abortions in Japan?. Please indicate which of the reasons account for this:

	Percent
1. Parents think that their own lives are the most important	42
2. The feeling about the evil of abortion has become weak	31
3. Sex morality has deteriorated in general	23
4. Because the law which regulates abortion is too liberal	21
5. Others	3
6. I don't know	11
Total	131

Question. In order to decrease the number of abortions, where do you think efforts should be concentrated? Choose one answer only please:

	Percent
1. On diffusion of knowledge about proper methods of conception control	73
2. By controlling it strictly by law	11
3. By promoting a good sense of morality	8
4. No policy is needed	1
5. Others	0
6. Don't know	7

Question. Do you know that the Eugenic Protection Law exists? (If so) do you know what is determined by this law? What are its contents?

	Percent
1. I know about the law	52
It determines when abortion is permitted	15
It determines when sterilization is permitted	6
It determines in what manner doctors can get a license for abortion and sterilization operations	4
Others; it determines vaguely matters about abortion and sterilization	3
Others	3
I don't know; unclear	26
2. I don't know about the law	48

Appendix VII

Survey on abortion and birth control of Nagoya area by Aichi Prefecture Women's Association for the Protection of Human Rights, 1968 (1)

The survey covered an estimated 1,500 women age 16 and above in and around Nagoya City. It was conducted in October of 1968, and the results were published in a pamphlet distributed to the various committee members at their meeting in Nagoya City Education Hall on January 20, 1969.

The purpose of the survey was to ascertain the attitude of the ordinary citizens towards abortion, and to learn under what circumstances abortions are being performed; the result should then be used as reference in the drive to curb abortions.

1,500 women age 16 and above were selected to answer the survey questionnaire. 1,200 were from the Nagoya City area, 300 from the surrounding area. There were 19 survey areas within the city, and 30 in the surrounding area; responsibility for each of the areas was assigned to one who would conduct the sampling survey. To prevent bias, the sampling targets were selected according to age, occupation, income, and education. The surveyors then visited their respective target persons, and left with them the questionnaire, and an envelope in which to seal it after it had been answered. On the next day they gathered the sealed envelopes, took them to the Human Rights Protection Office, Legal Section, Nagoya City Hall, and opened them there. What follows is a translation of the published results:

I. The extent of knowledge and approval of family planning

Question 1. What are you doing in regard to family planning?

	Percent
1. I am practicing it	71
2. I am not practicing it	12
3. I am not much concerned with it	17

II. Concerning the human personality of the fetus

Question 2. What is your opinion about a fetus?

	Percent
1. I think it is a human life from the moment it is conceived in the womb	67
2. It is not a human life until the 6th or 7th month of pregnancy	4
3. It is a part of the mother until it has been born	22
4. I cannot say	7

III. What do you think about the manner in which abortion is being practiced in our country?

Question 3. It is said that above 2,000,000 abortions are performed annually in our country; what do you think about this situation?

	Percent
1. It is not good	42
2. It is not good, but it cannot be helped	57
3. I don't know whether it is good or bad	1

IV. To what extent are you acquainted with the legal aspects of abortion?

Question 4. Do you know that a number of strict conditions for the performance of an abortion are determined by law?

	Percent
1. I am acquainted with the details of the law	6
2. I am aware that such conditions exist	82
3. I am not aware of them	12

V. Concerning the extent of abortion practice

Question 5. Have you ever experienced an abortion?

	Percent
1. Yes	62
2. No	38

(N.B. The questions which follow should be answered only by those who have experienced abortion.)

VI. Reasons for the performance of abortion

Question 6. Which of the following reasons did you have for abortion?

	Percent	
1. I cannot give birth because of physical weakness or sickness		13
2. My living conditions are very difficult		
3. I am worried about passing on heredity defects to a child		
4. Violence		
5. Because I would not be able to go out to work		87
6. I don't need more children than I already have		
7. I wasn't married		
8. Taking care of children is troublesome		
9. Others forced me		
10. Other reasons		

VII. Influence of abortion on physical health

Question 7. What is the state of physical health after the abortion was performed?

	Percent
1. I was severely troubled with adverse after-effects	14
2. It is not as good as before the operation	45
3. There isn't much change	41

VIII. Time of recuperation after the abortion

Question 8. What did you do concerning recuperation after abortion?

	Percent
1. I rested for about a week	49
2. I was careful for 2 or 3 days	43
3. I took no special time for recuperation	8

IX. The doctor's attitude when you requested an abortion

Question 9. To what extent were you questioned by the doctor when you asked for an abortion?

	Percent
1. I was questioned in great detail	17
2. I was questioned only briefly	74
3. Practically no questions were asked	9

Question (For those who experienced abortion): After the abortion, did any of the following things occur, or did they not? And, beginning immediately after the operation and lasting for some time, was there any kind of physical change? Please indicate by checking the items below:

	Percent
There was some kind of abnormal change	[1] 31
Habitual spontaneous abortion	5
Sterility (after 3 years)	3
Extra-uterine pregnancy	1
Headache	8
Abdominal pains	6
Dizziness	6
Menstrual irregularity	5
General lassitude	4
Neurosis	1
Frigidity	1
There was no abnormal change	67
No answer	2
Total	[2] 100

[1] 13 percent of total samples.
[2] 1,089 replies.

The data indicates that the damage was greater when the abortions were repeated, when the first pregnancy was aborted, when the person was under 24 years old, and when the first abortion occurred after the person was 35 years old:

[In percent]

	1 abortion	2 abortion	3 abortion and over	Under age 24	25–29	30–34	35 and over	Abortion of 1st pregnancy	Abortion after 2d or more pregnancies
Number	(570)	(310)	(176)	(237)	(472)	(262)	(90)	(185)	(842)
There was some kind of change	26	32	48	37	28	28	32	41	28
Habitual spon. abortion	2	5	10	8	4	2	4	9	3
Sterility	4	3	1	3	2	3	6	5	3
Extrauterine pregnancy	1	1	2	3	1	1	1	2	1
Headache	6	8	14	9	8	9	10	11	8
Abdominal pains	4	7	12	8	6	6	2	9	5
Dizziness	4	7	8	7	6	7	6	8	6
Menstrual irregularity	4	7	6	8	5	4	4	7	5
General lassitude	4	4	6	4	3	5	9	4	4
Neurosis	1	1	2	0	2	2	1	2	1
Frigidity	1	1	3	1	1	1	2	1	1
No abnormality	72	66	52	62	70	70	67	58	70
No answer	2	2	0	1	2	2	1	1	2

Question. What is your opinion about abortion? Please check the one which corresponds most nearly with your opinion:

	Percent
1. It should be forbidden absolutely	11
2. I think it is an evil thing	29
3. I don't think it is good, but it can't be helped	48
Subtotal	88
4. I don't think it is something bad	2
5. One cannot say in general	7
6. I don't know	3
Total	100

Question (To those who think it should be forbidden absolutely): Why do you think it should be forbidden under all circumstances? (To those who think it is an evil thing): Why do you think it is evil? (To those who don't think it is good, but it can't be helped): Why do you think the practice is not very good?

	Percent
1. Because it is against laws of God and nature	6
2. Because it is against humanity (respect for life, pity for fetus)	34
3. For other moral reasons	6
4. Because it is against the law	1
5. Because it is harmful to the health of mothers	56
6. Other reasons	3
7. Not clear	4
Total	[1] 107

[1] Answers, 89 percent.

Question. Under what circumstances do you think abortion should be permitted? Please check all the reasons below which you think sufficient:

[In percent]

Number of times	1965	1966	1967	1968	1969
Had abortion	5.9	4.6	4.0	4.1	3.1
Once	5.5	4.1	3.6	3.8	3.0
Twice	.3	.4	.4	.2	.1
3 times	.1	.1	----	.1	----
4 and over	----	----	----	----	----

ABORTION EXPERIENCE, AGE AND NUMBER OF TIMES

Age	Number	Percent						
		Had abortion	Once	Twice	3 times and over	Forgot; no answer	Did not have abortion	No answer
20 to 24	133	24	15	6	3	0	75	1
25 to 29	520	32	22	6	3	1	67	1
30 to 34	607	46	28	12	5	1	53	1
35 to 39	501	49	22	15	12	0	50	1
40 to 44	459	48	21	15	11	1	50	2
45 to 49	377	39	16	15	7	1	60	1

Question, for those who have experienced abortion: What was the reason for terminating the pregnancy; please check the appropriate reason below; you may check more than one reason: (1089 replies.)

	Percent
1. Because the pregnancy was unplanned	46
2. Because I feared damage to health, being sickly	24
3. Economic circumstances are difficult, although not so difficult that government aid would become necessary	7
4. Because of a housing problem	7
5. Because I am not properly married	2
6. Because I fear passing on bad hereditary defects	1
7. Economic difficulties were so bad that I needed aid	1
8. Other reasons	17
9. No answer	2
Total	107

Question, for those who have experienced abortion: Did you have an abortion because there was a failure in contraception (conception control)? Or were you not practicing conception control at the time? (In case of several abortions, state the condition about the most recent one). (1089 respondents.)

	Percent
1. Because of failure in conception control	46
2. I was not practicing conception control at the time	51
3. No answer	3

Question (For those who had failures in conception control, ending in abortion): What kind of conception control method were you using at the time? (506 replies.)

	Percent
Condum	43
Ogino Rhythm	41
Contraceptive ring	3
Basal temperature	6
Tablet	6
Withdrawal	4
Jelly	6
Pessary	6
Douche	1
Oral contraceptive	0
Others	2
No answer	1
Total	119

Question (For those who experienced abortion) : Was your first abortion performed on your first pregnancy?

	Percent
First pregnancy	17
Second pregnancy or more	77
I forgot	4
No answer (1,089 replies)	2

REPORT ON DAMAGE RESULTING FROM INDUCED ABORTION

Year	Number of cases	Deaths	Serious damage to health	Investigator
1950	29,900	87	119	Scientific Association of Japan Gynecologists.
1951	6,405	12	150	Tohoku Division, Scientific Association of Japan Gynecologists.
1954	108,055	4,140		Medical Association for Maternal Protection.

Source: Reported in "Selected Statistics Concerning Fertility Regulation in Japan" tabulated by Hisao AOKI, Institute of Population Problems, Ministry of Welfare, 1967, p. 49.

Note: Since the basis for judging about harmful effects is not the same, the results of the investigations are not comparable.

Appendix V

STATEMENT ON BANNING ORAL CONTRACEPTIVES

[Japan Family Planning Association, Issued at Shizuoka Convention, July 17, 1964]

". . . A look at Japan's situation, the birth rate, the net reproduction rate, tells us that we have already reached the time when the government will have to be saying "Let's have children again." It is a problem of guarding the basic welfare of our daily living, of preserving a balance of the age structure of the population, so that the threat to our national life from an unbalanced population will not become a reality. For this reason the government is working out plans for a Mother and Child Law, and is hastening to make other provisions, such as child allowances, in order to make it easy to bear and provide for children. What reason is there then, at a time like this, to introduce an oral contraceptive which bristles with problems?

Because of the imperfect division between medical and pharmaceutical agencies, which invite the sale of prescription medicines by pharmacies, would this not spur a deterioration of morals and an increase in crime among the young? Would we not have to expect the poison of "sexual intercourse entertainment" (a problem already existing in America) just as we experienced the "sleeping pill sport" . . .

Japan's Net Reproduction Rate (an index employed by demographers to assess long-term population trends; it is the replacement rate of daughter for mother; i.e., it tells the rate by which daughters born in a single year will live to replace their mother when they reach the same age as the mother. Japan has fallen below the level of unit replacement rate, and is therefore on a population decline course, although at present population continues to increase by about a million per year.

Year:	*Net reproduction rate*
1948	1.67
1950	1.53
1955	1.05
1960	0.92
1965	1.00
1969	[1] 0.98
1956–69	0.93

[1] Provisional.

Source: Institute of Population Studies, Ministry of Welfare.

Professor Haruo Mizushima, Prof. Emeritus of Kyushu University, Demographer, calculated that if the 0.92 NRP rate of 1960 were to continue unchanged, the Japanese population would be reduced to half every 9 generations, i.e. every 240 years. (Journal of Japan Public Sanitation XV, 7 (July 15, 1968) p. 626.)

This implies not a uniform decrease among all age groups, at least initially, but an unbalance of aged persons in comparison to the young and then to the working age categories. The population projection made in 1959 by the Institute of Population Problems indicated that the population age group 0–14 years would decrease from 33.4% of the total in 1955 to 17% in the year 2005; those age 65 & + would increase from 5.3% to 20%, indicating a very heavy burden from the unbalanced old age structure. The latter figure has been modified to 16.94% in the 1969 projection; and the 0–14 age group has increased to 21.12% in the new projection, for the year 2005.

Appendix VI

Report on Public Opinion Survey on Birth Control and Abortion, Office of the Prime Minister, Bureau of Public Information

Conducted during Nov 25–30, 1969; carried out by the Central Survey Agency, Inc. Results published in March, 1970. 3,000 married women, age 20–49 selected by random sampling method were interviewed; the survey material was left with them, and they were asked to fill it out and to return it by mail, anonymously. There were 2,597 returns, 86.6%. Selected sections of the results are presented below.

Question. Have you ever had an artificial termination of pregnancy? If so, please indicate the number of times. 42% Yes (22% once, 12% twice, 5% three times, 1% four times, 1% five times and plus, 1% no answer), 57% No, 1% No answer.

Question. Those who answered "Yes" to the above, please indicate when and how often during the years given.

X. Influence of abortion on mental health

Question 10. Allow us please to ask about your psychological condition after the abortion.

	Percent
1. I was troubled for a while	48
2. My mind was put at ease	36
3. I didn't think much about it	16

End of Translation of Survey

The survey was instituted and its findings published under the auspices of the Joint Committee of the Aichi Prefecture Association for the Protection of Human Rights. Joint sponsors were the Nagoya City Committee of Education; the Nagoya City PTA Coordinating Committee; the Nagoya City Coordinating Committee of Regional Women's Associations; the Nagoya City Coordinating Committee of Women's Clubs; the Aichi Prefecture Association for Mother and Child Welfare; the Aichi Branch of University Women's Association; the Nagoya Mothers' Association; and the Nagoya Branch of the Japan Voters' League.

Appendix VIII

Survey of Contraception as Related to Abortion

Committee on Eugenic Protection Law, 1963

At a meeting of the Mother and Child Hygienic Association, Nagoya, Japan, October 25, 1963, findings were released on a questionnaire concerning contraception and abortion. 1,727 women returned the questionnaire, or 74% of those questioned. Doctors Tatsuo Kaseki and Hiroshi Tomota of the Committee on the Eugenic Protection Law conducted the survey with the help of medics.

Experience in Abortion

Of the 1,727 women, 1,163 (67.4%) had experienced abortion, 564 (22.6%) had not. The rate was highest among the patients of gynecologists (71.7%, or 615 among 857); next in rank were patients of other doctors (63.4% or 104 among

164) ; and lowest among other women (61.8%, or 375 among 606) ; 69 among the 100 whose category is not clear also had experienced it.

EXPERIENCE IN CONTRACEPTION

Of the 1,727 women, 1,116 or 64.6% practiced contraception.

SUCCESS IN CONTRACEPTION

Among 1,084 respondents, 623 (57.5%) reported failures; 312 (28.8%) reported success; and 149 (13.7%) were not clear. Among those who failed, 314 reported one failure; 301 reported 2 or 3; and 8 reported 4 or more failures; presumably these were terminated by abortion. (The failure risk continues, hence those who had not failed up to that date, remain exposed to the risk, and those who failed, remain exposed to further risk. The high failure rate is part of the explanation of the high number of abortions in Japan.)

CONFIDENCE IN CONTRACEPTION

Of 1,116 respondents, 559 (50.2%) indicated "no confidence" in contraception; 236 (21.1%) indicated confidence; and 28.7% did not specify. (This indication of non-confidence in the effectiveness of contraception is all the more remarkable since it represents the opinion of women with experience, rather than the expectation of theorists who plan to stop abortions through a further popularization of contraception.)

FEELINGS ABOUT ABORTION

Of 525 respondents, 384 (73.1%) admitted that they had feelings of "anguish" about abortion; 123 (23.4%) felt lightly about it. 18 (3.4%) failed to indicate their reaction. However, only 92 among 1,727 thought that abortions should be forbidden. (This may indicate the following dilemma: women feel compelled to limit births; they do not trust contraception; hence they feel that the escape method of abortion should remain open to them.)

ABORTIONS VS. BIRTHS

Of 459 respondents who had borne three or more babies, 370 (81.1%) had experienced abortion; of 498 respondents who had born two children, 377 (75.7%) had experienced abortion; and among 368 respondents with one birth, 215 (58.4%); among 219 who never gave birth, 92 (40.1%) had experienced abortion.

CONCLUSION

The data indicates that contraception failed in the majority of cases, and that the promotion of contraception with its overtones of hostility towards live births occasioned the abortions. The reporter is convinced that the promotion of contraception in Japan has casual relation with the (±) 2,000,000 abortions per year in Japan.

Reported by John Nishinoiri, sociologist (Waseda, Tokyo) observer for Pax Romana, at the First Asian Population Conference, (ECAFE) New Delhi, Dec. 10–20, 1963.

Appendix IX

Family Planning in Japan : A Record of Failure

EDITORIAL, ASAHI JOURNAL, OCTOBER 16, 1966, P. 52

One of the focal points of the recent Pacific Science Congress was the population problem. In the course of the discussions, participants loudly praised the success of the family planning movement in Japan. Japan was credited with splendid success in controlling the increase of population.

In reality, however, has the family planning movement in Japan not experienced a pitiful failure? There is hardly anything to be found which merits the name success.

The family planinng movement in Japan has boasted of three special features which are unprecedented in the history of family planning movements in the rest of the world. (1) It was initiated in 1951 by the Japanese Government itself with the humanitarian aim of protecting mothers from the great disaster of

abortion. (2) It was promoted by experts, consisting of midwives and public health workers, who gave practical instructions. (3) Guidance was provided at 780 (now 830) consultation offices located in public health centers.

These three features were truly unique, and they would have added a bright page to the history of the birth control movement, if the project had succeeded.

FAILURE IN EVERY RESPECT

What are the results of the efforts of these fifteen years? The movement suffered a miserable defeat in all of these three features. First, did it curb the practice of abortion?

The number of registered cases of abortion, which was about 489,000 in 1950, increased steadily until it went beyond a million in 1953. In 1962 the number began to decrease, and sank below the million mark. In 1964 the number was 878,000, still twice as many as in the first year of the movement. Moreover it is common knowledge that this number is far less than the actual total of the operations performed.

Second, the system of providing instructors failed, because the government did not appropriate a budget which was sufficient to compensate the midwives for their loss of income, thus lowering their morale. At present, in none of the 46 prefectures is the program of instructions being carried out actively.

Statistics indicate that housewives had obtained information about birth control "through printed matter, such as newspapers." The instruction system failed completely due to the negligence of the government.

Third, what about the consultation offices? None of the 830 offices in the country is thriving. This is undoubtedly a most typical waste of taxpayers' money.

PREGNANCY HAS NOT DECREASED

The most elementary arithmetic enables us to prove that pregnancies have not decreased. The number of pregnancies is the sum of the number of births and of abortions. The average number of pregnancies between 1949 and 1964 was 2,730,000. During all these 16 years, the number stood at $2,730,000 \pm 170,000$. The greatest difference was less than 6%. It shows, in other words, that the pregnancy potential of Japanese women is remarkably constant, with a variation of a mere 6%. We can conclude from this that the movement of 16 years' duration has not succeeded in changing the Japanese women's capacity of pregnancy.

To this someone might object immediately that the number of registered abortions does not represent the actual number. One million registered abortions suggests two million actual cases of abortion. Hence pregnancy is being controlled to a great extent, but the number of registered abortions does not bring the effect into light.

Granted that the registered number of cases may not represent the reality, since the registration of abortion operations is up to the whim of doctors, and that the actual case may be two millions cases; nevertheless this does not at all prove that the movement has been effective in curbing the number of pregnancies.

THE INFLUENCE OF ABORTIONS

There is the fact of a remarkable increase of abortions among unmarried mothers.

Add to this the fact that a normal pregnancy of 280 days plus three months of non-fertility after delivery, gives a total of about twelve months during which pregnancy is not possible.

On the other hand, when pregnancy is interrupted by abortion, the non-fertile period ends two months after the operation. Since 94% of the operations are performed within three months after pregnancy beginning, the period during which conception is excluded for mothers who have abortions is only five months, as contrasted to the normal duration of twelve months. This fact is of great significance in regard to pregnancy potential.

One million persons experiencing abortion in a year imply a pregnancy potential of 600,000. In other words, there is a vicious circle here, namely that the abortions as such actually increase the pregnancy potential. Add to this the number of abortions by unmarried women, and you have accounted for the total number of abortions beautifully.

In short, Japan's wonderful success (?) with birth control during the past sixteen years consists in this that Japan's women are exposed to psychic and

physical dangers leaving psychic and physical scars which never heal; it is success in the form of unhealthy abortions.

Success has never been achieved by the supposedly beautiful and cultured method of conception control as presented by propaganda. The whole story is miserably stupid.

(The Asahi Journal is probably the most respected weekly among the educated people of Japan.)

APPENDIX X

[From Asahi Evening News, Mar. 16, 1967]

TIGHTEN STEPS AGAINST ABORTIONS: PRIME MINISTER SATO

Prime Minister Sato said at the Cabinet meeting Tuesday that too many abortions are being conducted in Japan and that "administrative guidance" steps should be strengthened to curb the trend.

Health and Welfare Minister Hideo BO, in response to the Prime Minister's statement, said he intends to order stricter enforcement of the Eugenic Protection Law and will take other measures.

The number of abortions increased sharply when an economic recession followed the approval of abortions for certain reasons in a Eugenic Protection Law revision in 1952, Health and Welfare Ministry figures show.

Abortions averaged more than 1,000,000 yearly from 1953 to 1961. The annual figure dropped slightly after 1962 but still reached 840,000 in 1965.

[From Yomiuri, Mar. 15, 1967]

SATO ORDERS TIGHTER CONTROL ON ABORTION

Prime Minister Sato ordered the Welfare Ministry on Tuesday to reexamine the existing Eugenic Protection Law and draft revisions in order to implement more restrictions on artificial abortion.

Sato issued the instruction when the cabinet discussed the current labor shortage plaguing the country.

During the cabinet meeting the Premier pointed out that he regretted that Japan had become internationally known as a "haven for artificial abortions."

"The Eugenic Protection Law must be reviewed from the viewpoint of respecting human life," he said.

According to a Welfare Ministry survey, there were about 955,000 artificial abortions performed in 1963. Although the number had dropped annually since then, there were still many abortions that were not reported, the ministry said.

Abortions are permitted in Japan if "continuation of pregnancy is considered harmful to the woman's health or if the family cannot afford to have the baby."

However, many women have abortions by claiming that they "cannot enjoy life" or because they "cannot afford to give the child a satisfactory education."

The Welfare Ministry wants to restrict abortions to women from low income families receiving government aid under the Livelihood Protection Law or which are considered "borderline cases."

Prime Minister Sato, at public Diet Questioning, March 23rd, 1970: He declared that fundamental respect for life is the very foundation on which the nation rests, that this is an even graver reason to oppose abortion than are the problems about maintaining the labor force for the future, the danger of Japan disappearing from the face of the earth. "Whether a life has already been born, or whether it still exists as a fetus, our way of thinking about that life must be one of profound respect," he said.

(The above report was presented at the XIIth International Congress of FIAMC. International Federation of Catholic Medical Associations. Washington, D.C., Shoreham Hotel, Oct. 11–14, 1970.)

Morbidity and Mortality. U.S. Department of Health, Education, and Welfare/ Public Health Service, May 11, 1973

COMPLICATIONS OF A NEW METHOD OF ABORTION

On May 15, 1972, the Philadelphia Department of Health notified CDC of the hospitalization of an 18-year-old woman following an abortion induced by a new method called "super coils." This patient sustained a uterine laceration and a cervical perforation, requiring a total abdominal hysterectomy to control blood

loss. She was 1 of a group of 15 women in the 2nd trimester of pregnancy who came to Philadelphia from other states to undergo induced abortions in an outpatient clinic. Following the procedures, the remaining 14 women returned to their home states.

According to the originator of the method, the super coil is a plastic strip 40 cm long which is wound into a spiral 2 cm in diameter. The coil is straightened and inserted in the uterus in a fashion similar to an intrauterine contraceptive device. As many coils as will fit the space are used, and they are removed approximately 12–24 hours after insertion; at this time evacuation of the uterine contents is said to usually occur. If the uterine contents are not expelled spontaneously, they are removed with ovum forceps.[1]

TABLE 2.—COMPLICATION RATES IN PATIENTS WHO UNDERWENT 2D TRIMESTER ABORTIONS INDUCED BY SUPER COILS VERSUS SALINE-AMINIOTIC FLUID EXCHANGE

Method	Number of patients	Complication rate per 100	
		Major	Total
Super coil [1]	15	20.0	60.0
Saline-amniotic fluid exchange	5,973	2.6	27.9

[1] Assumes no complications following discharge from clinic for 2 women for whom complete follow-up data were not available.

Of the 15 women who underwent super coil abortions, 13 received follow-up evaluations within 1 week of the initial procedures. Nine (60%) of the women developed complications, defined as fever of 100.4° F or more, estimated blood loss of 500 cc or more, or other conditions requiring subsequent medical attention. Three (20%) of the women sustained major complications, defined as the need for unintended major surgery, blood loss estimated at 1,000 cc or more, and 3 or more days of fever. In addition to the woman hospitalized in Philadelphia, a 2nd woman was hospitalized in her home state upon her return from Philadelphia and underwent 2 10-day courses of antibiotic treatment and a laparotomy for suspected acute appendicitis. The postoperative diagnosis was endometritis with intra-pelvic adhesions. A 3rd woman had heavy vaginal bleeding following coil insertions, and laboratory tests demonstrated a fall in her hematocrit from a preoperative value of 36 to 24.5.

The criteria for complications in this investigation were those defined in the Joint Program for the Study of Abortion (JPSA).[2] Table 2 shows the complication rates of the patients who underwent abortion by the super coil compared with the complication rates for JPSA patients, on whom follow-up data were available, who were aborted by saline-amniotic fluid exchange, the technique most commonly employed in this country for terminating 2nd trimester pregnancies. The complication rates, both major and total, for patients who underwent super coil abortions were significantly greater than those who underwent abortions by saline-amniotic fluid exchange ($p<.05$).

[From British Medical Journal, Mar. 3, 1973]

Latent Morbidity After Abortion

The abortion debate continues. An important contribution to it now comes from Margaret Wynn and Arthur Wynn,[3] incorporating their evidence to the Lane Committee on the Working of the Abortion Act. This Committee is expected to report later this year and its findings are eagerly awaited, though the problems of abortion are such that it would be sanguine to hope for simple solutions.

In her paper Margaret Wynn is firmly of the opinion that "it would be wise for young women and their parents and future husbands to assume that induced abortion is neither safe nor simple, that it frequently has long-term consequences,

[1] Karman H.: The Paramedic Abortionist. Clinical Obstet Gynecol 15:379–387, June 1972.
[2] Tietze, C., Lewit, S.: Joint Program for the Study of Abortion: Early medical complications of legal abortion. Studies in Family Planning 3:97–122, 1972.
[3] Wynn, M., and Wynn, A., (1972) *Some Consequences of Induced Abortion to Children Born Subsequently.* London, Foundation for Education and Research in Childbearing, 27, Walpole Street, London S.W. 3. Price 60 p.

may affect subsequent children and makes young single women less eligible for marriage." The evidence in support of this statement comes from an analysis of a series of publications with much reference to overseas experience, which is often longer and more complete than our own. Her emphasis is on the long-term effects of abortion, which Arthur Wynn designates latent morbidity. In Britain notifications of abortion include only the complications occurring in the first week—much too short a period on which to base estimates of morbidity, especially when in the private sector patients are frequently seen only for one day. Moreover, nobody knows the extent of the failure to notify. The Wynns argue that there is enough evidence now available on which to base estimates of morbidity. Most importantly they stress that the longer the follow-up the worse the results. With a really prolonged follow-up—that is, several years—a 30% morbidity rate may not be an over-estimate.

A previous abortion increases the chances of a subsequent perinatal death by 50%, according to the British Perinatal Mortality Survey,[2] and the experience of some other countries suggests that even this figure is an underestimate. In addition there may be a 40% increase in premature births, and these are known often to be associated with impaired mental and physical development. Ectopic pregnancies are increased two- or three-fold after a previous abortion, and there is a four-fold increase in pelvic inflammation and menstrual disorders, while 2–5% of those who have abortions may subsequently be sterile. Husbands who desire a family, Margaret Wynn suggests, might justifiably be alienated from wives who fail to bear children because of termination of a prenuptial pregnancy for which they were not responsible.

As regards the consequences of abortion older women with families are in quite a different category from young single women. Arthur Wynn emphasizes the problems for the latter group by citing the statistically significant increase in premature labours, and he carries the story further by showing that they have an increased likelihood of postpartum haemorrhage, mid-trimester abortions, rhesus isoimmunization, antepartum haemorrhage, stillbirth, and even congenital malformation. Much of the evidence for these sequels of abortion comes from German experience, though it can be matched from Czechoslovakia too. And these results take no account of any psychological consequences of abortion.

Margaret Wynn shows that up to 1970 the numbers of illegitimate births—with all their social consequences in terms of unhappiness—had scarcely diminished, while the numbers of terminations of pregnancy in single women had rapidly increased. She infers that "abortion is being used increasingly as a contraceptive method." More than half the women seeking abortion had used no other method of birth control.

Doctors may legitimately ask what sort of society has been underwritten by the Abortion Act? Is it one of sexual freedom or even licence with serious consequences for those involved? Does legislation make any difference to human behaviour in such delicate areas, or does it drag along in the wake of public opinion? Has the Abortion Act made a change in behaviour which would not otherwise have occurred? Do these changes in behavious matter? The questions crop up endlessly and still the answers seem no clearer. This is because they involve value judgements with elements of emotion, passion, and reason. Simple consideration of the pros and cons will not solve the dilemma, but it has to be attempted.

One aim of the Abortion Act was to get rid of backstreet abortions with all their bad consequences. The backstreet element may have been greatly decreased, but many of the bad consequences remain. Legal abortion has probably diminished the number of maternal deaths, and it could be argued that it may have enlarged the limits of human freedom. These factors might be put on the credit side, but the debit side might show a great sum of serious morbidity—and the final bill will have to be paid by those who undergo abortions, their children (if they have any), their immediate circle, and society at large. Is the price too high? Will any law make it different? Presumably there will always be casualties of cultural attitudes in any society, and whether one attitude is better than another remains a matter of opinion. Nevertheless, the Wynns have produced a very serious indictment of legalized abortion, which must be heeded by doctors and law-makers. Some may argue that their case is overstated, but it is well and dispassionatly argued, and the supporters of easy abortion must look to their defenses. The importance of the subject in social, economic, and human terms demands a similar dispassionate reply.

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Hemoglobin A Synthesis in the Developing Fetus[1]

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By Haig Kazazian, Jr., M.D., and Andrea P. Woodland, B.S.

Abstract.—To determine when synthesis of hemoglobin A (composed of 2α and 2β chains and the hemoglobin predominant in the human adult) begins in the fetus, hemoglobin synthesis was measured in fetuses of various gestational ages. Synthesis of hemoglobin A by reticulocytes obtained from 42 embryos and fetuses 3.5 to 20.0 cm in crown-to-rump length accounted for 4.3 to 13.0 per cent of total hemoglobin synthesis, and varied directly with fetal crown-to-rump length. Since the smallest embryo was estimated to be 55 days old, β-chain synthesis has begun by that gestational age. Furthermore, since β thalassemia is characterized by decreased β-chain synthesis, the accurate diagnosis of this condition in fetuses depends on knowledge of the value for hemoglobin A synthesis in normal fetuses of various gestational ages. (N Engl J Med 289:58–662, 1973.)

Hemoglobin F ($\alpha_2\gamma_2$ comprises 70 to 90 per cent of human hemoglobin at birth (1) whereas hemoglobin A ($\alpha_2\beta_2$ is the predominant hemoglobin in the adult. The work of Walker and Turnbull (2) and Huehns et al. (3) suggested the presence of hemoglobin A in the fetus at 10 to 20 weeks of gestation. The synthesis of hemoglobin A by reticulocytes of the midtrimester fetus was demonstrated by Hollenberg and his coworkers. (4) Subsequently, fetal synthesis of hemoglobins S and C containing β^s and β^c chains respectively, was detected. (5–7)

However, the time of onset of adult hemoglobin synthesis in the human fetus has not yet been established. Pataryas and Stamatoyannopoulos (7) have stated that hemoglobin A is not present in fetuses smaller than 80 mm in crown-to-rump length and have suggested that another minor component, hemoglobin Portland i($\gamma_2\xi_2$), (8, 9) may be confused with hemoglobin A in smaller fetuses. Our previous studies (4) and those of Kan et al., (6) which suggested the synthesis of hemoglobin A in embryos of 45 and 56 mm respectively, do not exclude this possibility. Thus, one aim of this study was to demonstrate conclusively the synthesis of hemoglobin A in small embryos.

The homozygous and heterozygous states of β-thalassemia are revealed in the newborn infant by reduced β-chain synthesis. (10, 11) Abnormally low β-chain synthesis as compared to γ-chain synthesis during fetal development should be observed in fetuses heterozygous for β-thalassemia, and the virtual absence of β-chain synthesis would be diagnostic of homozygous β-thalassemia in fetuses of parents heterozygous for β-thalassemia. Thus, the normal level of hemoglobin A ($\alpha_2\beta_2$) synthesis for any fetus of known gestational age is an important prerequisite for the antenatal detection of the β-thalassemias.

METHODS

A sample of peripheral blood cells, free of contamination with maternal blood was obtained from fetuses immediately after delivery by elective hysterectomy or systerotomy. The cells were washed and incubated in a protein-synthetic medium with S-methionine (specific activity, 10 to 100 Ci for millimole). The cells were lysed, and the dialysed lysate was chromatographed with unlabeled marker hemoglobins in small columns (0.5 cm. by 7 cm) of cation-exchange resin (Bio-Rex 70). (4) When the hemolysate of an individual homozygous for the hereditary persistence of fetal hemoglobin was subjected to chromatography, 99.6 per cent of the hemoglobin eluted as hemoglobin F. Thus, the separation of hemoglobins A and F is essentially complete by Bio-Rex 70 chromatography, allowing the quantitation of hemoglobin A synthesis in relation to total hemoglobin synthesis (hemoglobin F and hemoglobin A).

Globin was prepared from the isolated hemoglobins, digested by tryspin, and subjected to 2-dimensional paper electrophoresis and chromatography. (12) Kodak RP S–2 x-ray film was used for autoradiography. Electrophoresis of hemoglobin samples on cellulose acetate gels was performed as previously described. (4)

Separated globin chains were detected by radioactivity after electrophoresis on cellulose acetate (Cellogel) strips with a technic modified from that of Ueda and Schneider. (13) Globin was prepared by acid-acetone precipitation, and 1 mg of globin was dissolved in 10 to 20 μl of 4 M urea, 0.05 M dithiothreitol. Electrophoresis of 3-μl samples was performed in 0.07 M barbital buffer, 0.04 M 2-mercaptoethanol, 6 M urea, pH 7.2, on presoaked cellulose acetate strips for 2 hours at 270 V and 1 mA per strip. The strips were stained for 5 minutes with Ponceau red and destained in 10 per cent acetic acid. Each sample track including marker α and β chains was cut into 2-mm strips, which were dried, dissolved in 0.4 ml of boiling 50 per cent acetic acid and assayed for radioactivity in 10 ml of Bray's solution. (14)

RESULTS

Approximately 100 μl of whole blood was obtained from an aborted embryo that measured 35 mm from crown to rump and was estimated to be 55 days of age. (15) On electrophoretic analysis the hemoglobin of this embryo contained 85 per cent hemoglobin F ($\alpha_2\gamma_2$), 9 per cent hemoglobin Gower 2 ($\alpha_2\epsilon_2$), (3) and 6 per cent hemoglobin Gower 1 (ϵ_4). No hemoglobin A or hemoglobin Portland 1 was observed. Hemoglobin A synthesis was demonstrated in the following manner. As a first step, ion-exchange chromatography of the ^{35}S-methionine hemoglobins of the embryo demonstrated that 5 to 6 per cent of the radioactivity eluted with unlabeled marker hemoglobin A, 83 per cent eluted with hemoglobin F, and 11 per cent eluted with the Gower hemoglobins. Secondly, the radioactivity associated with marker hemoglobin A was shown to migrate with α and β chains after separation of the globin chains by cellulose acetate electrophoresis. Although α chains contain two methionine residues, and β chains one methionine residue, radioactivity associated with α-chain marker was only 40 per cent greater than that associated with β-chain marker. Selective loss of α chains in the sample preparation may account for this result, since the tryptic peptide data presented below indicate that α chains do contain twice the radioactivity of β chains. The small amount of radioactivity at 2.7 cm is probably associated with traces of radioactive ϵ chains contaminating the radioactive α and β chains. When the Gower hemoglobins isolated by column chromatography were subjected to similar chain-separation procedures, no radioactivity was associated with β-chain marker, but radioactivity was found in α chains and at the presumed ϵ-chain position noted. Thirdly, the radioactive material associated with the hemoglobin A marker after the original ion-exchange chromatography was digested with trypsin and subjected to two-dimensional paper electrophoresis and chromatography. Subsequent autoradiography demonstrated that radioactivity corresponded exactly with the only methionine-containing peptides of hemoglobin A, αT5,[2] αT9 and, most importantly, βT5 (Fig. 4). The radioactivity in βT5 was 80 per cent of that in each of the peptides, αT5 and αT9. Similar digestion of the radioactive material associated with hemoglobin F and hemoglobins Gower 1 and 2 showed no correspondence in either case with βT5, although a presumed ϵ peptide demonstrated radioactivity close to βT5. Two presumed ϵ peptides containing methionine in hemoglobins Gower 1 and 2 were definitely less radioactive than the α peptides of these hemoglobins, suggesting exchange of α chains into preformed $\alpha_2\epsilon_2$. Since both the fingerprint and the chain separation procedures indicate that radioactivity associated with hemoglobin A marker by ion-exchange chromatography is found in α and β chains, not in γ chains, this material must be hemoglobin A, not hemoglobin Portland 1. The synthesis of hemoglobin A by reticulocytes of this 35-mm embryo accounted for about 7 per cent of total hemoglobin synthesis.

The synthesis of hemoglobin A by reticulocytes of embryos of 5.7-cm, 6.2-cm, 7.5-cm and 8.0-cm crown-to-rump length was also confirmed by the demonstration of labeled αT5, αT9 and βT5 in the tryptic digests of radioactive material eluted with marker hemoglobin A by ion-exchange chromatography.

We have measured the synthesis of hemoglobin A in 42 fetuses of 3.5 cm to 20.0 cm in crown-to-rump length. When the percentage of hemoglobin A synthesis is plotted against crown-to-rump length, a statistically significant relation is demonstrated with a correlation coefficient of $+0.46$ ($p<0.001$.). Of the 42 fetuses

[2] The tryptic peptides are numbered according to the distance their lysyl or arginyl residues from the NH_2 terminus of the unhydrolyzed chain—e.g., βT1 is the NH_2 terminal tryptic peptide of the β chain.

studied, 25 were black, and 17 were white. The percentage of hemoglobin A synthesis versus crown-to-rump length was examined in each group. Although the slope of the fitted regression line was greater for black fetuses than for white fetuses, the difference was not statistically significant.

DISCUSSION

These data indicate that the percentage of hemoglobin A synthesis varies directly with fetal crown-to-rump length. Using this standard of normal values of percentage of hemoglobin A synthesis for fetuses of known gestational age, one may differentiate normal fetuses from those heterozygous for β-thalassemia. A value of hemoglobin A synthesis of 4 per cent of total hemoglobin synthesis would be normal in a fetus eight to 10 weeks old, but such a value would indicate deficient hemoglobin A synthesis or presumed β-thalassemia trait in an 18-week fetus. Since there was no statistically significant difference in hemoglobin A synthesis levels between black and white fetuses, our estimate of normal values for a given fetus does not depend on the race of the fetus in question. To increase our knowledge of β-thalassemia trait in the fetus, we need to study fetuses of whom one parent is doubly heterozygous for β-thalassemia and an abnormal β-chain gene—e.g., β^s or β^c. Since β^s and β^c chains have previously been detected at 15 to 20 weeks' gestation, (5–7) the absence of synthesis of the abnormal β chain would indicate that such a fetus was an obligate heterozygote for β-thalassemia. The differentiation of fetuses heterozygous for β-thalassemia from those homozygous for β-thalassemia will also require further study.

Since hemoglobin A synthesis can now be determined with as little as 1 to 2 μl of fetal blood, we have attempted to measure hemoglobin A synthesis in erythroid cells found in amniotic fluid obtained at routine amniocentesis. Only one of five amniotic-fluid samples so obtained contained an adequate number of fetal erythroid cells for this determination.[3] Thus, since routine amniocentesis is not a reliable method of obtaining fetal blood samples, we believe the antenatal diagnosis of hemoglobinopathies, such as β-thalassemia and sickle-cell anemia, awaits development of a safe, reliable amnioscope to aid in sampling small quantities of fetal blood under direct visualization.

The observation that the synthesis of hemoglobin A accounts for 7 per cent of hemoglobin synthesis in an embryo of 35 mm in crown-to-rump length of 55 gestational days is intriguing, since hemoglobin A is not clearly seen on electrophoresis until the fetus is 80 mm in length or 80 gestational days.(7) Since 50 to 80 per cent of peripheral erythroid cells in the embryo are reticulocytes producing hemoglobin, an earlier electrophoretic appearance of hemoglobin A might be expected.

Red-cell precursors in the mouse embryo nine to 12 days old are derived from the yolk sac and synthesize only embryonic hemoglobins. These cells are replaced at 12 to 16 days by erythroid cells of hepatic origin that make only adult-type hemoglobin.(16, 17) Similar differentiation of red-cell types in the human embryo has been proposed.(18) Although no experimental data exist in man, we suggest that α and ε chains of human embryos are derived from red-cell precursors of yolk-sac origin and are the only hemoglobin chains synthesized by this cell type. Conversely, we believe that erythroid cells of hepatic origin, which populate the bone marrow in late fetal life, can synthesize α, γ, β, δ, and ξ globin chains. Since erythroid precursors of a 35-mm embryo synthesize β chains, we suggest that β-chain production occurs in the earliest erythroid cells of hepatic origin at the 5-mm to 8-mm stage of embryonic development.

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(Fetal Experimentation)

Transplacental Passage of Erythromycin and Clindamycin[1]

By Agneta Philipson, M.D., L. D. Sabath, M.D., and David Charles, M.D.

Prescribing antibiotics for pregnant women allergic to penicillin frequently presents a problem because of potential adverse effects—to mother or fetus—and uncertainty of transplacental delivery of antibiotic. Passage of drug into the fetus may or may not be desired.

Erythromycin is a good alternative to penicillin for many infections, but it has been suggested that it does not reach the fetus in sufficient concentrations to prevent congenital syphillis. (1)

Little information on the transplacental passage of clindamycin, which has a spectrum of activity similar to that of erythromycin, is available. The present study was designed to demonstrate whether or not erythromycin and clindamycin reach the fetus and its tissues in therapeutic concentrations after oral administration to the mother.

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METHODS

Patients

With the informed consent of each of 14 pregnant women who were admitted to the hospital for therapeutic abortions, a single oral dose in capsules of erythromycin estolate (Eli Lilly and Company), equivalent to 500 mg base, or of clindamycin hydrochloride (Upjohn Company), 450 mg, was given during the morning of the operation after a fast of 8 or more hours. Two additional patients received erythromycin base (Eli Lilly and Company), 500 mg, in tablet form. Seventeen additional pregnant patients admitted for abortions received multiple (4 to 20) doses of antibiotic before their operations; they had been fasting for 8 or more hours before the last dose. *The women were 15 to 43 years old and 10 to 22 weeks pregnant.* All patients had normal renal hepatic and hematologic functions.

The abortions were done by hysterotomy in all patients who received a single dose and in 9 patients who received multiple doses. In 8 women who received multiple doses the abortion was done by saline infusion.

Maternal blood for assay of antibiotic levels was drawn before the antibiotic was given and 1, 2, 4, 6 and 9 hours after a single dose. From patients who received the multiple doses, blood for assay was drawn before and after the 1st dose was given, as well as before and after the last dose in a similar way. Assay for antibiotic content was performed on amniotic fluid and fetal liver, spleen, kidney, lung, brain, muscle, bone and blood. When the abortion was performed by intra-amniotic infusion of hypertonic saline, a control sample of amniotic fluid was collected, and fetal tissues were obtained after delivery.

Control fetal tissues were obtained from 6 additional patients undergoing abortions who did not receive any antibiotic. Control amniotic fluid was collected, from 50 untreated patients at normal delivery.

All tissus were homogenized at +4° C in a glass tissue homogenizer with equal amounts by weight of potassium phosphate buffer adjusted to pH 8. Samples not assayed the same day were frozen at —20°C until assayed later.

Tests for Antibiotic Levels

All samples, including tissue homogenates, were assayed in quadruplicate for their content of antibiotic, with the use of *Sarcina lutea* SKF 1360 or *Staphylococcus aureus* ATCC 6538P as the test organisms and Difco antibiotic medium No. 5 (pH 8). A disk agar-diffusion method (2) was used for all samples except for the tissue homogenates, for which a well-diffusion technic was used. Reference standards of clindamycin and erythromycin were made up in human serum for all samples except amniotic fluid, for which reference standards were prepared in potassium phosphate buffer adjusted to pH 8. The lowest detectable level of erythromycin was 0.03, and that of clindamycin 0.1 μg per milliliter.

Identification of Antibiotic in Sample

Evidence that antibacterial activity measured was due to erythromycin or clindamycin, and not to some other substance or factor was sought by the following methods: descending paper chromatography in a methyl ethyl ketone :acetone : water (180 :32 :20) system, developed as an autobiogram on Difco medium No. 5 seeded with *S. lutea*; absence of activity in control samples; absence of activity against resistant organism; and a "pH effect" (greater activity at pH 8, with marked diminuition or absence of activity at pH 5.5).

RESULTS

Concentrations of clindamycin or its active metabolites in a number of fetal tissues after single doses (Table 1) and multiple doses were somewhat variable, but the fact that concentrations in the liver consistently exceeded those in fetal blood indicates that fetal liver can concentrate this antibiotic.

Erythromycin was found in one or more fetal tissues in most cases in which the mother had received a single dose of this antibiotic and in most fetal tissues from mothers on a multiple-dose schedule (Table 1). A higher concentration in fetal liver than in fetal blood suggests that fetal liver can also concentrate this antibiotic.

Overall, fetal tissue levels of both antibiotics were considerably higher after multiple doses than after a single dose.

The concentrations of clindamycin, or its bioactive metabolites, found in fetal blood and tissues after multiple doses had been given to the mothers were higher

than when the mothers had received single doses (Table 1), and were greater than the minimum required to inhibit most pathogens for which it is prescribed. (6, 7) In one case the concentration of clindamycin in the fetus exceeded the simultaneous maternal serum level.

The antibacterial activity in fetal tissues from mothers who had received clindamycin or multiple doses of erythromycin could be identified as the antibiotic given for the following reasons: it was demonstrable in the *Staph. aureus* ATCC 6538P system whereas control fetal tissues (from untreated mothers) had no activity in this system; in acid medium the activity was diminished or irradicated; and no activity could be demonstrated against a resistant staphylococcus.

The antibacterial activity in fetal tissues from mothers who received erythromycin in a single dose was so low that it could be demonstrated only against the more sensitive *S. lutea* SKF 1360 and not against *Staph. aureus* ATCC 6538P. Therefore, the effect of variations in pH of the medium could not be checked, and the presence of erythromycin could not be verified.

TABLE 1.—CONCENTRATIONS OF ANTIBIOTIC IN FETAL BLOOD AND FETAL TISSUES IN RELATION TO CONCENTRATIONS IN MATERNAL BLOOD[1]

Material assayed	Mean clindamycin concentration (μg/ml)		Mean Erythromycin concentration (μg/ml)	
	Single dose[2]	Multiple dose[3]	Single dose[4]	Multiple dose[5]
Fetal blood	0.32(0–1.0)	0.7(0–2.2)	0.02(0–0.11)	0.06(0–0.12)
Amniotic fluid	.02(0–0.11)	[6] 0.82(0.3–1.9)	.01(0–0.11)	[6] 0.23(0–0.45)
		[6] 1.07(0.64–1.6)		[6] .36(0.32–0.39)
Fetal tissue:				
Liver	.9(0.4–1.8)	2.1(0.8–3.0)	.41(0–0.53)	.35(0–0.84)
Kidney	.9(0–5.8)	1.8(0.9–2.2)	[7] 0	.17(0–0.44)
Spleen	.09(0–0.64)	1.24(0–2.0)	0	.17(0–0.28)
Lung	.7(0–3.8)	1.22(0–2.0)	0	.16(0–0.44)
Brain	.08(0–0.58)	.54(0–1.3)	0	.08(0–0.33)
Muscle	.3(0–2.2)	1.07(0–1.84)	0	.22(0–0.5)
Bone	0	.84(0–1.52)	0	.13(0.0.49)
Maternal blood:				
At peak	5.16(2.9–9.0)	6.3(4.2–10.4)	2.55(0.38–7.2)	4.94(0.66–8.0)
At operation or infusion	1.77(0.68–4.5)	2.84(1.1–5.8)	1.41(0.19–2.45)	3.48(0.55–5.15)

[1] All figures in parentheses represent ranges. .
[2] 0.45 g given 5.5 (2.5–6.5) hours before operation or infusion at mean of 18 (12–22) weeks of gestation to 7 patients.
[3] 4.6(1.8–9.0) g given 5.1(3.3–6.3) hours before operation or infusion at mean of 18 (16–20) weeks of gestation to 9 patients, 4 of whom had abortion by saline infusion rather than hysterotomy.
[4] 0.5 g given 4.33 (1.8–7.3) hours before operation of infusion at mean of 16(10–18) weeks of gestation to 9 patients—erythromycin base to 2, and erythromycin estolate to 7.
[5] 4.2(2.5–8.0) g given 4.25(3.0–5.5) hours before operation or infusion at mean of 15.4 (11–19) weeks of gestation to 8 patients. 3 of whom had abortion by saline infusion rather than hysterotomy.
[6] Of the sets of figures. 1st pertains to fluid obtained at time of operation or saline infusion (5 mothers were given clindamycin and 3 erythromycin), and 2d to fluid obtained at time of delivery of patients who had saline infusion.
[7] Lowest detectable level <0.1 μg/ml or /g for clindamycin and <0.03 μg/ml or /g for erythromycin.

Two of the six control fetal livers did not demonstrate any bacterial activity, whereas the other four caused no inhibition of the *Staph aureus* but a small zone of inhibition of the more sensitive *S. lutea*.

None of the control amniotic fluid showed any antibacterial activity in either assay system.

Attempts to demonstrate the presence of antibiotic in fetal tissue homogenates by means of paper chromatography and autobiograms were unsuccessful, because the system was incapable of detecting these low levels—i.e., controls prepared by addition of comparable concentrations to drug-free homogenized fetal liver also could not be detected.

The data presented strongly suggest that erythromycin and clindamycin accounted for the antibacterial activity noted in this study.

DISCUSSION

Both erythromycin and clindamycin crossed the placental barrier—clindamycin more readily and erythromycin less predictably. Fetal tissue levels of both erythromycin and clindamycin increased as therapy was continued.

Provided the infecting organism is sensitive, both antibiotics may be reasonable alternatives to penicillin in the treatment of intrauterine infections.

The placenta is the most obvious source from which antibiotic enters the fetus. Another possible source is fetal swallowing of antibiotic in amniotic fluid; fetal swallowing begins at the 12th week of intrauterine life. Antibiotic might enter amniotic fluid either in fetal urine (9) or by secretion or diffusion across the amniotic membrane. Antibiotic that enters the fetus via the placenta may be excreted into the amniotic fluid, swallowed and absorbed, and thus recycled. The ability of certain fetal tissues to concentrate antibiotic is apparent from the fact that antibiotic levels in many fetal organs exceeded that in fetal blood (Table 1).

In the nonpregnant subject some drugs are not completely absorbed after oral administration and during pregnancy an alteration in gastrointestinal motility further delays absorption. (10, 11) The latter fact may explain why previous studies with erythromycin have given variable results concerning placental transfer. (12) Placental transfer involves not only simple and facilitated diffusion but, in all probability, active transport, Starling-Landis filtration, pinocytosis, phagocytosis and vesiculation. (13)

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A.M.A.

[From the Prism, May 1973]

A Famous Scientist Looks at One of Our Most Serious Ethical Dilemmas

On the Cam River, some 80 miles northeast of London, England, lies the quiet university town of Cambridge. Rich in history and tradition, Cambridge University is presently the site of an Orwellian scientific venture—the artificial conception and growth of a human zygote.

In Cambridge's physiology laboratory, Dr. Robert G. Edwards and Dr. Patrick S. Steptoe have developed techniques for removing an egg from a woman's ovary,

fertilizing the egg in the laboratory, and then growing the resulting zygote in vitro until it reaches the blastocyst stage. The last step, thus far not taken, will be to attach the blastocyst to the uterine wall of the woman and allow the fetus to develop normally.

The eggs used in these experiments are donated by a small group of women—mostly nurses, physicians, or physicians' wives—who share two things: sterility, caused by oviduct blockage or some similar problem, and the hope that someday this research will make it possible for them to bear children.

But this work has not met with universal enthusiasm. Far from it. Scientists as eminent as Dr. James D. Watson, Nobel laureate and codiscoverer of the molecular structure of DNA, have wondered where the research will lead, fearing its long-term consequences.

In order to explore Dr. Watson's objections and the ethical implications of the Edwards/Steptoe experiments, PRISM recently assigned Associate Editor James McDonald to interview Dr. Watson in his office in The Biological Laboratories at Harvard University. His thoughts ranged from his ideas on government control of such research projects to his fear that Edward's research may eventually lead to the "birth" of the first clonal man—a human carbon copy of one parent, produced asexually by introducing the nucleus of a somatic cell into an enucleated egg that can then begin multiplying like a fertilized egg.

PRISM. Dr. Watson, do you think that Edwards and Steptoe have any reservations about the implications of their work?

WATSON. I don't know. I've never met Steptoe and only met Edwards in the course of two scientific meetings. I do know, however, that there is one point upon which Edwards and I disagree: I told him I wouldn't want to do his kind of experiment unless the doctor who attended the births that resulted from it had the right to terminate a baby's life should it come grossly abnormal. Edwards thought this precaution unnecessary, since occasionally babies come out badly with no known intervention.

But if the first one came out looking bad, it would be psychologically hard to say that you were not responsible. The doctors who might be involved in this sort of procedure should be legally protected.

But legalities aside, I think we must reevaluate our basic assumption about the meaning of life. Perhaps, as my former colleague Francis Crick suggested, no one should be thought of as alive until about three days after birth.

PRISM. But how would society react to such a proposal?

WATSON. Our society just hasn't faced up to this problem. In a primitive society, if you saw that a baby was deformed, you would abandon it on a hillside. Today this isn't permissible, and with our medicine getting better and better in the sense of being able to keep sick people alive longer, we are going to produce more people living wretched lives. I don't know how you get society to change on such a basic issue; infanticide isn't regarded lightly by anyone.

> *I think we must reevaluate our basic assumptions about the meaning of life. Perhaps . . . no one should be thought of as alive until about three days after birth.*

Fortunately, now through such techniques as amniocentesis, parents can often learn in advance whether their child will be normal and healthy or hopelessly deformed. They then can choose either to have the child or opt for a therapeutic abortion. But the cruel fact remains that because of the present limits of such detection methods, most birth defects are not discovered until birth.

If a child were not declared alive until three days after birth, then all parents could be allowed the choice that only a few are given under the present system. The doctor could allow the child to die if the parents so chose and save a lot of misery and suffering. I believe this view is the only rational, compassionate attitude to have.

PRISM. Then you do not strictly object to the potentials of the Edwards/Steptoe experiment?

WATSON. If the Edwards and Steptoe procedure becomes general—which it will if it works—then you will certainly be confronted with many new problems.

For example, when a doctor performs a laparoscopy, he gets a number of ova from the ovary, but only one is needed. Therefore, a lot of human eggs will be floating around for people to experiment with. And one of the experiments people might try is cloning—and I think that would probably be a bad idea from the start.

PRISM. You're quite emphatic about that. Could you tell me why?

WATSON. Human cloning would not represent any gain for society or for science. Instead, it holds almost infinite potential for great harm.

Now perhaps because of fundamental biology, it may turn out that we will never be able to take a cell from an adult to produce a clone. In the case of the frog, where cloning has been done many times, it is successful only if you use embryonic cells. But conceivably, some form of adult somatic cells can be made to work.

PRISM. But what would be the great harm in cloning?

WATSON. For one thing, I think it would be hell to grow up knowing you were of the same genetic potential as someone in the past. One would know from the start how one would look many years later. Also, the odds would be against you ever being as successful as the person from whom you were a clonal descendant. So on the whole, I believe most clones would be miserable.

PRISM. Do you really think there is a valid possibility of cloning humans?

WATSON. If eggs are freely available, it would be most surprising if many different groups of individuals didn't try to do the first step of inserting adult nuclei into enucleated eggs. And if this step works, then they will try to make it divide to the blastocyst stage and then try implantation into the uterine wall.

If human eggs become available in thousands of places around the world and unless there is some kind of restriction on their use, they will be fair game for anyone to see what can be done with them. This is the main objection I have to Edwards' and Steptoe's work.

Most important if the means are there, it would be difficult to say to an infertile couple that they could not have the Edwards/Steptoe treatment. Of course, if the public were sufficiently aroused, legislation could outlaw the procedure.

PRISM. Do you think American physicians would be particularly prone to using the Edwards/Steptoe technique once it is perfected?

WATSON. Most certainly. But even if American doctors agreed not do do it, that wouldn't restrict Danish doctors or Swedish doctors, or others. Moreover, the procedure could be done very quietly, the way abortions used to be done in most states. Normally, it will be more difficult, but nothing like heart transplants or even more complicated surgery.

The first few times the Edwards and Steptoe technique is used, the blastocyst will undoubtedly be reimplanted in the donor mother. But there is no reason that the blastocyst couldn't be reimplanted in another woman simply for convenience.

PRISM. But would anyone take the chance?

WATSON. Certainly. You would find lots of women who, being of sound body and good health but damned poor, would be willing to take a year out of their lives to carry someone else's child if you paid them the right amount of money.

I do not believe that this is in any sense a preposterous idea. It would simply depend on the risks involved, and those can be determined only with time.

PRISM. Aside from providing a lot of women with a chance to bear children when they otherwise wouldn't be able to, can you see any other beneficial results that might come out of Edwards' and Steptoe's work?

WATSON. There is the possibility of sex determination. This would be more tricky than simple reimplanting since it would involve removing one or more cells from a blastocyst. But if that can be done, it would afford a surefire way to choose whether the child would be male or female. But I don't think that is an important use of the procedure—just a by-product.

Edwards has also suggested that through such studies, we may get better ideas of the causes of abnormal chromosomal segregation and so be able to learn a great deal scientifically—information that probably could only be attained by the study of human eggs.

PRISM. From the child's viewpoint, how do you think the knowledge that he was conceived and, for a time, grew in a laboratory would affect him?

WATSON. Not at all. I don't think it would have any effect.

PRISM. It would have *no* effect?

WATSON. The Edwards/Steptoe treatment shouldn't affect you any more than the fact that hormonal treatment was used to make your mother ovulate. Of course, if it made you a twin or a triplet, that would indeed affect you. Unlike

the clone, you would still have your own unique genetic constitution, and temporary manhandling in the laboratory would have no more significant psychological effect than manhandling in a hospital.

The possibility that something could go wrong is the scary thing. If you came out genetically impaired, you might easily believe this was due to the Edwards/Steptoe technique, and that, of course, would most definitely affect you—and possibly Edwards and Steptoe.

PRISM. Since these experiments are designed to overcome infertility, what implications have they for population growth?

WATSON. By itself, I think the restoration of fertility can only be regarded as a good thing. I don't go along with the idea that it will add to the population problem. About ten percent of couples are infertile, and infertility due to blocked tubes is probably not more than about a quarter of that at maximum. So there would be a small effect.

I can see nothing wrong per se with the technique—I don't have any preconceived reasons as to why it would be good or bad. "Sacredness of life" or anything like that is not relevant to my concerns. My chief concern is that the development of this technique may provide an inevitable step toward cloning. The public really ought to be aware of that.

PRISM. In your article, "Moving Toward the Clonal Man" (Atlantic Monthly, May, 1971), you said that "if the matter proceeds in its current nondirected fashion, a human being born of clonal reproduction most likely will appear on the earth within the next 20 to 50 years, and even sooner if some nation should actively promote the venture." Do you still consider this statement accurate, or would you revise your figures?

WATSON. I think 20 to 50 years is probably still a good estimate, though there are many potential obstacles. One is the practical matter—obtaining large numbers of human eggs for experimentation. But, in the absence of any laws governing what we should do with the eggs, the Edwards/Steptoe technique could provide a situation in which hundreds of people would have the possibility of taking the first steps to cloning.

I believe we as a society should think about the possibilities now. Our current way of operating just lets science go ahead. Then later, when a problem gets real, we try to face up to it. I think we should draw attention now to those things which might have real consequences 20 or 30 years hence.

If the Edwards technique doesn't work and there aren't eggs to play with, then cloning may just never happen.

PRISM. But what if it does happen? Wouldn't there be some very complex legal problems?

WATSON. Perhaps the most interesting is whether the unborn child, though only an egg, has any legal protection under the system. When does a legal entity come into existence? Only after he is born?

For several years, Senator Walter Mondale [D.-Minn.] has been trying to get Congress to set up a federal commission whose sole task would be to consider the consequences of biology—not to legislate, but to inform Congress, the representatives of the people, what is possible and what is not possible. This is a very good idea, because the commission would be independent of any present scientific or medical agency. My suspicion is that the directors of the National Science Foundation and the National Institutes of Health would like to blot Edwards and Steptoe out of their minds, hoping that their concept never pans out. If their work suddenly bursts forth onto the American scene, many people will be very upset, because the "sanctity of human life" has been invaded, and so become even more unsympathetic to science as a whole.

PRISM. What is the likelihood that some nation might actively promote cloning experiments?

WATSON. Little except, perhaps, in some sort of bizarre form of dictatorship in which the ruling powers aspire to have a never-changing leader. With cloning, they could always claim to have the same king. If cloning had been possible in ancient Egyptian times, it would probably have been used for that purpose.

Interestingly, Edwards told me that in Russia, cloning is the last thing in the world they want; so they have forbidden the Edwards/Steptoe sort of operation. Having already had one Stalin, they don't want another.

Of course, lack of support by major nations doesn't rule out this sort of research. Almost any small country could do it, because it isn't very expensive, nor does it require extraordinary resources.

PRISM. Assuming that somebody did decide to push cloning, perhaps in the same spirit as the space race, could the time it would take to produce the first clonal man be cut to less than 20–50 years?

WATSON. I don't think one can say. Our only hard facts come from the attempts to produce a clonal mouse, now being done by Christopher Graham at Oxford. About three years ago, he felt there was no inherent difficulty—today, his mood is less optimistic. To my knowledge, even today he remains the only person working toward this objective.

Many people have speculated that cloning could have a beneficial effect on agriculture. If a way were found for clonal mice to be produced easily, then I imagine that attempts would soon begin with economically important animals. Many governments might pursue the development of clonal domestic animals, hoping to produce more perfect cattle, better pigs, and so on.

PRISM. But what about human cloning? Is there any particular advantage in creating human clones?

WATSON. Only in the sense of increasing the number of exceptional genetic constitutions. The genetic background, however, is never the whole story in forming a person—environment may be equally important.

PRISM. Could human clones be of any significant value for scientific studies?

WATSON. I don't think so. You could do retrospective studies to see how the clonal individual's attributes correlate with those of the original genetic donor, but I don't think you would find out anything profound. Most likely, much less could be learned than from analyzing identical twins. For one thing, the state of the world wouldn't be the same for a clone as it would have been for his donor. Enough factors in life would be very different; so you wouldn't expect him to behave the same as his genetic parent.

PRISM. Getting back to Edward's and Steptoe's work, what implications does it have for the future of genetic engineering? Will it bring any notable advances?

WATSON. It might, if we could change the genetic constitution of someone by injection of good genetic material—DNA. This would have to be done in a very early embryonic stage; after someone is born, I think it would be very hard to cure cystic fibrosis, for instance. On the other hand, I just can't believe that any of the DNA-transformation experiments are going to work over the next ten to 20 years. So, except for the Edwards/Steptoe type of test-tube baby, I don't regard genetic engineering as imminent.

PRISM. Some people are so concerned about genetic engineering and cloning that they are discussing the idea of limiting research in certain areas, depriving scientists of the commonly accepted right to pursue anything they like in research. What are your thoughts about this?

WATSON. I think it would be very hard to control anything immediately, except, perhaps, experimentation with human eggs. Asking now, or in the future, to totally restrict someone's experiments with a mouse would be very hard. Society, however, might eventually control such work through curtailment of funding. For example, if you thought that the development of artificial placentas for the mouse might soon lead to one for humans, then you might decide not to fund such a project.

PRISM. How should the decision be made?

WATSON. Setting up a commission such as Senator Mondale's is a good way to put such an issue in front of the people. If the public then responds, the appropriate legislation could be introduced in Congress.

Most certainly, you shouldn't put every research proposal to a vote of either the Congress or the electorate. You would never get anything done that way. But I think the public should have a voice in those things that might be catastrophic.

PRISM. Could you be a little bit more specific?

WATSON. Already, we have laws limiting some types of research. For example, it is illegal for just anyone to play with fissionable material and assemble an atomic bomb. Likewise, cloning may be outlawed one day if people thought it was around the corner. On the other hand, I do not believe we will get a great outcry against the in vitro conception methods that Edwards and Steptoe are working on. Although many religious groups will be offended, I suspect they don't now constitute a majority of the American public.

PRISM. Would you, then, have Congress decide only those issues that are major?

WATSON. I would. The Secretary of Agriculture, for example, should ask for congressional consent before committing agricultural research stations to finding ways to make clonal cows.

We must always remember that most individual scientists do not want any restrictions on what they can do. They are no different from the more avid capitalists. Leaving the scientific community entirely alone to decide whether something should or should not be done, almost always assures that it will be done, that is, given appropriate funding.

PRISM. Since all the different questions that might arise couldn't be put directly to the electorate, somebody would have to sift through them. Could this be one of the purposes for the formation of the commission you mentioned?

WATSON. Yes. In this way, a matter like the Edwards and Steptoe experiment could be discussed. The viewpoint taken by groups of doctors, such as the American Medical Association, would, of course, also have an effect. If the AMA, for instance, said that it couldn't imagine anything better for society than the Edwards and Steptoe technique, its introduction into medical practice would be hastened. Conversely, if the AMA came out against it, fewer such conceptions would occur—at least at first.

PRISM. Who do you think should serve on such a commission or group organized to help inform the general public?

WATSON. First of all, you would need people with technical competence. Gynecologists, for example, could tell you whether they thought it was easy or hard to do certain things. On the other hand, you wouldn't want to have only doctors. The consumer public would have to be strongly represented. You need a mixture of people who can appreciate both the difficulties and the advantages.

PRISM. What do you think will happen if nothing is done—if this kind of experimentation is just allowed to go on the way it has without great public discussion and without some decisions being made?

WATSON. If the first in vitro fertilizations are successful, I don't see stopping the tide. Obviously, a lot of legal problems would quickly emerge. If one of the first test-tube babies should come out bad, I believe most people wouldn't look at such a failure in a dispassionate, statistical fashion. They would simply blame the doctor—or scientist.

PRISM. Will success for the Edwards and Steptoe technique have a profound effect on our society in the near future?

WATSON. Per se, I don't think so. It will, however, accelerate the trend toward the demystification of life that has been going on over the past century, in which life ceases to be a gift of God but, instead, becomes something we control. In that sense, hopefully, a society may emerge that takes a more active role in its own destiny.

> *Almost any small country could do it [cloning], because it isn't very expensive, nor does it require extraordinary resources.*

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THERAPEUTIC ABORTION: MEDICAL AND SOCIAL SEQUELS [1]

By Ann B. Barnes, M.D., Elisabeth Cohen, A.B., John D. Stoeckle, M.D., and Michael T. McGuire, M.D., Boston, Mass.

A retrospective study of 114 patients ranging in age from 12 to 47 years who had had therapeutic abortions showed few medical complications. The large number of women whose most serious problem was their unwanted pregnancy stated that the abortion was helpful. Social activities, religious attitudes, and occupation were little affected by the abortion. For the small number who had serious psychiatric problems the abortion had little effect on the course of their condition. A marked increase in birth control practice followed therapeutic abortion. Most patients cited the need for wider dissemination of birth control information.

[1] From the Gynecologic, Medical, and Psychiatric Services, Massachusetts General Hospital; and the Departments of Medicine, Psychiatry, and Obstetrics and Gynecology, Harvard Medical School; Boston, Mass.

This follow-up study of 114 women who underwent therapeutic abortion at the Massachusetts General Hospital, Boston, reports on medical complications of the operation, on what they have done since about birth control, counseling, marriage, work, and subsequent pregnancies. All therapeutic abortions that were done by one gynecologist between January 1968 and June 1970 are included. Information was obtained during July 1970 from hospital and office records and from questionnaires given to the patients. Ninety-nine of the 114 women completed the follow-up questionnaire either in an interview (13), in writing (32), or by telephone (54). Five refused to cooperate; 10 could not be reached because they had moved, and their new addresses could not be found. Twelve of the 15 lost to follow-up had post-operative visits within 6 weeks of the procedure; 3 did not return. No complications were recorded in any of these 15 patients' charts.

PATIENTS

The 114 women seeking a therapeutic abortion either came directly, on lay advice, or were referred by physicians. In accord with the hospital's practice, each therapeutic abortion was recommended by two or more physicians and the gynecologist. Each physician evaluated the patient in separate interviews and examinations. The criterion for an abortion was whether continuation of the pregnancy would be a serious impairment to the patient's mental health and welfare. Only one of the patients had in addition a severe medical illness. Usually, the consulting physicians were two psychiatrists and an internist.

A profile of the usual patient seen in this study is that of an unmarried Protestant (42%) or Catholic (30%) woman from 18 to 29 (80%) years old, working (43%) or a student (35%) (Table 1). She knows the putative father and is partly aware of his current occupation (42%). The patient has had no previous psychiatric illness (57%), children (77%), or abortion (86%) and does not practice birth control (87%) (Table 2). She is 10 to 12 weeks pregnant (53%) at the time of her dilation and curettage, returns for one postoperative examination, and thereafter practices birth control (69%) (Table 3).

Such a profile leads to a stereotyped impression of women faced with the problem of unwanted pregnancy. The preselection inherent in a private practice in a large hospital situated in an urban area encompassing many educational institutions in fact accounts for many of the characteristics noted. Despite the limitations of this study, the age range seen spans most of the reproductive life in women, the largest number of patients being in the peak reproductive period.

TABLE 1. SOCIAL SITUATIONS OF 99 WOMEN SEEKING THERAPEUTIC ABORTION

Social situation	*Number of women*
Age (12–47), years:	
17 and under	8
18–29	80
30–35	4
Over 36	4
Education:	
High school or beyond	84
Attended college	41
Postgraduate training	10
Less than 11 years of school	14
No information	1
Religion:	
Protestant	42
Catholic	30
Jewish	10
Greek Orthodox	1
None	16
Practice their religion	37
Do not practice religion	62
Resumed religious practice after abortion	1
Stopped religious practice after abortion	1

Social situation	*Number of women*
Marital status before abortion:	
Single	70
Married	21
Divorced	6
Separated	2
Marital status after abortion:	
Single	59
Married	31
Divorced	7
Separated	2
Occupation at time of abortion:	
Student	35
Housewife	16
Working	43
Nurse	14
Teacher	6
Secretary	6
Salesgirl	3
Other	14
Unemployed	5
Occupation after abortion:	
Unchanged	87
No longer student	7
Housewife	3
Secretary	2
Unemployed	2
Unemployed to working	4
Salesgirl to housewife	1
Duration of follow-up:	
1–6 months	47
7–12 months	29
12–24 months	12
24–30 months	2

The variety of reasons for which the patients sought therapeutic abortion reflects the wide range of ages as well as their marital status. For example, the situation of the abortion of a 12-year-old girl pregnant by her brother is entirely different from that of a 47-year-old married woman with older children who became pregnant when her oldest son was sent to Vietnam. Not surprisingly, the major distress among the single women was the very fact they were unmarried, did not intend to marry the putative father, and could not face the prospect of pregnancy. On the other hand, six married women felt they couldn't cope with another child because their husbands or children were chronically ill. For example, one woman feared she would have another retarded child. One felt she could not give her child with cerebral palsy the care he needed if she had still another. The husbands of two women in their forties had suffered recent heart attacks. Three women felt that an abortion was necessary to save their marriages.

Eleven of the single women have since married, seven to the putative father. Only one married woman was divorced. She was one of two women not pregnant by their husbands and had previously separated after another extramarital pregnancy.

OCCUPATION AND EDUCATION

The educational and occupational background of these patients can in large measure be attributed to an inherent preselection through informal referral systems in the educational and medical institutions in the area and the cost of four consultations and the hospitalization. At the same time, coupled with the scant pretreatment birth control practices, it suggests an enormous void in sex

education and contraceptive information in what appeared to be an intelligent group of women. Twelve women were sufficiently distressed by their unwanted pregnancy to have quit their jobs before abortion. Four returned to their employment; the rest sought new jobs. It was hard to distinguish distressed women who became pregnant and those whose distress was precipitated by the pregnancy. The women, however, emphasized their unhappiness due to the pregnancy and the sense of relief that accompanied the abortion.

RELIGIOUS INFLUENCE

In view of religious beliefs that prohibit or sanction therapeutic abortions, patients were asked about their degree of religious affiliation. Almost two thirds said they did not practice their religion. Yet, among the nonpracticers, many did feel religious, believed in God but not dogma, or followed a personal religion. Only 5% said they did not feel religious at all.

Catholic women had most difficulty in rationalizing their abortions with their beliefs. Most of the 18 (60%) did not practice their religion. Without being asked, approximately a third volunteered that they rejected the church's stand on birth control and abortion. One patient claimed to have stopped practicing her religion because of her abortion. Another went back to the church after her abortion, having been absent for several years; receiving absolution was very important to her. Similarly, a Catholic nurse explained that she appreciated the sympathetic reaction of her priest. Another nonpracticing woman mentioned that because of her upbringing she sometimes felt she was killing a living person. Although two Catholic women opposed birth control on moral grounds, neither regretted having the abortion because of the church's stand on it.

PSYCHIATRIC CARE

With few exceptions, the women in the group appeared to be functioning adequately. Although they frequently mentioned how desperate they felt when they were trying to arrange the abortion, they also indicated that the crisis ended essentially with the termination of the unwanted pregnancy.

The situation of women with serious problems before the pregnancy has remained essentially unchanged and perhaps, in one case, worse since their abortion. The one woman, who was in a mental hospital before she became pregnant, was rehospitalized for a short time after the abortion. Another woman who had a very long history of psychiatric problems before her pregnancy was in a mental hospital for the first time for several months during the year after her abortion. These are the only two cases in which there is possible evidence that an abortion may have aggravated existing problems.

In several women the crisis surrounding the unwanted pregnancy and therapeutic abortion encouraged them to confront problems that had been bothering them and to seek help. Nine people who had never had any counseling before have had some since their abortion. One young girl in this category felt that she had needed to see a psychiatrist for a while and appreciated that care was being offered to her at this point. Several women, however, were rather defensive in their insistence that they did not need psychiatric care.

SURGICAL PROCEDURES

At the time of the interruption of their pregnancies, 90 patients had been pregnant for 12 weeks or less; 24 were 13 to 20 weeks pregnant. No maternal deaths occurred, and no loss of reproductive capacity, except where requested, was noted in the limited follow-up period. Five patients had complications (Table 3). Two perforations occurred with abortions at 11 weeks; one was managed medically, and the other required major surgery. One patient, 10 weeks pregnant, required a repeat dilation and curettage for bleeding due to retained products of conception. Endometritis occurred twice, after a dilation and curettage procedure and a hypertonic saline abortion, both requiring hospitalization for intravenous antibiotics. Antibiotics were not routinely used for the initial abortion procedure.

Table 2. Medical Information on Patients

Medical data	*Number of patients*
Psychiatric history before abortion:	
No previous care	57
Some care before pregnancy	17
Long-term treatment before pregnancy	19
Hospitalization	1
Attempted suicide	7
Before pregnancy	5
While pregnant	2
Psychiatric history subsequent to abortion	
None	74
Talked with social worker	4
Talked with priest	1
Some therapy	8
Long-term therapy	10
Hospitalization	2
Number of children before abortion	
None	77
One	5
One given up for adoption	2
Two to four	12
Five or more	3
Previous abortion	
None	86
One legal	2
One illegal	8
No information	3
Self-induced efforts during pregnancy	
None	88
Illegal	4
Attempted on self	4
Spontaneous incomplete abortions while waiting for admission for interruption	3
Birth control practices before abortion	
None	66
Discontinued use of	21
Pills	15
Coil	3
Diaphragm	3
Using at conception	12
Pills	2
Coil	2
Diaphragm	2
Foam	1
Rhythm	4
Condom	1
Birth control practices subsequent to abortion	
Practicing	69
Pills	30
Coil	17
Diaphragm	6
Condom	1
Tubal ligation	5
Not practicing	21
Abortion 1 month before inquiry	2
Wants tubal ligation	2
Feels no need	5

The consultations and the waiting period for a hospital bed added an average 3 weeks to the duration of the pregnancy from the time the patient was first seen by a doctor. The delay caused by the patient's unwillingness to recognize the possibility of pregnancy, her inability to find a referral route, or both, was difficult to define (*1*). Certainly the most unfortunate situation is the combination of these sources of delay in the teenage girl. In three teenagers attempts

of hypertonic saline induction failed. One girl had a cardiac arrhythmia and was on propranolol therapy; there was evidence of fetal death with wine-colored amniotic fluid 48 hours after instillation of saline. Although uterine contractions were elicited regularly with oxytocin, no cervical effacement or dilation occurred and a hysterotomy was uneventfully carried out. In the other two girls the initial and repeat amniotic taps showed bloody fluid later found at hysterotomy to be the result of anterior fundal placental implantation. The Caesarean sections that these three girls will probably have for their future deliveries may be of little hazard to their lives. The psychologic effects and expense, however, could be significant.

TABLE 3. TYPES OF TREATMENT

Treatment	*Number of women*
Methods of interruption:	
Suction dilation and curettage	98
With tubal ligation	2
Hypertonic saline	9
Dilation and curettage for retained products	3
Hysterotomy	6
With tubal ligation	2
For failed saline	1
Multiple leiomyoma	1
Placental abruption	1
Bloody amniotic fluid on amniocentesis	2
Hysterectomy for multiple leiomyomas as well as interruption and sterilization	1
Complications:	
Perforation at site of recent previous instrumentation requiring small-bowel resection (11-week pregnancy)	1
Perforation with uterine dilator, no therapy required (11-week pregnancy)	1
Repeat dilation and curettage for retained products	1
Endometritis treated with intravenous antibiotics	2

BIRTH CONTROL PRACTICES AND ATTITUDES

The information on birth control practice from records and follow-up questionnaires explains how the women reacted to the experience of an unwanted pregnancy and therapeutic abortion. Before the abortion 66% never practiced any form of birth control; some claim they knew nothing about birth control. For example, one girl came from a Catholic family where such information was not mentioned. Another was a college graduate who had gone to a private high school for girls. Many claim to have had little sexual experience and became pregnant the first or second time they had intercourse. One college-educated woman who did not claim ignorance for her failure to practice birth control explained her behavior in a way that may apply to other women in the group. She said, "because of the shame society attached to sex, a girl gets pregnant because she doesn't want to face the fact that she is sleeping with someone." Of the 33 who had practiced birth control, 12 had stopped at the time they became pregnant. One woman stopped using oral contraceptives because she had fibrocystic disease of the breast. Another stopped when she was divorced because she did not anticipate beginning another sexual relationship. Some patients implied that concern over the safety of oral contraceptives had been a factor in their stopping. Except in the patients with the coil (2), it is difficult to distinguish between the failure of the method of contraception and the failure to practice the method consistently and correctly. By practicing some form of birth control, however, some women in this group showed that they wanted to prevent a pregnancy.

After the pregnancy interruption, 69% of the women were practicing birth control. Only two of the women are opposed to contraception. Most of those not practicing it at the time of the follow-up study either had had their operation recently or do not intend to have sexual relations in the near future.

PATIENTS' COMMENTS AND VIEWS OF THEIR EXPERIENCE

When asked if there were any comments they would like to add to the questionnaire, the women frequently simply expressed appreciation and said that they hoped more women in such a predicament could get similar care. Although

they had found abortion an acceptable solution to their unwanted pregnancy, they frequently expressed the opinion that the prevention of unwanted pregnancy through more available birth control information and sex education was the preferred solution. A small minority expressed more negative reactions. One 15-year-old girl whose boyfriend wanted to marry her and whose parents wanted her to get an abortion wrote that she felt that she did not consider her decision carefully enough. Many viewed therapeutic abortions only in terms of their own situations, observing that they were "good girls." Several thought that abortions should only be available to "respectable women." One woman said that she could not imagine any situation except her own in which abortion would be justified. Similarly, a 40-year-old single woman thought birth control was a good idea but only for older single women.

A small number of women were resentful about their experience and angry that the men got off so easily. A graduate student commented bitterly that there is a double standard within the double standard: "It's okay to fornicate as long as one doesn't get caught." Many said they appreciated the practical orientation of the doctors, but some felt they were being judged. One woman, a college student, resented a question asked by the physician—"Why didn't you get married?"—because it meant this is what he thought she ought to do. Some were resentful because they thought a therapeutic abortion should be easier to get, without the need for interviews about themselves and their relationships.

SUBSEQUENT PREGNANCIES

Within the short follow-up time of this study, 1 to 30 months, four patients have subsequently become pregnant; one married and has had a child; two single women had a spontaneous abortion; and one had a second therapeutic abortion.

DISCUSSION

From the follow-up questionnaires and interviews, we conclude that the patients' experience with therapeutic abortion produced little handicap in most and constructive gains in many. Eleven single women subsequently married in the follow-up period; however, one repeated the pattern of unwanted pregnancy, and one woman divorced her husband. Only a few changed jobs, suggesting that the experience had little effect on the daily life of these women. That so few sought counseling or psychiatric aftercare suggests that abortions authorized to protect mental health and welfare have had, on the whole, few hazards. Judging from the patients' responses, there were positive effects on the outlooks of these women.

The patients neither regretted their abortion nor suffered serious medical complications. Most volunteered that greater availabiilty of birth control information and sex education was preferable. This attitude was reflected in their behavior; two thirds were not practicing any form of birth control when they became pregnant, and approximately the same number did practice after their abortion.

This study was carried out in a state where abortion is a matter of criminal law, not of medical ethics and conduct. Therapeutic abortions are allowed for the mother's "mental health and welfare." The interpretation of this term varies markedly from one hospital to another as well as among physicians in the same hospital. No patients requesting an abortion who saw the physicians involved in this study were refused abortion. Since the completion of the study the number of consultations has been reduced from four to two. We now have facilities for performing suction D&C, so the patient can be discharged in 8 hours.

The hesitant attitude of many American physicians in facing the needs of women with unwanted pregnancy is reflected in the inordinate consulting system of the hospital in this study. Recent papers from Colorado and California also reflect such caution.(2, 3) Yet, the study of Brodie, like the present study, suggests scant psychological sequels to therapeutic abortion(4). Furthermore, the report from San Francisco points to the positive effect therapeutic abortions can have on diminishing the number of maternal deaths from septic abortions as well as overall maternal mortality. In the rest of the world many countries have extensive experience with abortion, and the relative safety of the procedure, particularly with suction currettage, is well established (5, 6). According to long-term reliable data from Eastern European countries, the major ill effect is in patients with repeated abortion (three or more) having premature infants or placenta previa(5). (The women having three or more spontaneous abortions

also fall into "the high-risk during pregnancy" category.) Thus, it is becoming apparent that the extremely cautious attitude of many American physicians is difficult to justify on medical or psychological grounds and may, in fact, account in part for the difficulty the United States has in lowering its maternal mortality figures to levels similar to those in other industrialized societies.

Just as the patients in this study eloquently demonstrate the need and desire of women for easily available contraceptive advice and assistance, so in the international studies the need for contraceptives as part of any abortion program is apparent to all.

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[From American Medical News, May 7, 1973]

Euthanasia

I read the letter from Florence Clothier, MD, entitled "Dying with Dignity," and her approval of the report of the Medical Society of the State of New York and its policy on death (*AMN*, March 12, 1973).

I agree with her heartily that the word "euthanasia" has connotations that make it rather objectionable. In my legislation in the Florida Legislature I have carefully avoided the mention of the word "euthanasia." But, as Dr. Clothier said, it actually is a very kind word and says nothing about active mercy killing. As the original proponent of this legislation, I am introducing legislation this year after five years of slow building. I have reason to believe that at least 10 states, Australia, and possibly the United States Senate will consider legislation of similar import.

I think we, as doctors, have to face this issue. When I came through medical school there were no nursing homes on every street corner, there were no huge storage bins for the completely mentally and physically retarded of the vegetable variety. We must do something about correcting this situation and to such is my legislation intended.

Walter W. Sackett Jr. M.D.,
Miami, Fla.

Editor's note: Dr. Sackett is a member of the Florida House of Representatives.)

New York City Abortion Report: The First Two Years

In the first two years under New York State's liberal abortion law (July 1, 1970–June 30, 1972), an estimated 402,059 abortions were performed in New York City.[1]

Of these, approximately 228,000 occurred during the second year, July 1, 1971–June 30, 1972.

The most important conclusion that can be drawn from the two-year data is that abortion can be provided safely on a large scale.

The safety record for abortion is measured by two indices—death rate and complications—and both of these indices showed constant improvement over the two-year period after the law went into effect.

The New York City death rate for first-trimester abortions in particular (those performed within the first twelve weeks of pregnancy) has been extraordinary. There was, in fact, only one death associated with a legal first-trimester abortion during Year 2, and there is some question about the gestation reported in that case. The last abortion death following a legal first-trimester abortion in New York City occurred in July, 1971. During Year 1, there were three first-trimester deaths, yielding a rate of 2.1 per 100,000 abortions. For Year 2, the rate dropped to 0.5, indicating that there is exceedingly small risk attached to first-trimester abortion performed with proper medical safeguards.

Overall, there were eight deaths in New York City following legal abortions during each of the two years under the law. The death rate for Year 1 was 4.6 deaths per 100,000 abortions. By the 18-month point, this figure had dropped to 4.3, and it declined even further—to a remarkable 3.5—for Year 2.[2]

A comparison of the New York City figures with those of other countries with liberal abortion laws demonstrates how outstanding the New York City abortion safety record is. In Great Britain, for example, the rate was 27.8 per 100,000 abortions during the first year of liberal abortion. In Sweden and Denmark, the average rate was 39.2 in the 1960's.

Like every other surgical procedure, abortion has attendant complications. Here, too, however, the trend has been favorable overall. In the first year, the rate of reported complications was 8.5 per 1,000 abortions. For Year 2, that figure dropped to 7.2.

For first-trimester abortions, the rate of reported complications dropped from 4.6 per 1,000 abortions during Year 1 to 3.9 per 1,000 during Year 2.

For the second-trimester cases, however, the rate of reported complications rose marginally—from 26.8 to 28.6 per 1,000 abortions—in the two-year period.

There is some evidence that this increase in the number of complications reported may be due more to an improvement in the reporting system itself—i.e., more complications are being reported now—than to any real change in the complications picture itself. The Health Department, nevertheless, has initiated an investigation into the rising rate of reported complications from second-trimester abortions, which is now about nine times as high as for early abortions.

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[1] Estimated totals are derived from weekly reports from the hospitals and clinics, adjusted for known underreporting. These totals provide the base for total volume of abortions and for computation of mortality and complication rates.

Certificates of termination of pregnancy, which are to be filed by the physician in each individual abortion, provide the base for detailed demographic analysis. They totalled 334,865 for the two-year period, or about 83% of all abortions estimated to have been performed.

[2] There were also 7 deaths in New York City following illegal abortions in the first year under the law and 6 in the second year. Death rates are calculated, as in other countries, only for deaths from abortions under legal auspices.

In addition, in each year, there was one reported death that occurred outside the City following legal abortions performed in the City. The New York City Health Department works closely with the U.S. Public Health Service to follow up on all reports of deaths and complications that occur out-of-state following City abortions. Since some such cases may be missed, the City calculates the abortion death rate on the basis of the number of deaths associated with legal-auspices abortions that occurred in the City, and tabulates separately the reported out-of-state deaths.

At the same time, the Obstetrics Advisory Committee to the New York City Commissioner of Health is developing new guidelines for the use of saline instillation, the principal mode of terminating second-trimester abortions, and it is hoped that implementation of these guidelines will lessen the risk presently involved in saline abortions.

The real solution to the problems involved in second-trimester abortions, however, is to encourage more women who want abortions to have them early, and the City has been using all the public education tools at its disposal to accomplish this purpose.

The result has been a dramatic increase in the proportion of first-trimester abortions during the two-year period since the abortion law went into effect. First-trimester abortions rose from 69% of the total in the first three months under the law, to 76% in the whole of Year 1, to 79% during Year 2. For New York City residents, the increase was even more outstanding: from 73% in Year 1 to 81% in Year 2.

Since the abortion law went into effect in July, 1970, there has been mounting evidence that liberal abortion was having a favorable impact on maternal and infant mortality and out-of-wedlock births. While it is still somewhat early to reach definitive conclusions, the data for two years of liberal abortion strongly suggest that access to abortion is providing an important alternative to women who are at risk of mortality in childbirth or whose offspring risk death in infancy.

Since the abortion law went into effect, there has been a definite improvement in the maternal mortality picture. The overall maternal death rate for the two-year period under the new abortion law was 37.7 per 100,000 live births, a statistically significant 28% decline from the preceding two-year period, when it was at a rate of 52.2.

Infant mortality, which had been on the decline for a number of years, dropped to an all-time low in 1971, the first full year under the abortion law. The New York City infant mortality rate was 20.8 per 1,000 live births in 1971, down 3.7% from the rate of 21.6 in the "transition" year of 1970, and still more from 24.4 per 1,000 births in 1969. In the first six months of 1972, the rate was 20.3.

Out-of-wedlock births had been increasing dramatically in recent years, but there was a decline after the law went into effect. In 1971, the number of out-of-wedlock births dropped 11.8% from 31,903 in 1970 to 28,126 in 1971. This was the first year-to-year decline since 1954 when records first began.

Access to abortion also appears to have brought about a striking decline in "incomplete" abortions—those cases that the hospitals see after an abortion was begun elsewhere or was self-induced. Data from ten reporting municipal hospitals show a sharp drop in incomplete and spontaneous abortions, from 415 per month in Year 1 of the law to 220 per month in Year 2. Since the number of spontaneous abortions was likely to remain relatively constant, it is likely that this reflects a true decline in the number of criminal abortions.

There is an important corrollary to the favorable impact of abortion on public health in New York City. It must be noted that abortion on a large scale has not swamped the City's health system as many originally feared. Some two dozen freestanding abortion clinics developed over the first two years, supplementing the capacity in public and private hospitals. The number of abortions performed in clinics increased progressively during the two-year period—from 14% of the total number of abortions in the early months of the law to over 50% in the months ending Year 2.

While it was concluded originally that the clinics would serve nonresidents primarily, it is now clear that an increasing number of New York City residents are also using the clinics. In fact, the proportion of abortions for City residents accounted for by clinics climbed from 6.6% in Year 1 to 23.1% in Year 2.

At the same time, the number (and proportion) of abortions being performed in the municipal hospitals has been declining. In Year 1, the municipal hospitals performed 31,818 abortions; in Year 2, although the total number of abortions performed in the City increased, the municipal hospitals were called on to perform only 27,814.

Other early trends have been borne out by the two-year data. For example out-of-City residents have continued to account for an increasing proportion of abortions. During the first year under the abortion law, non-City residents accounted for 61.7% of all abortions in the City. During Year 2, non-residents accounted for 66.5% of all abortions.

The two-year data also continued to show striking differences between City women and non-resident women who obtained abortions. Non-residents tended to be younger and terminating a first pregnancy, suggesting that perhaps more non-residents were unmarried. It is also likely that the non-residents receiving abortions were, on average, more affluent than the City residents since they incurred travel expenses as well as the cost of their abortions.

In both groups, a majority of the women were in their twenties. Among non-residents, however, 31.5% were under 20 years old, compared to 17.0% of the residents in the two years combined. Overall, the proportion of teenagers increased from 24.2% in Year 1 to 28.8% in Year 2 (rising from 16.1% to 18.0% among residents and from 28.9% to 33.9% among non-residents).

While non-residents were more likely to be terminating a first pregnancy (61%, vs. 38% for residents in Year 2), the proportion of women terminating second or subsequent pregnancies grew in both groups in the second year.

Among residents, this proportion grew from 55.5% to 60.4%. Among non-residents the figure went from 34.4% to 38.6%.

The two-year data showed no major ethnic shift between Year 1 and 2, although the proportion of non-whites among non-residents increased markedly.

[Percent]

Live Births	Year 1	Year 2	Live births in New York City, 1971
New York City Residents:			
White	47.0	42.0	54.2
Nonwhite	42.8	45.7	29.8
Puerto Rican	10.3	11.3	16.0
Nonresidents:			
White	90.0	85.3	(1)
Nonwhite	9.5	13.9	(1)
Puerto Rican	.5	.8	(1)

[1] Not Available.

There is also continuing evidence that City residents of all income levels have had access to abortion in New York City. A study in May, 1972, showed that in 1971, Medicaid paid for 47.3% of the abortions in the municipal hospitals and for 67.7% of abortions for ward patients in the voluntary hospitals.

In addition, in the municipal hospitals City residents pay only what they can afford and are given free abortions if necessary.

One disturbing development during the two-year period was the number of "repeat" abortions. Although the proportion of such abortions is extremely small, the number—6,000 over two years, including 3,500 among non-residents—suggests that family planning services must be expanded substantially.

Some progress has been made in this area through a family planning program run by the N.Y.C. Health Department for abortion patients in the municipal hospitals. In the two years since the abortion law was passed, special family planning counselors have seen 80% of the abortion patients in the municipal hospitals, and about 65% of these women requested and were placed on a conception control regimen before they left the hospital.

CHART 1

NEW YORK CITY ABORTIONS TO OUT-OF-STATE RESIDENTS, JULY 1970 TO JUNE 1972

State	July 1970 through June 1971	July 1971 through June 1972	Total 2 years
Alabama	506	815	1,321
Alaska	5	46	51
Arizona	50	43	93
Arkansas	162	362	524
California	148	154	302
Colorado	332	215	547
Connecticut	3,729	5,344	9,073
Delaware	266	524	790
District of Columbia	345	157	502
Florida	5,255	7,897	13,152
Georgia	1,751	2,016	3,767
Hawaii	3	16	19
Idaho	22	19	41
Illinois	7,163	13,016	20,179
Indiana	2,478	3,405	5,883
Iowa	873	1,906	2,779
Kansas	115	332	447
Kentucky	939	1,343	2,282
Louisiana	628	950	1,578
Maine	619	1,131	1,750
Maryland	878	551	1,429
Massachusetts	5,107	6,471	11,578
Michigan	7,296	12,028	19,324
Minnesota	1,501	2,122	3,623
Mississippi	325	528	853
Missouri	854	1,120	1,974
Montana	63	432	495
Nebraska	466	631	1,097
Nevada	23	30	53
New Hampshire	592	1,017	1,609
New Jersey	11,849	19,575	31,424
New Mexico	24	57	81
North Carolina	1,032	1,185	2,217
North Dakota	143	166	309
Ohio	7,403	11,310	18,713
Oklahoma	349	514	863
Oregon	6	20	26
Pennsylvania	6,600	11,591	18,191
Rhode Island	925	1,289	2,214
South Carolina	657	1,271	1,928
South Dakota	71	99	170
Tennessee	1,168	2,058	3,226
Texas	1,730	966	2,696
Utah	32	26	58
Vermont	276	287	563
Virginia	1,998	1,631	3,629
Washington	32	26	58
West Virginia	529	614	1,143
Wisconsin	1,139	1,716	2,855
Wyoming	35	41	76
Canada and other countries	2,788	4,944	7,732
Total	81,280	124,007	205,287

Source: Certificates of termination.

CHART A

ESTIMATED[1] NUMBER OF INDUCED ABORTIONS BY TYPE OF PROVIDER AND QUARTER OF OCCURRENCE, NEW YORK CITY, JULY 1, 1970–JUNE 30, 1972

Quarter of occurrence	Numbers						Percents					
			Voluntary			Free standing clinics			Voluntary			Free standing clinics
	Total	Municipal	Ward	Private	Proprietary		Total	Municipal	Ward	Private	Proprietary	
3d 1970	34,207	7,428	2,340	9,839	9,826	4,774	100	21.7	6.8	28.8	28.7	14.0
4th 1970	38,011	7,408	2,400	6,385	12,064	9,753	100	19.5	6.3	16.8	31.7	25.7
1st 1971	45,751	7,737	2,816	6,466	13,423	16,309	100	16.6	6.0	13.8	28.7	34.9
2d 1971	54,996	9,245	2,989	5,921	14,592	22,249	100	16.8	5.4	10.8	26.5	40.5
3d 1971	58,611	8,113	2,550	5,170	17,522	25,256	100	13.8	4.4	8.8	29.9	43.1
4th 1971	52,081	5,905	2,523	4,048	14,521	25,084	100	11.3	4.8	7.8	27.9	48.2
1st 1972	59,202	7,080	2,185	4,985	15,271	29,681	100	12.0	3.7	8.4	25.8	50.1
2d 1972	58,200	6,716	2,282	4,445	14,563	30,194	100	11.5	3.9	7.6	25.0	51.9
1st year	173,965	31,818	10,545	28,612	49,905	53,085	100	18.3	6.1	16.4	28.7	30.5
2d year	228,094	27,814	9,540	18,648	61,877	110,215	100	12.2	4.2	8.2	27.1	48.3
Total, 2 years	402,059	69,632	20,085	47,260	111,782	163,300	100	14.8	5.0	11.8	27.8	40.6

[1] Estimates are based on the following: (1) Health and Hospitals Corporation weekly telephone reports; (2) weekly reports by providers mailed to the Department of Health; (3) estimates of delayed or missing weekly mailed reports.

CHART B

PERCENT DISTRIBUTION OF NEW YORK CITY RESIDENT AND NONRESIDENT ABORTIONS BY TYPE OF FACILITY [1]

	Total	Municipal hospitals	Voluntary hospitals		Proprietary hospitals	Free-standing clinics
			Ward	Private		
July 1, 1970 to June 30, 1971:						
Resident	100.0	35.6	16.1	26.9	14.8	6.6
Nonresident	100.0	1.1	1.6	13.1	44.5	39.8
Total	100.0	13.7	6.9	18.1	33.6	27.6
July 1, 1971 to June 30, 1972:						
Resident	100.0	34.6	10.6	17.3	14.3	23.1
Nonresident	100.0	.6	.7	4.5	35.8	58.3
Total	100.0	11.7	3.9	8.7	28.8	46.9

[1] Source: Certificates of termination. Percents may not add to 100.0 due to rounding.

CHART C

CASELOAD OF ABORTION FACILITIES BY RESIDENCY AND GESTATIONAL AGE

	Total		Municipal		Voluntary				Proprietary		Free-St. Clinics	
					Ward		Private					
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
July 1, 1970–June 30, 1971:												
New York City residents:												
12 weeks and under	37,094	72.8	11,068	60.9	5,438	66.5	10,977	80.2	6,387	84.7	3,204	95.6
Over 12 weeks	13,123	25.7	6,799	37.5	2,559	31.8	2,558	18.7	1,059	14.1	109	3.2
Not stated	701	1.3	285	1.6	141	1.7	145	1.1	89	1.2	41	1.2
Nonresidents:												
12 weeks and under	68,924	78.2	488	51.8	865	61.2	7,385	63.9	26,789	68.3	33,397	95.3
Over 12 weeks	18,762	21.3	422	44.8	539	38.1	4,103	35.5	12,170	31.1	1,528	4.4
Not stated	437	.5	32	3.4	10	0.7	73	.6	218	.6	104	.3
July 1, 1971–June 30, 1972:												
New York City residents:												
12 weeks and under	49,431	80.7	15,312	69.3	4,762	70.4	8,522	77.2	7,085	77.5	13,750	93.3
Over 12 weeks	11,808	15.3	5,864	26.5	1,647	24.4	2,004	18.2	1,699	18.6	594	4.1
Not stated	2,544	4.0	918	4.2	353	5.2	512	4.6	359	3.9	402	2.7
Nonresidents:												
12 weeks and under	100,654	76.2	426	57.9	667	69.3	3,614	60.4	24,242	51.2	71,705	93.1
Over 12 weeks	27,036	20.5	240	32.6	270	28.0	2,116	35.4	21,559	45.6	2,581	3.7
Not stated	4,350	3.3	70	9.5	26	2.7	250	4.2	1,519	3.2	2,485	3.2

Source: Certificates of termination.

CHART D

PERCENT DISTRIBUTION OF ABORTIONS PERFORMED IN NEW YORK CITY BY GESTATIONAL AGE [1]

Gestational age	New York City residents		Non-New York City residents		Total	
	July 1970 through June 1971	July 1971 through June 1972 [1]	July 1970 through June 1971	July 1971 through June 1972 [1]	July 1970 through June 1971	July 1971 through June 1972
12 weeks and under	72.8	80.7	78.2	78.8	76.2	79.4
13 to 15	7.9	6.6	7.6	7.8	7.7	7.4
16 to 18	8.2	5.6	6.0	6.0	6.8	5.9
19 to 20	4.9	2.7	4.6	3.2	4.7	3.0
21 to 23	3.2	1.6	2.1	2.1	2.5	1.9
24 and over	1.6	2.8	1.0	2.2	1.3	2.4
Not stated	1.4	4.0	.5	3.3	.8	3.5
Total	100.0	[1] 100.0	100.0	[1] 100.0	100.0	[1] 100.0

[1] In July 1971 to June 1972, figures add to more than 100 percent because distribution is based on percent of total stated.

Source: Certificates of termination.

CHART E

AGE DISTRIBUTION OF WOMEN RECEIVING NEW YORK CITY ABORTIONS BY RESIDENCY AND YEAR

Time period and residence status	Total number of abortions	Percent distribution by age								
		Total	Under 15	15 to 17	18 to 19	20 to 24	25 to 29	30 to 34	35 to 39	40 plus	Not stated
July 1, 1970 through June 30, 1971:											
Resident	50,919	100.0	0.2	5.5	10.4	35.2	23.8	14.2	7.5	2.7	0.5
Nonresident	88,123	100.0	.2	9.9	18.8	38.3	14.6	9.1	6.1	2.6	.5
Total	139,042	100.0	.2	8.3	15.7	37.2	18.0	11.0	6.6	2.6	.5
July 1, 1971 through June 30, 1972:											
Resident	63,783	[1]100.0	.8	6.3	10.9	34.0	24.0	13.9	7.3	2.6	2.2
Nonresident	132,040	100.0	1.2	11.9	20.8	35.1	14.5	8.8	5.4	2.3	1.7
Total	195,823	100.0	1.1	10.1	17.6	34.7	17.6	10.5	6.0	2.4	1.9

[1] Distribution based on percent of total stated (97.8 percent).

Source: Certificates of termination.

ABORTION MORTALITY RATE PER 100,000 ABORTIONS BY GESTATION AND METHOD OF TERMINATION [1]

	Total	Gestation		Method			
		12 weeks and under	Over 12 weeks	D. & C.	Suction	Saline	Hysterotomy
July 1, 1970, through June 30, 1971:							
Number of deaths	8	3	5	2	1	2	3
Rate per 100,000 abortions	4.6	2.1	16.4	4.8	.9	9.0	([2])
July 1, 1971, through June 30, 1972:							
Number of deaths	8	1	7	0	0	6	2
Rate per 100,000 abortions	3.5	.5	18.8	0	0	22.2	([2])

[1] Based on deaths occurring in New York City following legal abortion.
[2] Rate not calculated.

Source: Weekly reports.

CHART F

PERCENTAGE DISTRIBUTION OF ABORTIONS BY PREGNANCY ORDER FOR NEW YORK CITY RESIDENTS AND NON-RESIDENTS[1]

[In percent]

	Total	1st	2d	3d	4th	5th	6th or more	N.S.
July 1, 1970, to June 30, 1971:								
New York City residents	100	42.9	17.7	15.3	10.1	6.2	6.2	1.5
Nonresidents	100	65.0	11.3	9.4	6.7	3.8	3.2	.5
July 1, 1971, to June 30, 1972:								
New York City residents	100	38.3	20.2	16.6	10.8	6.3	6.5	1.3
Nonresidents	100	60.7	13.9	10.3	6.9	4.0	3.5	.6

[1] Source: Certificates of termination. Percents may not add to 100 due to rounding.

CHART G

NEW YORK CITY ABORTION DEATHS BY OCCURRENCE AND TYPES OF AUSPICES

	Under legal auspices		Not under legal auspices (or unknown)		Total	
	In New York City	Out of New York City	In New York City	Out of New York City	In New York City	Out of New York City
July 1, 1970, through June 30, 1971	8	1	7	0	15	1
July 1, 1971, through June 30, 1972	8	1	6	0	14	1

Source: Weekly reports.

CHART H

ABORTION COMPLICATIONS RATES PER 1,000 ABORTIONS BY PERIOD OF GESTATION AND BY METHOD OF TERMINATION[1]

	Gestation			Method of termination			
	Total	12 weeks and under	Over 12 weeks	D. & C.	Suction	Saline	Hysterotomy
July 1970 to June 1971	8.5	4.6	26.8	5.9	4.4	31.6	34.3
July 1971 to June 1972	7.2	3.0	28.6	3.0	3.2	36.1	19.5

[1] Source: Weekly reports.

THE CITY OF NEW YORK,
HEALTH SERVICES ADMINISTRATION,
New York, N.Y., October 7, 1972.

CHASE REPORTS ON TWO-YEAR DATA FROM N.Y.C. ABORTION EXPERIENCE: CITES FAVORABLE TRENDS IN SAFETY AND PUBLIC HEALTH BENEFITS

The safety of abortion on a large scale has been demonstrated conclusively in data covering two years of liberalized abortion in New York City, Health Services Administrator Gordon Chase announced today.

In a report covering two years of abortion in New York City (July 1, 1970–June 30, 1972) released as he spoke on Saturday before the National Association for the Repeal of Abortion Laws in Detroit, Michigan, Chase outlined the major

trends seen during two years of abortion and pointed to the success of abortion in New York City—both in terms of safety for the estimated 402,059 women who have been served, and the favorable impact of abortion on various public health indices. He urged other states to follow New York's example in liberalizing abortion.

"Overall, the (New York State Abortion) law has been an enormous success in New York City," Chase said. "Our hospitals and clinics have provided prompt, dignified care to vast numbers of women—rich and poor, resident and non-resident alike. This care has been accompanied by an outstanding safety record and by a sharp increase in the proportion of women receiving earlier—and, therefore, safer—abortions."

First trimester abortions (those performed during the first 12 weeks of pregnancy), rose from 69% of the total in the first three months under the law, to 76% in the whole of Year 1, to 79% during Year 2. For New York City residents, the increase was even more dramatic: from 73% in Year 1 to 81% in Year 2.

"There is now exceedingly small risk attached to first-trimester abortions performed with proper medical safeguards," Chase emphasized, adding that "we have not had a first-trimester death . . . since July, 1971."

Actually, the New York City abortion safety record, as a whole, showed constant improvement during the first two years under the law, dropping from 4.6 deaths per 100,00 abortions in Year 1, to a remarkable 3.5 for Year 2.

"When you compare our figures with those of other countries," Chase pointed out, "you get a better idea of how well we're doing. In Great Britain, for example, the rate was 27.8 during the first year of liberalized abortion. And, in Sweden and Denmark, the average rate was 39.2 in the 1960's."

Like every other surgical procedure, abortion has attendant complications, but here, too, the trend has been favorable overall, with the rate of reported complications dropping from 8.5 per 1,000 abortions in Year 1 to 7.2 in Year 2.

The New York City two-year abortion report also adds to the mounting evidence that liberal abortion has had a favorable impact on maternal and infant mortality and out-of-wedlock births.

"It's still early to draw definite conclusions," Chase remarked, "but it does appear that abortion offers an important alternative to women who are themselves at risk of mortality, or whose children are—for example, very young women, unwed mothers who generally get poorer prenatal care, women who have had many previous births and pregnancies, women nearing the end of their fertile period, and women with medical handicaps."

"Since the abortion law went into effect, he continued, "there has been a definite improvement in the maternal mortality picture. The overall maternal death rate for the two-year period under the new abortion law was 37.7 per 100,000 live births, a statistically significant 28% decline from the preceding two-year period, when it was at a rate of 52.2."

Infant mortality, which had also been on the decline in New York City, dropped to an all-time low in 1971, the first full year of abortion. And, out-of-wedlock births, which had been increasing dramatically in recent years, dropped for the first time in 1970–71.

Chase also pointed out that abortion on a large scale has not swamped the City's health system, as many originally feared. About two dozen freestanding clinics are now performing more than half of the abortions in the City. Although these clinics originally served non-residents primarily, an increasing number of City residents are now using the clinics—and thereby easing some of the load on the City's municipal and voluntary hospitals.

The report also cited a number of other trends that have been borne out by the two-year data:

Out-of-City residents have continued to account for an increasing proportion of abortions—61.7% of all abortions in the City during Year 1, increasing to 66.5% during Year 2.

Incomplete or "botched" abortions have declined sharply in the two years under the abortion law, indicating that the abortion law is reducing the incidence of criminal abortions.

A majority of the women who sought abortions in New York City were in their twenties. Overall, however, the proportion of teenagers increased from 24.2% in Year 1 to 28.8% in Year 2.

While non-residents were more likely than residents to be terminating a first pregnancy (61%, vs. 38% for residents in Year 2), the proportion of women terminating second or subsequent pregnancies grew in both groups in the second year.

"We in New York City feel abortion-on-request is indeed feasible on a large scale," Mr. Chase concluded. "We have ironed out many of the problems that surfaced when this service was first made available, and we are making headway against other problems that have cropped up along the way. Our prime concern now is to preserve the good law that we have."

Urging in his speech that other states liberalize their abortion laws, Chase said that abortion does involve moral decisions—but not just those concerning the fetus. "We must consider the morality of forcing a woman to bear and raise a child she does not want," he said. "And what of the unwanted child, whose prospects for a good life may be dim precisely because he or she was not wanted?"

Citing the immorality of forcing women into the hands of criminal abortionists, Chase said: ". . . Women were having abortions long before New York voted its law. Desperate women will continue having abortions—even if they are illegal. Can we in good conscience consign these women to the butchers who thrive on criminal abortion?

Chase repudiated the "ridiculous" contention of many anti-abortionists that liberalized abortion dulls respect for life and will lead to euthanasia or worse, saying, "Abortion has been legal for years in places like England, Japan, Scandinavia, Eastern Europe, and I see no evidence that respect for life has diminished as a result."

[From Marriage and Family Newsletter, Vol. 4, Nos. 2, 3, 4, Feb., Mar.–Apr., 1973]

Some Consequences of Induced Abortion to Children Born Subsequently

(By Margaret Wynn and Arthur Wynn)

PREFACE

The first of the papers here reprinted was originally prepared as part of Margaret Wynn's evidence to the Committee on One-Parent Families. At the suggestion of the Chairman of that Committee the paper, in a slightly shortened form, was sent to the Committee on the Working of the Abortion Act under the chairmanship of Mrs. Justice Lane in May, 1972. The longer version is reprinted here.

Arthur Wynn's paper was prepared subsequently and was submitted to the Lane Committee in October, 1972. It draws on additional sources, mainly German but also American and French, including a number of papers first published in 1972. It extends Margaret Wynn's conclusions.

The bibliographies at the end of the two papers cover about 75 papers or books. The authors stress that this is only a small fraction of the relevant published literature. The two papers are, indeed, only the beginning of a story that could be greatly extended from existing sources.

BIBLIOGRAPHICAL NOTE

Margaret Wynn was born in Barnsley, Yorkshire and was educated at Barnsley High School and St. Hilda's College, Oxford. She is the author of *Fatherless Families* (Michael Joseph, 1964) and *Family Policy* (Michael Joseph, 1970; Penguin Books, 1972).

Arthur Wynn was born in Birmingham and was educated at Oundle School and Trinity College, Cambridge. He joined the Government service and became a Chief Scientific Officer. He became Director of the Safety in Mines Research Establishment concerned with the prevention of industrial accidents and disease. He was Scientific Member of the National Coal Board from 1955 to 1965 and had responsibility for the medical service at Board level. He joined the Ministry of Technology in 1965 and retired in 1971.

The Foundation for Education and Research in Child Bearing was established in March, 1971. It is a registered charitable trust. The aims of the Foundation are twofold, as its name suggests. In the first place it disseminates basic information on all aspects of childbearing to as wide an audience as possible. Secondly it encourages and assists research into all aspects of childbearing and fetal life and makes known the results of such research by means of papers, lectures, public meetings, and so on.

Further details are available from the Correspondent. The Foundation for Education and Research in Child Bearing, 27 Walpole Street, London, SW3.

SOME CONSEQUENCES OF INDUCED ABORTION TO CHILDREN BORN SUBSEQUENTLY

A Note by Margaret Wynn
Contents
Abortion, illegitimacy and extra marital pregnancy.
Who is affected by an abortion?
The effect of abortion on subsequent pregnancies and subsequent children.
The effect of abortion on subsequent marriage.
Morbidity and mortality following abortion.
Abortion for older women.
Changing attitudes to abortion for young women.
The need for surveillance of the costs and consequences of abortion.
Conclusions.

MARCH 1, 1973.

Today, the Foundation for Education and Research in Child-bearing, London, England and Marriage & Family Newsletter, Collegeville, Minnesota are publishing two papers concerning the consequences of induced abortion for women and future children.

In England, the Foundation is publishing the papers in booklet form. In the United States, the papers are being published as a special issue of Marriage & Family Newsletter, Vol. 4, Nos. 2, 3, 4.

The authors, Margaret and Arthur Wynn, in "Some consequences of induced abortion to children born subsequently," indicate that a woman definitely should not have her first pregnancy end with induced abortion.

Margaret Wynn in her conclusion states that "induced abortion has adverse consequences to the reproductive capability of young women who may wish to have children subsequently and increases the risk that such children may suffer perinatal damage."

Arthur Wynn, in his paper, "classifies the risks to a subsequent pregnancy resulting from an induced abortion that are described in the literature." Wynn's paper also discusses "damage to the pelvic organs resulting from induced abortion and the consequential latent morbidity that only becomes apparent during the course of a subsequent pregnancy and its consequences in terms of mid-trimester abortions, still-births, perinatal morbidity and handicap, and sterility."

The Foundation for Education and Research in Child-bearing was established in March, 1971. The aims of the Foundation are to disseminate basic information on all aspects of childbearing to as wide an audience as possible and to encourage and assist research into all aspects of child-bearing and fetal life, and makes known the results of such research by means of papers, lectures, public meetings, etc.

At this time, you as a concerned member of society, are asked to do what you can to place a copy of this Newsletter in the hands of every legislator, at every level of government, so that the legislators may be informed as to the drastic consequences of abortion on demand. This Newsletter could also be widely distributed to physicians so that they may be aware of the serious risks involved in abortions. This Newsletter could also be widely distributed both to those who counsel women who seek abortions and also to the women themselves so that they may be cognizant of the personal risks involved in abortion and the possible risks to their future children.

Quantity discounts for this 24-page Newsletter are listed on the back page of the Newsletter. 100 copies of this special issue may be ordered for $25.00 plus postage. Subscribers are entitled to a 10% discount.

Sincerely,

JOHN E. HARRINGTON.

ABORTION, ILLEGITIMACY, AND EXTRAMARITAL PREGNANCY

1. In the year 1970 the following numbers of women had legally induced abortions:

Table 1.[1] Number of Abortions in 1970, England and Wales

	Number
Single women	40,734
Widowed, separated and divorced women	7,611
Married women	38,096
Not stated	124
Total	86,565

[1] *Registrar General's Statistical Review of England and Wales for the year 1970: Supplement on Abortion* (1972).

There were 58,663 legal abortions notified to the Registrar General in 1969 and 126,774 in 1971.

2. This increase in the numbers of legal abortions has not been accompanied by any corresponding reduction in the number of illegitimate children. Table 2 shows the number of illegitimate births in recent years:

TABLE 2[2]

ILLEGITIMATE LIVE BIRTHS, ENGLAND AND WALES

Year	Births	Illegitimate as percentage of all live births
1957	34,562	4.78
1967	69,928	8.40
1968	69,805	8.52
1969	67,041	8.41
1970	64,744	8.30

[2] National Council for the Unmarried Mother and her Child, Annual Report April 1970–March 1971.

3. Comparing Tables 1 and 2 there are several possible inferences:

3.1 It may be inferred that in the absence of legal abortion the illegitimacy rate in 1970 and 1971 would have been higher. By extending the 1957 to 1967 trend it could be inferred that the illegitimacy rate in 1970 could have been 9.45 instead of 8.30. Illegitimate births might have been about 9,000 higher in 1970. There were, however, 48,345 abortions induced in women without husbands in 1970, and it is unlikely that illegitimate births could have been 48,000 higher.

3.2 It may also be inferred that in the absence of legal abortion the number of pre-marital conceptions followed by marriage would also have been higher. Table 3 shows the recent trend:

TABLE 3[3]

PREMARITALLY CONCEIVED LEGITIMATE MATERNITIES, ENGLAND AND WALES

Year	Live births	Percentage of all live births
1957	48,611	6.7
1967	73,667	8.9
1968	74,531	9.1
1969	72,595	9.1

[3] National Council for the Unmarried Mother and her Child, Annual Report April 1970–March 1971.

Again assuming that the 1957 to 1967 trend had continued, the number of extra-maritally conceived legitimate maternities in 1969 would have been about 2,000 higher (9.34 and not 9.1 per cent of total births). Another 2,000 of the 48,000 abortions is therefore possibly attributable to a reduction in the number of these pre-maritally conceived legitimate births.

3.3 It may also be inferred that in the absence of the Abortion Act, 1967, many of the abortions performed under the Act in 1970 would have been performed nevertheless in circumstances of doubtful legality. The number of illegal abortions has probably fallen since 1967, although the evidence from the hospitals of any decline in complications, notably sepsis, following illegal abortions is not very convincing in the DHSS returns.[4]

3.4 It may also be inferred that abortion is being used increasingly as a contraceptive method. There is evidence that more than half the women seeking abortion had not used any other method of contraception.[5] The total number of legitimate births has been declining quite steeply since 1964 and the decline has continued in 1972 so far. However, the total number of maternities resulting from extra-marital conceptions increased every year from 75,250 in 1955 to 144,337 in 1968. This big increase in extra-marital conceptions carried to term happened in spite of the increased sales of contraceptive pills and other devices and more widely disseminated contraceptive knowledge. The rising abortion rate appears then also to be having a rather small effect on the number of premarital conceptions carried to term. Unmarried women, unlike married women, are taking less care year by year to avoid conceptions either by abstaining from intercourse or by using contraception. Reliance on a more liberal abortion law could be one factor encouraging the trend which may be expressed in statistical terms by saying that it seems to take at least four or five abortions to reduce live births by one.

WHO IS AFFECTED BY AN ABORTION?

4. If an abortion were generally regarded as reasonably safe and simple and accessible and confidential, and were either free or inexpensive, then large numbers of women would be expected to use it increasingly as a contraceptive method. Large numbers of young women and girls who become pregnant have an abortion believing that it restores them to their physiological and psychological condition preceding the conception. Are they right in so believing? How safe is an induced abortion? How does induced abortion affect subsequent pregnancies and subsequent children? Should an induced abortion be a matter of any concern to a future husband? How far, indeed, should an abortion be a matter of serious concern to people other than the woman herself, in particular her parents, husband or future husband, and past or future children, because they may be affected?

THE EFFECT OF ABORTION ON SUBSEQUENT PREGNANCIES AND SUBSEQUENT CHILDREN

5. The evidence is clear that abortion frequently reduces a woman's future reproductive capability. The first report of the British Perinatal Mortality Survey concluded:

"Any patient who has a previous history of an abortion should be regarded as a high risk patient and be invariably booked for hospital delivery under consultant care." [6]

[4] See Annual Report of Chief Medical Officer of DHSS for 1970. Table V 14 P. 84.
[5] See for example Brudenell, M. (1971).
[6] Butler, N. R. & Bonham, D. G. (1963) p. 32.

This survey showed that women who had abortions or ectopic pregnancies had on average a reduced reproductive capability and subsequent children were at higher risk. This survey included in the term abortion both illegal abortions and spontaneous abortions. There are now a substantial number of studies showing that legal abortions also increase the risks to subsequent children. In the words of one paper:

"It is clear that induced abortion plays an important role in the development of a subsequent child." [7]

6. There are papers from a number of other countries [8] showing that induced abortion increases perinatal mortality, subsequent spontaneous abortions, subsequent ectopic or extrauterine pregnancies, the proportion of premature births and a variety of other complications affecting subsequent pregnancies. These complications are those statistically associated with a poor reproductive performance and the birth of damaged and handicapped children. The effect of even one induced abortion appears to be serious in the average case. The British Perinatal Mortality Survey showed a 50 per cent increase in subsequent perinatal mortality with one abortion.[9] Papers from other countries showed a doubling of perinatal mortality rates following the liberalization of abortion,[10] a 40 per cent increase in premature births,[11] a 100 to 150 per cent increase in extrauterine pregnancies,[12] a fourfold increase in pelvic inflammatory conditions, menstrual and other disorders,[13] and an increase in sterility.[14] One paper says:

"Especially striking is an increased incidence of ectopic pregnancy. Furthermore, as noticed recently, a high incidence of cervical incompetence results from interruption of pregnancy that raises the number of spontaneous abortions subsequently to 30–40 per cent. These legal abortions affect subsequent pregnancies and births." [15]

This paper was describing the sequelae of legal abortion using primarily the suction method and exclusively at less than 12 weeks gestation.

7. The substantial increase in the number of premature births to women with a history of abortion is reported in several countries. The figures from Hungary in Table 4 show the increase in the risk of prematurity with the number of abortions. The overall prematurity rate in Hungary increased from 7 per cent in 1954 to 12 per cent in 1968; abortion was legalized in 1956:

TABLE 4. Abortion and Subsequent Prematurity: Hungary 1964 [16]

Number of abortions:	Prematurity rate percent
0	less than 10.1
1	14.4
2	16.0
3 or more	20.5

[16] Horsky, J. (1971) Prematurity means birth weight less than 2500g.

There are numerous papers showing association between the complications of pregnancy, particularly prematurity, and such handicaps as cerebral palsy, epilepsy, mental deficiency, behavior disorders, reading disabilities, strabismus, hearing disorders, blindness, and autism.[17] It has been shown that the pathological consequences of prematurity may be much reduced by improved, intensive care of premature infants. One paper quoted handicap rates as rising from 1 per cent among children of normal birth weight to 64 per cent among children under 1250g.[18] A recent paper [19] on intensive care suggested that the rate might be reduced to perhaps 16 per cent for infants under 1500g.

8. An increase in prematurity rates or in perinatal mortality rates is normally accompanied by increased numbers of children born handicapped. During the six years following the liberalization of abortion in Japan the number of births fell by 37 per cent while the infant death rate from congenital malformations in-

[7] Klinger, A. (1970).
[8] See references at the end of this paper.
[9] Butler, N. R. & Bonham, D. G. 1963.
[10] Klinger, A. (1966) p. 468.
[11] International Planned Parenthood Federation (1970); Stallworthy, J. A. et al (1971).
[12] Hall, R. E. (1970) Vol. II p. 46.
[13] Hall, op. cit. Vol. I pp. 311–312. Vol. II pp. 45–46.
[14] Sweden (1971).
[15] Kotasek, A. (1971).
[17] Dinnage, R. (1970).
[18] Drillien, C. M. (1969).
[19] Rawlings, G. et al (1971).

creased by 43 per cent. The infant death rate due to congenital malformations was 30 per cent higher in 1960 than it had been in 1947.[20] For every congenitally malformed child that dies there are others less damaged that survive. The cost to health services and to the community of children born physically or mentally handicapped is one of the main costs of all health services. A recent French estimate set the cost at over £1,000 million a year and the total cost is probably of the same order in Great Britain.[21] Any new measures like the Abortion Act, 1967, that can be interpreted in practice in such a way as to increase this cost measured in either human suffering or in money merit the most careful scrutiny. The complications of subsequent pregnancy resulting in children being born handicapped in greater or less degree could be the most expensive consequence of induced abortion for society and most grievous consequence for the individual and her family.

9. Clause 1(b) of the Abortion Act, 1967, legalizes abortion if two registered practitioners are of the opinion that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped. A mother who contracted rubella, for example, would generally be allowed an abortion on these grounds. In 1970 1,248, or about 1.4 per cent of legally induced abortions, were undertaken on these grounds, and were mostly induced in married women over age 25. It is generally accepted that abortion used for this purpose can reduce the number of children born handicapped and, indeed, could be used more extensively for example to reduce the numbers of mongols born. The number of abortions aimed at reducing the number of handicapped children is, however, very small compared with the number of abortions liable to increase the prevalence of handicap.

THE EFFECT OF ABORTION ON SUBSEQUENT MARRIAGE

10. A man is more likely to have a sterile wife or a stillborn or premature or defective child if he marries a girl who has had an induced abortion. A single girl who has one or more abortions is made less eligible for motherhood and therefore for marriage. She faces the dilemma of telling or not telling a prospective husband. She may tell the man who may marry her, not knowing of the possible consequences, which he may discover later if they become apparent. She may not tell the man who may nevertheless discover later, possibly after something has gone wrong with a pregnancy. Abortion before marriage may cause subsequent severe stresses in marriage, provide a cogent reason for marriage breakdown, and thereby increase the numbers of single-parent families. The following case history illustrates this new form of marital bitterness:

"A 24 year old woman was referred to an infertility clinic because of two miscarriages at 14 and 16 weeks pregnancy. She was found to have a badly damaged cervix. It turned out that she had had a pregnancy terminated when aged 15. Shortly after marriage, and before the first miscarriage, she had told her husband the story, and she did not think it had altered his affection for her. The damaged cervix was repaired but a third miscarriage occurred a few months later. Soon she became increasingly aware of her husband's resentment that she was unable to have a child. He was openly blaming this failure on her prenuptial therapeutic abortion. She was deeply concerned about the future of her marriage."[22]

A Swedish Government report refers to 4 to 5 per cent sterility following induced abortion;[23] a Norwegian paper quotes 3.4 per cent.[24] There are other papers quoting 2 to 5 per cent sterility.[25] These are high risks by the standards generally acceptable for personal risk-taking in all ordinary walks of life. A man will insure his house against a fire risk one hundred times less.

MORBIDITY AND MORTALITY FOLLOWING ABORTION

11. The social consequences of prematurity with its associated harvest of defective children may well be regarded as more important than sterility. However, the long term morbidity of mothers will also be damaging to family stability

[20] Matsunaga, E. (1966).
[21] *Informations Sociales* (1971).
[22] Gardner, R. F. R. (1972) p. 173.
[23] Sweden (1971).
[24] Kolstad, P. (1957).
[25] See Hall, R. E. (1970).

and to the viability of one-parent families that are particularly dependent on the health of the mother. One leading gynecologist places the main emphasis on the long term morbidity:

"There is now ample evidence to show that abortion is neither safe nor simple. The long term complications alone condemn its use as a contraceptive method." [26]

This consultant stresses the importance of the long term morbidity:

"The medical evidence available to us suggests that much chronic ill health has already been induced and steps should be taken now to assess the size of the problem." [27]

12. There are a number of countries that liberalized their abortion laws 10 or 12 years or more before the United Kingdom and have therefore many more years of experience. There are many papers discussing morbidity.[28] For example the following quotation summarizes the analysis of 27,435 cases in Denmark by three Danish gynecologists:

"It is clearly apparent that all methods involve a risk of more or less serious complications, ranging in the present material from 3 to 10 per cent with the various methods." [29]

There is a Swedish paper referring to 3.6 per cent of "relatively serious complications." [30]

13. There are several papers from British teaching hospitals showing that the morbidity from induced abortion in the United Kingdom is no less than in continental hospitals.[31] [32] [33]

14. The mortality from legally induced abortion was about 16 per 100,000 compared with a maternal mortality rate of 17 per 100,000 in England and Wales in 1970. Six out of 14 deaths followed induced abortions at less than 12 weeks gestation. On the basis of such mortality figures it is sometimes claimed that abortion is safer than childbirth. In any country today with a reasonable medical service the risk of maternal death from either childbirth or abortion is very low. However, throughout the crucial stages of human reproduction from conception to the weaning of a child the risk of death to the child is more than 100 times the risk of death to the mother. The child is also correspondingly more easily damaged by physical, chemical or nutritional insult than the mother. It is not the mother's life that is primarily at stake but the consequences to subsequent children, if any, of surgical interference with the delicately adjusted reproductive system of women. The health of the women is also at stake. Arguments based only on the low mortality of the women lack a sense of proportion and respect for the living.

ABORTION FOR OLDER WOMEN

15. This morbidity and mortality affect many people other than the woman concerned, and the rights and wrongs and social expediency of abortion must depend very much upon who is affected. Abortion may be indicated on a variety of medical and social grounds where a mother and her husband do not wish for more children. Sterilization may also then be indicated. The risk of biological damage to subsequent children is then absent. The health of the mother and well-being of the existing family can dictate the right course. A woman's future reproductive capability is not involved. Abortion at the request of a widow or separated wife above an age at which childbearing is wise may be indicated. Abortion for older women has, indeed, generally different consequences from abortion for young women.

CHANGING ATTITUDES TO ABORTION FOR YOUNG WOMEN

16. Several countries that introduced liberal abortion laws in the 1950's reversed their liberal policies in the 1960's in respect of young women without children at least partly because of the morbid consequences.[34] Although older

[26-27] Gordon, H. (1972).
[28] See references at the end of this paper.
[29] Olsen, C. E. et al (1970).
[30] Lindahl, J. (1959).
[31] Sood, S. U. (1971).
[32] Stallworthy, J. A. et al (1971).
[33] Abortion Statistics from The Samaritan Hospital, London quoted in Gardner, R. F. R. (1972) p. 218.
[34] For a summary see Hall, R. E. (1970) Vol. I p. 303 on legislation in Romania and Bulgaria.

women with several children still have the right to abortion this is no longer so for young women except on strictly medical grounds. A Czechoslovakian gynecologist following a summary of the complications resulting from induced abortion since 1957 wrote:

"These findings do not differ from experiences in other countries, for instance, Japan. We realize the necessity of altering our law, especially with regard to young women in their first pregnancy." [35]

The proportion of very young women having abortions is high in the United Kingdom compared with other countries. In 1970 46 per cent of abortees in England and Wales were under the age 25; the corresponding figure for Japan in 1966 was only 16.9 per cent. In 1970 17,030 or almost 20 per cent of abortees in the United Kingdom were under the age 20; the corresponding figure for Japan was only 1.9 per cent. Japan has a high abortion rate but it is concentrated in older age brackets, not among young women with first pregnancies. In 1970 most of the older women in Great Britain had their abortions in NHS hospitals, but most of the younger women in "approved places" where abortion was undertaken for payment. The incentives to counsel a young woman against abortion on any grounds are reduced in the private sector. The number of abortions, particularly of single women, was lowest in Social Classes 1 and 5, and highest in Class 3; there were indeed more than 20 times as many single women from the intermediate Class 3 as from each of the Classes 1 and 5.

THE NEED FOR SURVEILLANCE OF THE COSTS AND CONSEQUENCES OF ABORTION

17. The numerous papers in overseas medical journals and the recent papers in United Kingdom publications show a morbidity following induced abortion more than 10 times higher than shown in the Report of the Chief Medical Officer of DHSS.[36] It can be inferred that the Department is only notified of a small fraction of the complications. There are strong disincentives, particularly in the private sector where nursing homes are subject to approval, to providing full returns. Furthermore the Department's "Form of Notification" has to be sent in within seven days and only particulars of complications that happen before it is sent in and of which "the operating practitioner" is aware are requested. Many subsequent complications are unknown to the "operating practitioner" and even to the hospital where the operation takes place. Many complications are treated later by general practitioners and other hospitals. Many hospitals keep no records of complications.[37] Misled, no doubt, by these inadequate returns the Chief Medical Officer of DHSS in his Report for 1970 says:

"There are real, though very small, hazards in termination in the best hands and we know too little about morbidity."

This reassurance is wholly incompatible with the general tenor of the large number of papers in the world's medical journals, or with the recent papers from British teaching hospitals.

18. Let us accept, however, the Chief Medical Officer's view that "we know too little about morbidity". Very full knowledge is needed for doctors and social workers to give women responsible advice on therapeutic abortion. Only a longitudinal study of a large number of cases will provide such knowledge. The consequences of induced abortion in subsequent pregnancies and to subsequent children should be one main purpose of a longitudinal study. Nearly four years have been lost without accumulating this knowledge since the Abortion Act, 1967, came into force. There is a gap in the country's medical research programmes. The scanty and misleading information published by DHSS is not commensurate with the public importance of abortion. The young women seeking abortion in increasing numbers deserve better counselling. In the meantime, it would be wise for young women and their parents and future husbands to assume that induced abortion is neither safe nor simple, that it frequently has long term consequences, may affect subsequent children and makes young single women less eligible for marriage.

CONCLUSIONS

19. The Committee should make it clear in their report that induced abortions has adverse consequences to the reproductive capability of young women who may wish to have children subsequently and increases the risk that such children may suffer perinatal damage.

[35] Kotasek, A. (1971).
[36] Report for 1970 Table V 13 p. 83.
[37] See Hordern, A. (1971) p. 212 and "The Abortion Act (1967): findings of an inquiry into the first year's working of the Act conducted by the Royal College of Obstetricians and Gynecologists", *Brit. Med. J.* 2 :529–35 (1970).

19.1 A husband has a cogent cause of complaint if he discovers that his wife's good health or reproductive capability have been diminished, or that his wife is sterile, or that his child has suffered perinatal damage following a one-time termination of a pregnancy for which he was in no way responsible. Abortion induced in young women, particularly prior to marriage, may be a cause of severe marital stress subsequently, leading to marital breakdown, separation and divorce.

19.2 Induced abortion may be indicated for older women who do not wish to have, and are unlikely to have, more children on a variety of medical or social grounds without the need to consider the consequences to subsequent children or to a subsequent marriage. A husband's consent is likely in these cases.

19.3 The Committee should recommend that the Department should sponsor a longitudinal study of a substantial cohort of women who have an abortion in order to provide more satisfactory quantitative data on the morbid consequences of induced abortion in Great Britain, both to the women themselves and to their subsequent children.

19.4 Furthermore, the Committee should recommend that the Department should sponsor an on-going study of both the medical and social consequences of induced abortion in other countries by scrutiny of overseas literature and by contacts, both for the Department's own benefit and the better information of doctors and social workers in their onerous task of advising women seeking abortion.

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SOME CONSEQUENCES OF INDUCED ABORTION TO CHILDREN BORN SUBSEQUENTLY

A Supplementary Note of Evidence by Arthur Wynn.

SUMMARY

This paper supplements the paper presented to the Committee by Margaret Wynn. Drawing upon additional, mainly German, sources, it classifies the risks to a subsequent pregnancy resulting from an induced abortion that are described in the literature. It discusses damage to the pelvic organs resulting from induced abortion and the consequential latent morbidity that only becomes apparent during the course of a subsequent pregnancy and its consequences in terms of mid-trimester abortions, still-births, perinatal morbidity and handicap, and sterility. The diagram on page 13 summarizes the risks discussed in the papers selected for review.

CONTENTS

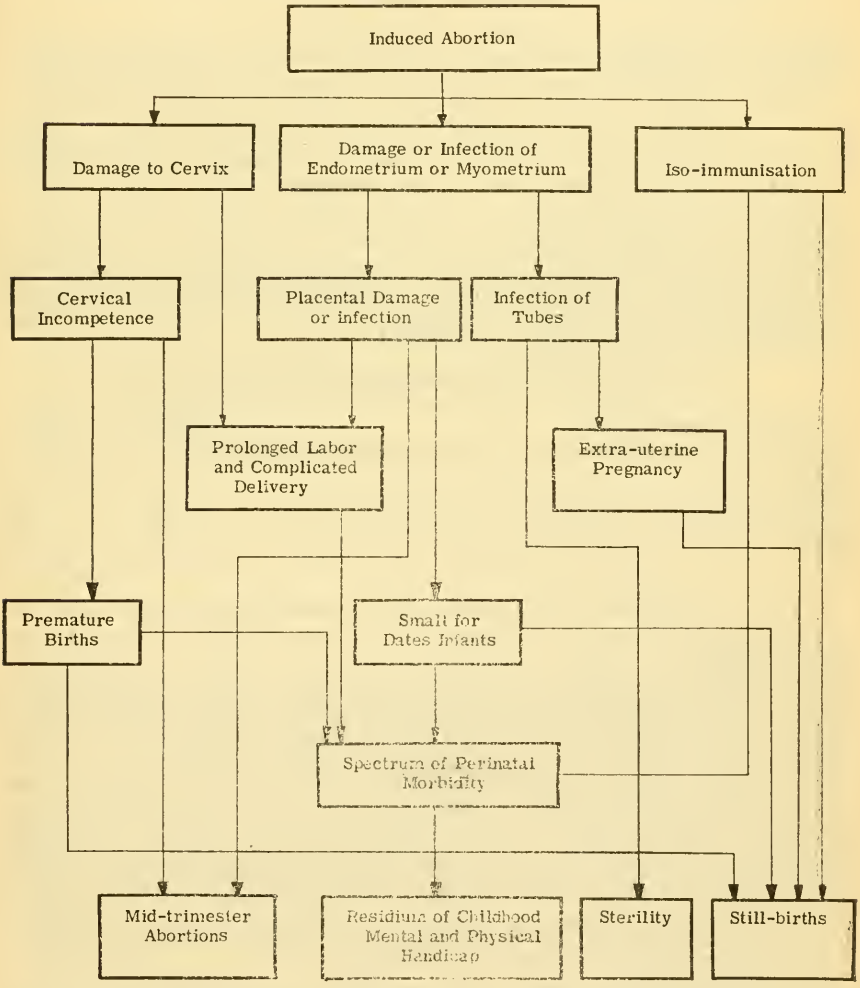
INTRODUCTION

1. The paper submitted to the Committee by Margaret Wynn in May, 1972 under the same title did not include references to papers published after the end of 1971 nor did it include references to papers in the German language. The literature on induced abortion and as sequelae in German is extensive. Several papers of importance have been published since the beginning of 1972. The diagram on page 13 shows the pattern of morbidity found in subsequent pregnancies following induced abortion as discussed in the papers reviewed.

2. This supplementary review, based mainly on German sources, shows that there are two classes of women meriting separate counselling advice and separate consideration from many social, legal and political angles. These are: women who may have children subsequently or the possible future reproducers who will be referred to as Class A women; women who are unlikely to have, or do not wish to have, further children or children at all or the non-reproducers

who will be referred to as Class B women. In general Class A women are young women often unmarried, while Class B women are usually married, often have two or more children already, and do not wish to increase the size of their families. The papers referred to show at length that there is a serious *latent morbidity* following an induced abortion that only becomes apparent during the course of a subsequent pregnancy or confinement. This *latent morbidity* is a serious matter for Class A women and their children, but of no consequence to women in Class B. This paper is concerned primarily with women in Class A and with the *latent morbidity* overlooked in many papers on the sequelae of abortion.

SOME RISKS IN A SUBSEQUENT PREGNANCY FOLLOWING INDUCED ABORTION



3. There are a number of papers that refer specifically to abortion as one factor in the etiology of childhood handicap. A Danish study of 2,621 cerebral palsied persons, for example, showed that there was a higher incidence of certain types of cerebral palsy following abortion.[1] This is probably no more than an example of the well known association of cerebral palsy, notably spastic diplegia, and prematurity. There are many papers that demonstrate associations

between premature birth and low birthweight with congenital handicap including not only cerebral palsy, but sensory disabilities, like blindness and mental subnormality.[2] The papers now reviewed show that induced abortion is frequently followed by prematurity and low birthweight.

4. The use of a vacuum aspiration technique for inducing abortion early in pregnancy has been publicized in the British and American press. It has been heralded as a new, safe technique! There is a large number of papers in medical journals in German and other languages analysing the use of many variants of this technique over many years. Some of the more recent papers are summarized. The conclusion is that the vacuum aspiration technique is neither new nor safe but does somewhat less damage than the older technique if used early enough in pregnancy.

THE EFFECT OF THE ABORTION OF FIRST PREGNANCIES ON THE COURSE OF SUBSEQUENT PREGNANCIES

5. One recent paper, in the German language, from the main hospital of the Opole district of Poland is expressly concerned only with this *latent morbidity* that becomes apparent during a subsequent pregnancy.[3] Dr. Lembrych compared two groups of women: Group I included 143 women who had a first child but had all had a legal abortion in hospital from 1 to 8 years previously. All these abortions had been performed between the 6th and 12th week of gestation. No late abortions or multiple births were included. Of these women 123 were married and 20 were single. Group II also included 143 first births. None of the women in this Group had had previous abortions. Of the women in this Group 131 were married and 12 were single. The age distribution was similar to that of the women in Group I.

6. There were substantial, statistically significant, differences between the course of pregnancy of the two groups. The higher prevalence of prematurity in subsequent pregnancies following abortion reported in previous papers[4] was repeated in this series as shown in Table I.

TABLE I.—LENGTH OF GESTATION FOLLOWING ABORTION OF 1ST PREGNANCY

Duration of pregnancy (weeks)	Group I	Group II
Under 28	5	
28 to 31	7	3
32 to 35	7	2
36 to 37	24	11
38 to 41	97	117
42 or more	3	10

7. Table I shows that 43 births in Group I occurred before the 38th week but only 16 births in Group II, or 30 per cent in Group I compared with 11.2 per cent in Group II.

8. The same paper reports other differences between the two series. There was a greater frequency of hemorrhage during pregnancy in Group I compared with Group II. The British perinatal mortality survey found that antepartium hemorrhage was associated with "stillbirth and neo-natal mortality rates which were over five times the average and also involves a risk to the mother."[5]

9. There were many differences between the two Groups during labor and delivery. The average duration of labor for women in Group I was longer than in Group II and this applied to all three stages of labor. It is noteworthy that if the Group I births had been second births following a normal delivery rather than an induced abortion then these birth periods would have been shorter not longer. Second births are on average the easiest. However, Group I births were more

[1] Spastic hemiplegia, spastic diplegia and spastic tetraplegia. See Hansen, E. (1960).

[2] See for example, Dinnage, R. *The Handicapped Child,* Vol. I (1970) Vol. II (1972) National Children's Bureau, for an annotated bibliography.

[3] Lembrych, S. (1972).

[4] There is, for example, a Hungarian paper, in English in a British medical journal, discussing therapeutic abortion as a factor in producing a high perinatal mortality and high proportion of low-weight births in Hungary. (Czeizel, A. et al (1970)). This paper contains a number of references to previous Hungarian papers associating therapeutic abortion and subsequent increased permaturity rates. A table entitled "Abortion and subsequent pregnancy: Hungary 1964" was given in Margaret Wynn's submission in May, 1972.

[5] Butler, N. R. & Alberman, E. D. (1969) p. 39.

difficult than Group II births. Group I births were not only more protracted but 49 births in Group I required manual or instrumental assistance compared with 33 in Group II.

10. Complications with the placenta were considerably higher in Group I (34 cases) compared with Group II (9 cases). These complications were mainly retained and adherent placentae. A statistically significant increase in the duration of the third stage of labor—that is, the time between delivery of the baby and the expulsion of the placenta—in pregnancies preceded by a previous abortion was also recorded in an earlier paper,[6] which analysed 8,000 births.

11. There were also more cases in severe hemorrhage at parturition in Group I and a substantially greater loss of blood for the whole sample as shown in Table II.

TABLE II.—LOSS OF BLOOD DURING DELIVERY FOLLOWING ABORTION OF 1ST PREGNANCY

Blood loss (milliliters)	Number of cases	
	Group I (141 patients)	Group II (137 patients)
Less than 200	30	42
200 to 500	94	87
500 to 1,000	16	8
Over 1,000	1	

12. A greater number of lesions were found in Group I notably of the cervix. Dr. Lembrych in commenting on these injuries noted that they were of two kinds. The first type of lesion was of a kind that might be expected from forcible dilation. The second type was of a kind more likely to have been caused mainly by infection. It may be inferred from the results in this paper that the damage to the cervix sometimes resulted in incompetence and sometimes in cervical rigidity.

13. Dr. Lembrych also commented that the bleeding during pregnancy, the complications involving the placenta and the substantial blood losses at confinement were almost certainly the results of a damaged endometrium.[7]

14. Dr. Lembrych concluded:

"Our investigations demonstrate the damaging effect of an interrupted first pregnancy on a subsequent pregnancy and birth. If we add these sequelae to the more often reported early and late sequelae including sterility and infertility we come to the conclusion that the interruption of a first pregnancy is most inadvisable. This places the doctor under an obligation to review the evidence for an abortion with care and to be particularly conscientious in explaining all the possible disadvantageous consequences to the women concerned."

CERVICAL INCOMPETENCE FOLLOWING INDUCED ABORTION

15. A paper[7a] on second trimester abortion after vaginal termination mainly of first pregnancies from Queen Charlotte's Hospital published in *The Lancet* in June, 1972 also referred to cervical incompetence following an abortion as the likely explanation of the ten-fold increase in second trimester abortions in pregnancies that followed a previous, induced abortion. Dr. Lembrych, by the way he chose his patients, excluded second trimester abortions but recorded other data. The two papers taken together pose many questions meriting further research.

16. A recent French paper is also devoted to the effect of gynecological operations, including induced abortions, on the course of subsequent pregnancies.[8] It found that cervical incompetence leading to second trimester abortions and premature births was due to thereaupeutic abortion more frequently than to difficult previous pregnancies or curettage. This French paper also discusses damage to the endometrium and myometrium as sequelae of therapeutic abortion, with examples of such damage leading to second trimester abortions, premature births and stillbirths.

[6] Hofmann, D. (1965).

[7] The endometrium is about 1.5 mm. thick and, excluding the basal layer, is shed at menstruation. The endometrium lies on the myometrium. "Endometritis" and "endomyometritis" are referred to frequently in the papers reviewed as consequences of induced abortion and are inflammation of these tissues.

[7a] Wright, C. S. W. et al (1972). "Of the 91 patients, 83 (91%) had had no previous pregnancy other than the one that had been terminated."

[8] Palmer, R. (1972).

17. A recent American paper discusses the treatment of cervical incompetence.[9] This paper also notes that induced abortion is an important part of the etiology of cervical incompetence. These four recent papers—one British, one German, one French, and one American—are only the latest of a large number of papers associating cervical incompetence and induced abortion. Several other references to cervical incompetence and damage to the cervix were referred to in Margaret Wynn's May (1972) submission.

18. The papers that report on cervical incompetence may be divided into those which point to cervical incompetence as a consequence of induced abortion and another group which are concerned with the treatment and etiology of cervical incompetence which is not only the result of abortion. Papers on the surgical treatment of cervical incompetence are encouraging and Professor Barter even talks of "a new chapter in modern obstetrics".[10] Yosowitz's 1972 paper is also encouraging although the quoted results show that a proportion of infants are stillborn or born too soon and too small even after using the best surgical techniques. Palmer's paper (paragraph 16 above) mentions 90 cases of second trimester abortion due to cervical incompetence, 38 the result of therapeutic abortion. Subsequently 68 cases were operated on, 56 successfully, but with 3 abortions and 9 premature births.

ANTE-NATAL CARE IN A SUBSEQUENT PREGNANCY

19. There will, however, always remain a danger that the assistance of the obstetric surgeon will be available too late to avoid a second trimester abortion or premature birth. Wright *et al* recommend that:

"Digital assessment of the cervix should be performed every two weeks in the subsequent pregnancy for signs of cervical incompetence."

They are thus recommending a very high standard of ante-natal care from the end of the first trimester for all women who have had a previous induced abortion. Reliable diagnosis of cervical incompetence is very difficult.[11] [12] Professor Barter says that cervical incompetence should be suspected if there have been two previous second trimester abortions. He explains, however, that cervical incompetence may result in either a second trimester abortion or "immature labors". Cervical incompetence may be suspected *following* any premature birth when there is no other obvious cause. The diagnosis before a second trimester abortion or premature birth is not easy and certainly requires the co-operation of the woman from early in pregnancy and disclosure by her of her obstetric history.

20. That women who have had a previous abortion should be regarded as high risk cases in a subsequent pregnancy was the subject of a recommendation in 1963 in the report of the British Perinatal Mortality Survey.[13] In 1966 Monro, basing himself on the Survey, wrote in a book intended for the guidance of pregnant women and published by the National Birthday Trust Fund.[14]

"The Survey showed that there is an increased risk to the babies of mothers who have a previous history of abortion or ectopic pregnancy. Previous abortion increased by about one-third the risk that the mother will lose her baby. This is true no matter whether the abortion was a miscarriage, whether it was done in hospital for medical reasons, or outside illegally."

The 1963 recommendation was that a women with a previous history of abortion should be regarded as a high risk patient and should be "invariably booked for hospital delivery under consultant care." It is now apparent that this recommendation is right but not quite adequate and that it is also important to ensure expert ante-natal care from about the 12th week of pregnancy. This makes it quite essential that all women who have had an abortion and may wish to carry a subsequent pregnancy to term should know to seek ante-natal care early and should know the reasons for doing so. Class A women need to know much about the risks and particularly the *latent morbidity* risk, that is of much less significance for Class B women.

The argument in this paper for early, priority, ante-natal care for all women who have had a previous abortion is based so far on the likelihood of cervical incompetence following an induced abortion. This is not the only reason, however, for placing such women in the high risk category as discussed further below.

[9] Yosowitz, E. E. (1972).
[10] Barter, R. H. (1967).
[11] Shirodkar, V. N. (1970).
[12] Barter, R. H. (1967).
[13] Butler, N. R. & Bonahm, D. G. (1963) p. 32.
[14] Monro, I. C. (1966) p. 13.

THE CLASSIFICATION OF MORBID SYMPTOMS FOLLOWING INDUCED ABORTION—APPARENT MORBICITY

21. One recent paper from Berlin University medical school [15] analyses what is described as the "early complications" following 1,234 abortions induced at two Berlin clinics. The restriction to a discussion of "early complications" is included in the title of the paper and the importance of this restriction is explained at some length. The authors of this paper came to the same conclusions as the authors of other more recent papers [16 17] that the prevalence of morbidity following induced abortion reported by many writers depends upon how long the women concerned are kept under surveillance after the operation. *The longer the surveillance the higher the morbidity reported.* Lunow *et al* found 12.2 per cent of "early complications" in Berlin. They were only able to obtain reports subsequently on 703 women, or 57 per cent of the original 1,234 women, at varying times after they were discharged from hospital. There were 36 per cent of the 703 women with "longer term complications". Hoffmann and Ziegel recorded 4 per cent of "early complications" and 15.5 per cent of "long-term complications". There is much lack of precision in the use of "early", "short-term" and "long-term". Zwahr records 35.6 per cent of complications and explains his high figure compared with that reported by some other hospitals partly by a concentration in his hospital of the more difficult maternity cases of the Schwerin district but also by the unusual length of time for which his team deliberately followed the cases and the unusual care with which the women were examined.

22. *Length of surveillance* is therefore a major factor influencing the amount of morbidity reported. There are papers both in German and in English that give prevalence figures for morbidity following induced abortion without any details, or even any broad indication, of the length of surveillance of the patient after the operation. Such papers not only add little to what is known but also can be misleading. Some clinics lose sight of their patients very soon after the operation and never see them again so that the period of surveillance is minimal.

The morbidity reported is then also likely to be minimal and bear little relation to what would be discovered if the patients were followed for five years. The requirements of the Department of Health & Social Security that complications should be reported to the Department by "the operating practitioner" within *one week* rules out any period of surveillance likely to result in the diagnosis of most of the post-abortion morbidity.

23. Lunow *et al* expressly exclude from their study what has been described above as latent morbidity or in their words the "pathological consequences of abortion during subsequent pregnancy and childbirth". They also exclude other types of latent morbidity expressly, including sterility, extrauterine pregnancies and serological incompatibility which are discussed further below and provide further arguments for distinguishing between Class A and Class B women in counseling and in policy. Lunow *et al* record 26 cases, or about 2 per cent, of cervical lesions, but comment that damage to the cervix is "commoner than is diagnosed" and quote an earlier paper expressing the same view.[18] Cervical incompetence is essentially latent.

24. The *apparent* morbidity, as distinct from this latent morbidity, is subdivided in nearly all the German papers into endometritis, endomyometritis, adnexitis, parametritis describing inflamation, infection, or damage to pelvic organs that is sometimes apparent soon after operation but more often much later. Intermittent or chronic ill-health may result. The literature reports many cases of such ill-health being brought to an end by hysterectomy. The restoration of good health by these means, is, of course, only available to Class B women and not to Class A women who wish to remain progenitive.

25. There are no grounds for assuming that there are no long-term psychiatric sequelae of abortion particularly in those cases where there are physical sequelae or a latent morbidity become apparent in a subsequent pregnancy. The value of psychiatric studies of abortion that are based on short periods only of surveillance or that fail to distinguish between Class A and Class B women is questionable. As noted above Class A women must be told that they must be regarded as high risk obstetric cases in a subsequent pregnancy. This will increase anxiety during subsequent pregnancies even if the outcome is normal.

[15] Lunow, E. et al (1971).
[16] Zwahr, C. (1972).
[17] Hoffmann, J. & Ziegel, E. (1972).
[18] Cee, K. (1964).

THE CLASSIFICATION OF MORBIDITY SYMPTOMS—LATENT MORBIDITY

26. Lembrych refers not only to cervical incompetence as a reason for the birth of more premature and light-weight babies, but also to damage to mucus membranes resulting in a variety of symptoms, at the time of confinement including cases of faulty placentae. Other papers, including Lunow *et al*, and not only German papers,[19] [20] refer specifically to damage to the endometrium resulting in defective implantation and in consequence to faulty development of the placenta. A recent American paper notes that damage to the endometrium and abortion are a part of the etiology of faulty development of the placenta and quotes four other papers in support.[21] There are many papers associating such faulty development of the placenta with perinatal mortality and congenital handicap.[22] Endometritis has therefore some consequences that may be described as latent that are only of importance to Class A women who wish to remain progenitive. Damage to the endometrium does not only result in the troubles at confinement listed by Lembrych, but prejudices the development of the placenta. The resulting placental insufficiency or defect may prejudice the development of the fetus. The complicated changes from the fertilization of the ovum to the end of the puerperium are prejudiced by types of injury to the reproductive organs that may not be noticed at all when these organs are passive. The sequelae of abortion are different when the reproductive organs are carrying a fetus subsequently than if they are not carrying a fetus. This may seem obvious, but is ignored in many papers on induced abortion thus making such papers relevant only to Class B women.

27. The Class A women who wish to remain progenitive will wish to take into account the possible consequences not only to themselves but also to a subsequent unborn child. It has also been taken into account that the risks to infants in the total sequence of human reproduction are much greater than to mothers. Perinatal mortality is more than one hundred times maternal mortality. The risk of damage to an infant's central nervous system is much more than one hundred times the risk of damage to the mother's.

LATENT MORBIDITY—ISO-IMMUNIZATION

28. This is another type of latent morbidity following induced abortion that is discussed in some detail in German papers. The risk is to subsequent children and is therefore another risk only of concern to Class A women. The risk depends on the blood groups of the father or fathers as well as of the mother, but also on the method of abortion used. The risk increases quite steeply with the number of pregnancies and is very low for a first pregnancy. The more pregnancies a women has aborted before she starts a family the higher the risk of iso-immunization to subsequent children.

29. The authors of a recent paper[23] on serological incompatibility recommend on these grounds alone that there should be *no abortion* if a later pregnancy is likely. The paper continues that if it is decided to proceed with an abortion nevertheless in spite of this advice then the consent of the husband should always be sought and the risks should be explained.

30. Asztalos *et al* analyse 267 cases of Rh (D) and ABO incompatibility. They compare the risks of feto-maternal iso-immunization following abortion by curettage and vacuum aspiration. They found a lower risk using vacuum aspiration but a risk nevertheless. The comparative risks of these methods of abortion as reported in some German papers are discussed further below. Asztalos *et al* (1972) quote 32 other papers, 28 in German, on iso-immunization.

31. Good protection against the consequences of iso-immunization in a subsequent pregnancy can be ensured for those Rh-negative women who are at risk by the injection of anti-D antibody following an induced abortion. This is considered good practice in all countries[24] [25] [26] and is practised by the British National Health Service. How far are women given this protection by the private abortion clinics? How far are the clinics *required* to provide this protection for Rh-negative women? A failure to take such prophylactic measures can lead not only to very difficult confinements but to still births and to some

[19] Huntingford, P. J. (1971).
[20] Palmer, R. (1972).
[21] Weekes, L. R. & Greig, L. B. (1972).
[22] Butler, N. R. & Alberman, E. D. (1969).
[23] Asztalos, M., et al. (1972).
[24] Browne, J. C., McClure and Dixon, G. (1970).
[25] [26] Freda, V. J., et al. (1971).

of the worst forms of human handicap in a child born subsequently. Induced abortion of a first pregnancy is reported to increase the risk at the next pregnancy from a very low figure to about 4 per cent.[27]

LATENT MORBIDITY—STERILITY

32. The risk of sterility is yet another reason for distinguishing between Class A women who wish to remain progenitive and Class B women to whom sterility is no problem. Lunow *et al* (1971) give references to papers discussing sterility as far back as 1938.[28] [29] [30] German papers quote figures for the prevalence of sterility following induced abortion within the 2 to 5 per cent range quoted in the previous submission.

MORBIDITY FOLLOWING ABORTION BY VACUUM ASPIRATION

33. The vacuum aspiration technique has been introduced rather recently in the USA and United Kingdom. There are numerous papers in German that compare the morbidity resulting from use of vacuum aspiration with other techniques at different numbers of week's gestation. For example, Zwahr's paper mentioned above summarizes the results of 745 abortions between the years 1967 and 1969, a period when the particular hospital was transferring from the general use of curettage, that had been in use for many years, to the use of vacuum aspiration.[31] This paper compares the subsequent short and long-term morbidity that resulted from the use of vacuum aspiration alone, from curettage alone and from vacuum aspiration followed by curettage when this was indicated. Before commenting on Dr. Zwahr's paper its predecessors should be mentioned. This particular paper gives 28 references, all in German. The earliest of these papers specifically describing vacuum aspiration and comparing the morbidity resulting from this technique with other techniques is dated 1964.[32]

34. The paper by Dr. Chalupa of 1964 is also extensively documented showing that there were already many papers on vacuum aspiration with comparisons of of other techniques already available at that date but mostly in Slavonic or other languages. The earliest paper quoted by Dr. Chalupa and other recent authors appears to be a Chinese paper reporting in 1958 on 300 cases where vacuum aspiration had been used.[33] The next earliest paper on vacuum aspiration quoted was published in a gynecological journal in Latvia in Russian in 1961.[34] Papers on vacuum aspiration covering large trials were presented to a gynecological congress in Moscow in 1963. Quite a number of papers in Czech based upon trials were already available in 1964. The vacuum aspiration method is much older than these papers suggest and is described in Russian papers in the 1920's. There was even a book on the Soviet experience published in Germany in 1933.[35] The continuity of recent experience does however only appear to go back to the Chinese paper of 1958. An Austrian paper summarized the world literature on abortion with particular reference to mortality and morbidity following legal therapeutic abortion in 1965.[36] This paper, and indeed the earlier papers, have now been superseded.

35. However claims have been made recently in the USA and the United Kingdom for the vacuum aspiration technique and it is now increasingly widely used on both sides of the Atlantic. It is important therefore to appreciate that many variations of the vacuum aspiration technique [37] have been used in many countries and the results of many thousands of cases of its use have been reported in the medical journals over a period of at least 14 years.

36. Dr. Zwahr confirms the result of many other German papers. Vacuum aspiration leads to somewhat less complications than curettage, but has a substantial morbidity rate nevertheless. Taking only long-term complications the

[27] Visscher, R. D. and Visscher, H. C. (1972).
[28] Schultze, G. K. F. (1938).
[29] Topp, G. (1959).
[30] Dykova, H., et al. (1960).
[31] Zwahr, Chr. (1972).
[32] Chalupa, M. (1964) but see also Cislo, M., et al (1966) ; Willgerodt, W. & Birke, R. (1967) ; Birke, R. & Willgerodt, W. (1968) ; Flamig, C. & Schneck, P. (1969) ; Nemet, S. & Konja, Z. (1970) ; Weise, W., et al. (1970) ; Lunow, E., et al. 1971).
[33] Wu-Yuan-T'ai & Wu-Hsien-Chen (1958).
[34] Melks, E. I & Roze, L. V. (1961).
[35] Mayer, A. (1933).
[36] Heiss, H. (1965).
[37] See Semm, K. (1972) for a recent paper on catheter design.

incidence was 14.4 percent when vacuum aspiration was used and 17.7 percent following curettage. Taking all cases where there were any kind of complications the total incidence was 31.8 percent following vacuum aspiration and 38.4 percent following curettage. The difference was statistically significant.

37. However the numbers of patients in Zwahr's series who suffered from each of the long list of complications were too small to provide statistically significant comparisons between the types of complication resulting from the different methods of abortion. It is noteworthy, however, that of all the late complications listed "endometritis" is the most important whichever method of termination is used and indeed more important than all the other long-term complications taken together. Following vacuum aspiration 7.3 percent and following curettage 10.7 percent of patients suffered from endometritis. This only repeats the importance of endometritis as a long-term complication following induced abortion emphasized by previous German papers, for example by Lembrych (1972) and other papers going back to Chalupa (1964) and further.

38. Dr. Zwahr concludes that abortion is not a safe and harmless operation whether or not vacuum aspiration is used and that it behooves every doctor who has the responsibility to weigh the risks carefully and only agree to an abortion if there is a strong medical indication.

39. The other German papers come to similar conclusions, for example Weise *et al* (1970) in discussing vacuum aspiration conclude that it is the best method if used early in pregnancy but "there is no harmless method".

40. Lunow *et al* reported 7.9 percent of early complications using vacuum aspiration on 683 patients and 18.9 percent of early complications on 514 patients using curettage and other methods, but that there was little difference between the prevalence of longer-term complications following vacuum aspiration and curettage which was higher at 36 percent of patients with complications but only of the 703 patients who were examined. The importance of the longer term morbidity is such that greater weight must be given to figures for longer term morbidity. Seen as a whole the papers do no more than suggest that the vacuum aspiration method used early in pregnancy is somewhat less damaging than other methods.

41. The recent paper of Hoffman and Ziegel recording 4 percent of early complications rising to 15 percent of long-term complications using vacuum aspiration has already been mentioned. The complications are subdivided into the usual endometritis, endomyometritis, parametritis, and adnexitis.

42. A recent Swiss paper analysing 629 abortions comes to similar conclusions :[38]
"The termination of a pregnancy is not a harmless procedure and this will remain so. Even for the simplest methods, the vacuum aspiration in early pregnancy, great care and experience are necessary."

Papers saying that great experience is necessary beg the question as to how the experience is acquired.

LATENT MORBIDITY—EXTRA-UTERINE PREGNANCY

43. Zwahr describes an abortion using vacuum aspiration that was followed by an ectopic or extra-uterine pregnancy with a fatal outcome. He then says that for this reason alone the material recovered should always be examined histologically. A macroscopic examination is not always adequate. "Only a histological examination can recognize an early extra-uterine pregnancy." It might be thought that ectopic pregnancies are so rare that Zwahr's firm recommendation could be over-cautious. However liability to an extra-uterine or ectopic pregnancy is another form of latent morbidity following an induced abortion, according to a number of papers. The risk that Zwahr points to is probably very low soon after the liberalization of abortion. It becomes a matter of greater importance as the population of women who have already had one abortion increases and the number seeking second and third abortions increases.

HISTOLOGICAL EXAMINATION OF ABORTION PRODUCTS

44. Other authors also emphasize the need for careful and histological examination of the products of vacuum aspiration. Chalupa quotes different investigators as return muscle fibers in the products in from 1.5 to 20 percent of cases. Vacuum aspiration does not necessarily only remove the fetus and placenta but may also remove muscle fibers from the wall of the uterus. This is likely to cause endometritis and endomyometritis. Histological examination is desirable to see that any faulty application of the technique may be improved.

[38] Stamm, H. (1972).

45. Several papers state that the authors found that vacuum aspiration did not remove fetal bones reliably after 10 or 11 weeks gestation.[39] [40] [41] These three papers appear to agree that 10 to 11 weeks is borderline and that later than 12 weeks is certainly too late for the use of the aspiration technique. Another paper describes the unfortunate consequences of fetal bone fragments being left behind in the parametrium following an abortion.[42] In 1970 in England and Wales there were 5,259 operations using vacuum aspiration at 13 weeks gestation or longer and 1,136 at 15 weeks or longer and the great majority of these operations was carried out on women under the age of 24.[43] The examination of abortion products not only throws light on whether too much is being removed but also upon whether enough is being removed. The German papers suggest however that at 12 or 13 weeks gestation and longer it is difficult and may be impossible to remove the whole of a fetus by vacuum aspiration and bone fragments in particular are left behind. In a vaginal termination it is impossible to see exactly what is happening. The operation is partly blind. The examination of the products therefore provides useful indirect evidence and may point, for example, to the need to supplement the aspiration with curettage. There is no wholly reliable way of determining accurately how many weeks of pregnancy have passed especially if the patient has been tutored to deceive the doctor. It is not practicable to limit the use of the vacuum aspiration technique to a very precisely defined part of the period of gestation such as the first 11 weeks.

CONCLUSIONS

46.1 The earlier submission by Margaret Wynn in May, 1972 came to a number of conclusions. This supplementary study of further papers, mainly in German, suggests that these conclusions were right but did not go far enough.

46.2 Problems of information retrieval and communication are familiar in many branches of science and technology today. Much existing knowledge about abortion is not available to the busy general practitioner or gynecologist in a form in which it can possibly be used. It must be assumed that it has become too difficult and expensive for the writers of books or articles in medical journals on abortion to keep up to date or follow the world literature. However, the retrieval of existing knowledge is much cheaper than new research repeating work already done elsewhere. Ignorance may also be costly in casualties. Most of the papers reviewed in the present paper describe casualties among women and subsequent children following induced abortion. Disregard of what these papers say is likely to result in a repetition of much of this experience but with British women and children as casualties. The Committee should consider how the accumulating knowledge about abortion can be made available to all those people to whom it can be of use and should recommend the amount of Government support that may prove necessary.

46.3 All persons concerned in any way with maternity or abortion services should be made aware of the 1963 recommendation of the British Perinatal Mortality Survey team and of Dr. Monro in 1966.[44] [45] All women who have had a previous abortion should invariably be booked for hospital delivery under consultant care. Such women should, however, also receive special ante-natal care from the end of the first trimester and all women who are possible future reproducers should be so informed at the time of the abortion with reasons adequate to persuade them to seek early ante-natal care in a subsequent pregnancy.

46.4 Morbidity details and prevalence data based upon only short surveillance of women following an induced abortion are of very limited value. Only studies involving surveillance over long periods, including the period of any subsequent pregnancies, will add substantially to knowledge and understanding. It is suggested that the latent morbidity, not diagnosable until the occurrence of another pregnancy, should have absolute priority in studies financed by the Department. It is further suggested that for the better organization and co-ordination of such research that all maternity services should be required to notify the Department of all women reporting for ante-natal care who have had a previous abortion, and

[39] Nemet, J. & Konya, Z. (1970).
[40] Hoffmann, J. & Ziegel, E. (1972).
[41] Birke, R. & Willgerodt, W. (1967).
[42] Friz, M. (1964).
[43] *Registrar General's Statistical Review of England and Wales for 1970, Supplement on Abortion.*
[44] Butler, N. R. & Bonham, D. G. (1963) p. 32.
[45] Monro, I. C. (1966) p. 13.

to provide the Department with such information about the course of the pregnancy as may be required for the furtherance of the research.

46.5 Risks to subsequent children from iso-immunization should be reduced as far as possible by making prophylactic injections a required preventive measure wherever indicated by examination of a patient's blood prior to an abortion.

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TABLE 14.—LIVE BIRTHS AFTER SALINE INSTILLATION, OR OTHER—JULY 1–DEC. 31, 1970

	Date	Initial	Method	Weight	Gestation (weeks)	Lived
1	July 22	P	Saline	1 lb, 8 oz	22	2 hr.
2	Aug. 20	L	Hysterotomy	15 oz	22	30 min.
3	Aug. 21	B	Saline	2 lb, 14 oz	25	6 hr, 35 min.
4	Aug. 23	C	do	1 lb, 9 oz	24	2 hr.
5	Aug. 23	W	do	2 lb, 8 oz	28	Alive.
6	Aug. 23	L	do	3 lb, 1 oz	20	4 hr, 55 min.
7	Sept. 1	R	Ethodine	1 lb, 13 oz	18	5 min.
8	Sept. 4	M	Saline	3 lb	201	hr. 5 min.
9	Sept. 9	V (1 of twins)	do	1 lb, 13 oz	20	15 hr.
10	Sep. 17	A	do	2 lb, 1 oz	24	47 hr, 40 min.
11	Sept. 24	V	Catheter	1 lb	17	2 hr, 20 min.
12	Sept. 30	L	Saline	3 lb, 5½ oz	30	53 hr, 15 min.,
13	Oct. 3	N	do	2 lb	26	7 hrs, 15 min.
14	Oct. 8	W	do	8½ oz	16	5 min.
15	Oct 9	S	do	1 lb, 10 oz	19	1 hr 35, min.
16	Oct. 11	G	do	1 lb, 7½ oz	21	5 min.
17	Oct. 17	D	do	2 lb, 3 oz	20	5 hr.
18	Oct. 18	G	do	1 lb, 4 oz	19	3 hr, 30 min.
19	Oct. 21	L	do	14 oz	19	1¼ hr.
20	Oct. 26	S	do	3 lb, 6 oz	24	24 hr.
21	Nov. 9	G	do	1 lb 14 oz	26	17 hr.
22	Nov. 20	R	do	1 lb, 14 oz	18	6½ hr.
23	Nov. 23	F	do	1 lb	21	30 min.
24	Nov. 25	M	do	1 lb, 8¾ oz	21	1 hr, 30 min.
25	Dec. 2	S	do	1 lb	20	55 min.
26	Dec. 7	P	do	1 lb, 5½ oz	20	2 hr, 40 min.
27	Dec. 16	R	do	1 lb, 11½ oz	20	2½ hr.

STATEMENT OF DR. MILDRED JEFFERSON, ACCOMPANIED BY ROBERT F. GREEN, NATIONAL RIGHT TO LIFE COMMITTEE

Dr. JEFFERSON. Thank you, Senator Hruska.

I will try to limit my discussion to about 5 minutes, and that will give some time for questions.

In my printed testimony, I have tried to identify myself, and I appear here today as a physician as well as a private citizen concerned about the trends which tend to lead us away from the founding principles of this Republic.

When we can consent to definition of a human being as other than the biological, one in existence; the person as one of a mass of people, in order to deprive this being of life, then we have departed from the democratic principle, and we have followed the path of the totalitarian states, which have traditionally declared biological beings in existence as nonpersons in order to deprive them of their lives, their liberties, or their property.

As a physician, I feel that my dedication is to save life. We do not have to wonder when life begins. It does not really matter, when about 4 billion years ago the first spark that we know of as life began: it does not really matter what the exact moment was when the sperm may have entered the wall of the egg. But we do know that whenever that moment occurred, the transmission of life to that individual began at that point.

The observation that physicians, theologians, and philosophers may not have reached consensus on this issue simply indicates that people can disagree. And if they do not bother to determine what the relevant facts are, it is possible for them to disagree even more.

Here, in 1973, we have very clear scientific evidence of what happens in the life of a child before birth. Scientists, such as Dr. Landrum Shettles in New York, for example, have come into difficulty with some groups because they have begun new life in the test tube; indeed, observed this life and stopped it, according to the ends of their experiments.

But we know many things from those who have worked positively with obliging mothers. Through their work we have followed, we have looked, we have seen what this baby does before birth. This is not just some little vegetable which grows through a certain phase and then, somehow, comes living at the time of birth. This new and developing—this youngest of our human family, is an entity, a growing thing which, by 8 weeks, has developed everything that you and I have, including organs it will not need after it gets here.

It does this from the two cells that it starts with—the one from the mother, the egg, and the one sperm cell from the father. The development from that point is just a matter of growth, maturation, and refinement of function.

If this newly growing young of our kind—human baby—cannot make the things for itself that it needs, there is no way its mother can make the provisions for it. But think of the circumstance that exists now. This youngest of our kind, who at age 12 weeks, is barely 3 inches long, and on the average may be about 2¼ inches, must somehow get past an extermination team of its mother and a doctor, not just through that 12 weeks but another 12 weeks, before it even has a chance of protection of the laws that are provided for our safety.

If there were any other test of citizenship for anyone else as stringent as this, I am sure it would be ruled unconstitutional. But this youngest of our kind, with no way to defend itself, has this kind of test decreed by the highest court in our land.

Now, how can I, as a physician, fully aware of the needs of this growing child, accept having it deprived of this protection? How can I accept being asked, being directed, to get rid of that child because its life is inconvenient or, perhaps may be a burden to someone else?

How can I as a physician accept turning away from the principle of the democratic government, which may be to provide and to protect?

But if I looked just at my medical practice, how can I willingly take my surgical skill and my instruments and go after this growing little body within its mother, simply because I have been given the license and permission to kill?

How can I accept that I am part of a privileged team, the only two members of our society who can decide to end a life and do so with impunity?

We have heard a great deal about difficult and trying circumstances in the so-called illegal abortion practice. We sometimes see pictures of mutilations that women have been subjected to.

But the same people do not show you that, because of the nature of the operation, in the most skilled hands, you still can have a perforation of the uterus. In the most skilled hands, you still can have uncontrollable hemorrhage; you still can have infection; and that no matter how great the skill of the operator is, no one can say what the effect of that operation, getting rid of that baby, is on a given woman until she has had a chance to undergo a full-term normal delivery.

We do not even know what the consequences are of the widespread operations that are going on in this country now, because there is no way of checking and no way to followup completely and accurately. And because in the first 12 weeks, there is no way to observe the practice, the State may not look, it may not protect the child; and consequently, it may not protect the woman. So it is not just a matter of rescuing women from a backroom butcher. It is a matter of bringing the butcher from the backroom into the drawingroom and saying that if he has a license, well, it is perfectly all right for him to ply his destructive trade.

He profits, yes; but not the woman who is mutilated and not the unborn child who dies. If we maintain and condone such as this in our society, turning away from all we have worked toward to establish a medical professional standard which requires that treatment of a patient by surgery, by operations, must be done to correct disabling or life-threatening medical conditions according to purely medical indications—if we turn aside from that, we simply turn the patient back to exploitation; because once one says the doctor may do this operation because of the economic problems of the mother, we no longer have any grounds to object at all if that doctor decides just to do the operation—abortion in this case—just to collect the fee and fill that doctor's pockets.

When we set aside a reasonable medical standard of preservation of life and return to the doctor a killing function, instead of separating this killing and curing function, we are turning back almost

2,000 years of medical tradition based on the Hippocratic Oath which has, at one point, certainly, provided us with one of the highest standards to which the medical profession can aspire.

I became a doctor in this tradition. I did not accept from the beginning that we may willfully destroy life. I think people do not realize how easy it is for us as doctors to end lives; how easy it is for us to get rid of anyone here, for example. Much easier—it takes a shorter time, for example, than doing an abortion. It would be a little harder to get rid of the body.

But if we are going to have killing by a doctor, the private contract—the private death contract, between a woman and her doctor—we will have to provide that to all citizens, or deny it to these two.

I am not willing to forsake the role, the traditional role, of a physician as one who tries to help, to heal, to become a social engineer, or to become the social executioner. And I hope in the consideration and revision of these laws and procedures that we will have a definition of human being which will accept the biological reality that we know, in keeping with what our best science and technology have discovered.

Mr. Blakey. Doctor, I would like to ask you a couple of questions. And before I ask them, I think it might be helpful to preface them by a remark that was necessary at the time Dr. Guttmacher testified.

At one point, the conversation became probably more heated than it ought to be, and I felt it was necessary for me to indicate that my questions were not necessarily reflective of my own personal opinions, and I hope you would take them in that same way, too.

But it seems to me, one question that fundamentally has to be asked you is as follows: are women not going to get abortions anyway?

And if they are, in fact, going to get them anyway, and our task is to save lives, would it not be better with having them in hospitals?

Dr. Jefferson. This always comes up. There are some things which people will do always. They will always steal cars; they will also run through red lights. But people do not always ask for society to sanction such acts.

When people tell me that women always will have abortions, I know perhaps that some will, but I also would like to show them what has happened in one recorded New York abortion experience. After their law had been in effect about 6 months, a study[1] was done and 380 women were asked what they thought about New York's law and if they approved it; 78.7 percent said, yes, they did approve of it, and they felt there should be some law like that.

But when they were asked what they would have done if there had not been such a law, only 28.5 percent said they would have abortions, but 58.1 percent said they would not have undergone abortion, they would have had the baby.

There is a lot of promotion in the idea. As long as one insists or tells someone or reminds someone that they will have an abortion, indeed you will promote the idea in many. But as this idea has been sold, the idea that it is something they may not consider can also be proposed.

Mr. Blakey. What right, really, though, does society have to force a woman to carry a child?

It is one thing to say we ought not to kill the child. But, on the other hand, is it not true that making a woman carry a child against her will makes her undergo a physical risk of her own harm?

[1] Clinical Obstetrics and Gynecology, March 1971.

How do we balance off the child's right against the woman's right, certainly, not to have an unwanted pregnancy forced on her?

Dr. JEFFERSON. Well, if you want to take that line of reasoning, you can make it quite logical. And that is exactly the thing which has changed the arguments of this country since 1967. There is a biologist—whose name I will not mention because he gets enough publicity already—who is responsible for that line of thought.

The society is not responsible for compulsory pregnancy. In the first place, I do not accept that term, unless someone did bind her down and artificially inseminated her and held her in bondage. The thing that determined her pregnancy is the fact that by natural law, the egg which came from her ovary had its natural resting and growing place in her uterus if it became fertilized. Now, if she does not wish to have a child, then she has every right and freedom to try to keep her eggs from being fertilized.

But once they are, I think she could as easily change her mind about the pregnancy. I find it interesting that people are much more willing to run the risks to her life and health, of promoting having an operation done on her, than trying to give her time, perhaps, to reorient her attitude or change her way of looking at her pregnancy and its consequences.

Senator HRUSKA. Doctor, would you yield?

Dr. JEFFERSON. Certainly.

Senator HRUSKA. Again, I am going to have to run, but before I do I want to compliment Dr. Jefferson. It is contributions of this kind that we need a great deal more rather than the emotional appeals that are made to us.

There are many areas in which we are precluded from acting as long as we have the type of government we have. We do not like it sometimes, but we have to grit our teeth and do the best we can.

I do not want to put it too simplistically, but here we have a situation where the Supreme Court says what we can and cannot do. Would it be fair to say that the type of testimony you give us here would be more properly directed to the subcommittee on Constitutional Amendments when Senator Buckley's amendment comes before it? Would that be a fair statement?

Dr. JEFFERSON. I would hope there too, but I appreciated and welcomed the opportunity of coming today. But there are so many issues involved. I do not know if you read Mr. Justice Blackman's comments before a Chamber of Commerce reported from Cedar Rapids, Iowa, one week after the decision. He said they did not have time to put their feet up and consider the issue. And it is precisely because they did not take the time and perhaps did not have some of these facts available that others who must think the problem through, as well, and have different recourses, must have them made available. This is one way of helping make that possible.

Senator HRUSKA. Mr. Greene, have you any testimony?

Have you a statement that you would like to put in the record?

I will have to leave in a very few minutes to make the rollcall vote.

Mr. GREENE. Yes, I understand.

I have a written statement that I have already submitted. The reporter has a copy of it.

Senator HRUSKA. Very well.

[The prepared statement of Mr. Greene follows:]

TESTIMONY OF ROBERT F. GREENE

I am appearing before this honorable committee as a representative of the National Right to Life Committee which I am privileged to serve as a Director and as a member of the Executive Committee. I am an unlikely substitute for either one of two distinguished law professors previously scheduled to appear here today. Either of them possess credentials far greater than mine. I am but a country lawyer in general practice. I have received no special training, nor have I had any significant experience in the field of constitutional law. I have had no significant experience with the Federal Criminal Code, nor the proposals to revise that code which are now under consideration by this committee. I appear before you on short notice and, therefore, have had no opportunity to make a study of the legislation that has been proposed, but I am advised of several problems that now appear relative to the protection of human life. Let me begin by expressing to you my profound shock, shared literally by millions of Americans, at the modern-day Dred Scott decisions rendered by the Supreme Court in the Texas and Georgia abortion cases decided on January 22, 1973. These unfortunate decisions require those who are concerned about protecting human life, specifically the life of the unborn, to suggest to this committee the very clear need for all new federal legislation to reflect that concern.

Pious protestations of some to the contrary notwithstanding, the Court judicially legislated abortion on demand, at the instance of the woman, for the entire period of pregnancy. The Court told us that until a human being is "viable" or "capable of meaningful life" a state has no "compelling interest" which justifies it in any way restricting in favor of the fetus a woman's fundamental personal liberty of abortion, which liberty the Court was not certain emanated from the Ninth Amendment or the Fourteenth Amendment, and which liberty had escaped the attention, heretofore, of the Congress of the United States and the legislators of all fifty states. After viability has been reached, the Court further instructs us that the human being is not a person "in the whole sense", so that even after the sixth or seventh month he or she is not protected by the Fourteenth Amendment's guarantee that life shall not be taken without due process of law. At this point he or she is, however, legally recognizable as "potential life", and a state may, if it chooses, restrict abortion, unless jeopardy is presented to the life or health of the woman. This "protection" of the unborn child still must yield to the World Health Organization standard of health, effectively adopted by the Court, when we are told that each particular case is a medical judgment to be "exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient." Opposed to the woman's "fundamental personal liberty", the unborn child is valued at precisely zero. Never before in British or American law has a baby in the last stages of pregnancy been so exposed to destruction at the desire of the parent.

An analysis of the Court's fallacious reasoning offers more than academic interest, since it will unquestionably serve as precedent on other, related issues. While the majority opinion gives lip service to the fact that the American Medical Association understood that the unborn child was human life, even before the fifth month, and this understanding existed in the 19th Century, the majority of the Court was obviously not educated by this information, a century later.

Of particular interest is the schizophrenic style of judicial interpretation employed by the Court, of necessity, to reach the extraordinary results it reached. On the one hand, the majority opinion tells us that the Fourteenth Amendment, enacted in 1868, incorporates a personal liberty which had escaped attention for over a century. In this branch of his opinion, Justice Blackmun is an evolutionist. He tells us that constitutions must be interpreted or remade to speak to the times. It is therefore not unusual for "liberty" to mean something different in 1973 than it meant in 1868, since of course the Constitution is a living, viable document which must be interpreted in light of current factual knowledge. On the other hand, in determining the meaning of "person" in the Fourteenth Amendments guarantee, the Justice is curiously inflexible. He looks at what "person" meant literally, based upon the level of knowledge at the time of the adoption of the Fourteenth Amendment, but does not ask if the new biological data on the fetus compels the Court to be as evolutionary in its definition of person as it is in its definition of liberty. He refrains from looking squarely at the facts of fetal existence. He takes the term person as if its meaning had been frozen forever. Contrary to the radical substance of the rest of his opinion, he is here, uniquely, a strict constructionist.

Neither logic nor biology seems to help us in explaining why Justice Blackmun chose the point in the continuum of human life which he picked for legal recognition, contrary to the host of other cases on the books recognizing the rights of the unborn child, from earlier stages, for purposes of insurance, social security, decedent's estates, prenatal injuries, etc. But, he has thrown out another phrase for our guidance—"*capability of meaningful life*". Here, perhaps lies the answer. What it is appropriate for the state to protect is not a human being, but a human being with the "capability of meaningful life" human life is defined in terms of this capability. This result was joyously greeted by Dr. Joseph Fletcher as the hallmark of our society's abandonment of the sanctity of all human life ethic, in favor of the quality of life ethic, which is more discriminating in choosing who shall live and who shall die.

What, then, is factual? What does mankind know, beyond any doubt, about the process of human development? When does human life begin? To define "human" by any criteria other than biological is to base ourselves upon speculation. The human conceptus, at whatever stage of development, is "living" by any definition of science, and is specifically killed by abortion. Even the most rabid pro-abortionists concede this. Next, all living things, whether frogs or apple trees or people, are classified under "species" by the biologist. Biologically speaking, the one, provable, basic difference between man (at the stage of the fertilized egg, or at any other stage in development, before or after birth) and any other living species of animal or plant is the gene make-up of his cells. Clearly ,then, a "human" life consists of progressive stages of development, biological and psychological, in part initiated and controlled by the hereditary make-up of all cells in this organism. The only facts that are legally indisputable at this time are in the realm of biology. The human embryo, fetus, baby, child, teen-ager, adult, old person are all members of one species, because of their genetic make-up. To say that one day or one week constitutes the difference between "human" life and "nonhuman" life is to be conveniently arbitrary. Such would be acceptable if no facts were available. But there are facts—biology provides them.

Unfortunately, however, the abortion mentality is fundamentally grounded in amoral, unprincipled pragmatism, and under the "meaningful life" criterion given us by the Court, cannot fail to lead us to further "progress" in this assault upon human life—witness:

1. The published statement, since January 22, 1973, of a Yale University geneticist to the effect that now that we have perfected amniocentesis testing of children in the womb, we should make mandatory amniocentesis testing in every pregnancy, and make abortion mandatory when there is detected abnormality.

2. A bill introduced in the Ohio General Assembly, since the Supreme Court decisions, requiring mandatory sterilizaton for all mothers drawing aid to dependent children.

3. A bill introduced into the Hawaii legislature calling for mandatory sterilization of all women with two children.

4. A bill introduced in the California legislature to legalize infanticide for all children born with "significant defects".

5. The published statement of Philip Handler, speaking to the American College of Surgeons, describing dreadful condition of the pollution of the human gene pool, in that diabetics and other persons are reproducing and passing defective genes on, wherein he prescribes the solution if we are but willing to change the medical ethics from the present—oriented to the welfare of the individual—to the future, oriented to the welfare of the species.

6. The recently published statements of Anthropologist Ashley Montagu, to the effect that the newborn is no more truly human than the fetus, until molded by social and cultural influences. Presumably, then, this "nonperson" is entitled to no more legal rights than the "nonperson" in the womb.

7. Published statements of Dr. Allen Guttmacher, President of Planned Parenthood—World Population, suggesting that each country will have to decide its own form of coercion in the population struggle, and suggesting that at present, the means available are compulsory sterilization and compulsory abortion, and that perhaps some day a way of enforcing compulsory birth control will be feasible.

8. The advent on the scene of such new organization as "Negative Population Growth", advocating the reduction of world population to one-half of its present

level, via compulsory population control, and listing among its board members, as well as some of the old familiar faces, Edgar Chasteen, President of "Compulsory Birth Control for All Americans".

9. Serious proposals by demographers, Erlich, etc., for introduction of sterilization materials into the public drinking supply, passage of laws making the delivery of a third child a felony, and ultimately, compulsory abortion.

10. A statement published last year by the Executive Director of the Ohio Nursing Home Association wherein he predicted that euthanasia would one day solve his state's problems with the aged: "If society can justify abortion on one hand, killing the unborn fetus, it is coming to the day when it will justify as morally right also, euthanasia, to kill off those at the other end of the scale."

11. A pending euthanasia bill in the Florida General Assembly, being promoted also by the Governor of Oregon, and promoted by the Euthanasia Educational Fund, chaired, interestingly enough, by Dr. Guttmacher, President of Planned Parenthood, which bill provides, among other things, that in the event that a person is incompetent to make that judgment for his own destruction, his next of kin may decide.

12. The shocking discovery of the practice of experimentation upon live aborted children (note it is medically and technically incorrect to refer to this child, now out of the womb as a fetus, pursuant to the pro-abortion philosophy; he or she is in fact a child). It was even more appalling to learn, as reported April 10, 1973 in The Washington Post, that this experimentation was going on with the approval of the National Institute of Health, which approval was secretly given in September of 1971, but not disclosed publicly. This incredibly inhuman practice apparently continues. An article in the June 8, 1973 issue of Medical World News describes reports given by physicians to the American Pediatrics Society Convention in San Francisco in May of this year involving the decapitation of live aborted children for experimental reasons.

13. The latest in this litany of horrors, which would in fact be patently incredible if one had not read the Roe and Doe decisions of January 22, 1973, is the public statement of Dr. James Watson, co-discoverer of the double helix, the master molecule DNA, published in the May 28, 1973 issue of Time Magazine suggesting that we withhold "legal personhood" from a child until three days after birth, so that parents could be allowed the choice that only a few are given under the present system.

This horrible sequence of developments, which is nothing more nor less than premature arrival of the most dire predictions of George Orwell and Aldous Huxley, would seem truly incredible until viewed in relative perspective. Such a logical analysis was made two years ago in "California Medicine", the official journal of the California Medical Association, in an article entitled "A New Ethic For Medicine and Society": "The process of eroding the old ethic and substituting the new has already begun. It may be seen most clearly in changing attitudes toward human abortion. In defiance of the long held Western ethic of intrinsic and equal value for every human life regardless of its stage, condition, or status, abortion is becoming accepted by society as moral, right and even necessary. It is worth noting that this shift in public attitude has affected the churches, the laws and public policy rather than the reverse. Since the old ethic has not yet been fully displaced it has been necessary to separate the idea of abortion from the idea of killing, which continues to be socially abhorrent. The result has been a curious avoidance of the scientific fact, which everyone really knows, that human life begins at conception and is continuous whether intra- or extra-uterine until death. The very considerable semantic gymnastics which are required to rationalize abortion as anything but taking a human life would be ludicrous if they were not often put forth under socially impeccable auspices. It is suggested that this schizophrenic sort of subterfuge is necessary because while a new ethic is being accepted the old one has not yet been rejected. . . . One may anticipate further development of these roles as the problems of birth control and birth selection are extended inevitably to death selection and death control whether by the individual or by society . . .".

Perhaps the most incredible aspect of the Supreme Court decisions is that they aborted the political process which was going on in this country relative to this issue, and which was demonstrating the clear conclusion that an overwhelming majority of the American people reject permissive abortion. In point of fact, the pro-abortionists have uniformly failed in each and every attempt to "liberalize" abortion in 28 efforts in state legislatures in the two years immediately preceding January 22, 1973. This includes Kentucky, where the effort was

defeated in 1972, and the pro-abortionists failed to obtain one single vote. Further, on November 7, 1972, in the only two referenda in this nation held that year on the issue of permissive abortion, the voters of Michigan and North Dakota overwhelmingly rejected permissive abortion by the landslide proportions of 63% and 78%, respectively. Also, the people of New York, through their elected representatives, after two years experience of that slaughter, repealed the most permissive abortion law in the United States, although the repealer was vetoed by the Governor. So far as the political process is concerned, the net effect of the January decisions was only to increase and catalyze the pro-life movement (clipping enclosed of Cincinnati Post and Times Star article on Rally of 10,000 at Fountain Square on May 6, 1973).

It has been suggested by some that permissive abortion leaves the question of abortion a private moral decision, while forcing no one to submit to an abortion, and is therefore really a passive law. We submit that the institution of abortion is as passive to the unborn child as the institution of slavery was to the black. Surely, the concern of a society for its minorities and its defenseless constitutes the measure of its civilization. As simply and directly put as possible, the issue is whether we want to legalize the killing by one person, the woman, of another person, the unborn child, in order to solve the personal and social problems of the first person. Is killing to be the accepted method of problem solving in 20th Century America?

Obviously, the burden of these decisions cannot and will not stand. There are several amendments pending now in the United States Congress. The first type, known as the States Rights Amendment, merely nullify the Roe and Doe decisions so far as future legislative authority of the states is concerned. The net effect of these amendments is to say that the states themselves may choose to legalize this killing. These amendments are totally and unequivocally unacceptable. Of the true Human Life Amendments, there are two prototypes presently pending in the Congress:

1. The first amendment introduced, that of Congressman Hogan of Maryland, which has now also been introduced into the Senate by Senator Jesse Helms of North Carolina, and

2. The Buckley amendment introduced by Senator James Buckley of New York, Senator Hatfield of Oregon, Senator Hughes of Iowa, Senator Bennett of Utah, Senator Bartlett of Oklahoma, Senator Curtis of Nebraska, and Senator Young of North Dakota, and now also co-sponsored by Senator Eastland of Mississippi.

It is indeed a strange society which says that our Constitution prohibits the taking of the life of the convicted felon who, after being furnished due process of law, assistance of counsel, and presumption of innocence, has been proven guilty beyond a reasonable doubt of a serious infraction of the most vital regulations of that society, but says further to us that it is legal to take the life of the innocent child in the womb for reasons of convenience, and base that decision upon his utility or capability. It is indeed a strange society which tells us that the Constitution furnishes legal rights to fleshless corporate entities as "persons" within the meaning of the Fourteenth Amendment, but denies those same rights to the live being—species homo sapiens—growing in his mother's womb. It is indeed a strange society which says to us that the woman who, on her way to keep a 4:00 p.m. appointment with her abortionist to kill the unborn child growing in her womb, and who suffers a vehicular accident resulting in the injury or death of that child, at 3:00 p.m., may now sue and collect damages for the injury or death of that child. But unfortunately, that is a small, but significant glimpse of value selection presently imposed upon the American people.

Draft (July 25, 1973)

What is involved in this issue is the fundamental question of the basic value of each individual human life. Obviously, there can be no greater public issue to be addressed by those in public life. Accordingly, I would encourage this committee to investigate thoroughly, these proposed revisions to the Federal Criminal Code to be sure that they contain the greatest possible protection for human life. Particularly the life of the unborn child until such protection can be afforded by an appropriate amendment to the United States Constitution.

One of the key points at issue for both S. 1 and S. 1400 are the definitions of "person" and "human being."

S. 1 contains the following provisions:

Par. 1–1A4. General Definitions.

(37) 'human being' means a person who has been born and is alive;

(52) 'person' includes a human being and an organization;

S. 1400 contains similar provisions:

Ch. 1. General Provisions.

Par. III. General Definitions.

"'human being' does not include an individual who has not been born or who has died;"

"'person' means a human being or an organization;"

Harriet Pilpel stated in her testimony to this committee that the court's decision in *Roe* v. *Wade* 410 U.S. 113 (1973), is to the same effect as the provisions of the proposed code in defining a human being as a person was has been born and is alive. I disagree. As bad as the court's decision is, it does grant the unborn the status of human being. It does not attempt to define the unborn child out of the human race. What it does do is deny personhood under the Fifth and Fourteenth Amendments to the non-viable fetus when measured against the rights of its mother. *Roe* v. *Wade* even recognizes potential personhood during the last trimester, again subject only to the mother's right to life and health. Is it the will of the Congress to circumscribe the right to life to an even greater degree than what has been legislated by the court? I trust that you gentlemen do not want to follow that example. I am ill-prepared to offer you a fail-safe definition for human life. There are many models, but I see no rational basis for a distinction between person and human being, at least to the extent that all human beings should be considered persons, and borrowing from the proposed Buckley Amendment. . . . "all human beings, including their unborn offspring at every stage of their biological development, irrespective of age, health, function or condition of dependency." Equally acceptable would be the language of the proposed Hogan Amendment recently introduced in the Senate by Senator Jesse Helms of North Carolina.

Beyond the problem of definition is the need for an entire stautory scheme on the subject of abortion and related crimes. The effect of *Roe* v. *Wade* and *Doe* v. *Bolton* was to erase from the statute books of every state its traditional abortion laws. These laws formerly became operative in the federal scheme under the assimulative crimes section, but now in many states there is nothing left of abortion now to assimulate. Accordingly, I would encourage further investigation by the committee into a statutory scheme which could contain, and perhaps should contain, a scathing criticism of the United States Supreme Court; indicating that these provisions were motivated by the legislative intrusion of the court who by these decisions has removed the protection traditionally afforded the unborn. It could reflect a true expression of the will of the people of the United States and the members of the Congress to provide protection for the life of the unborn child whenever possible until such protection can be afforded by an appropriate amendment to the United States Constitution. It would also afford to the members of the Congress an opportunity to expressly deplore the destruction of unborn human lives which has and will occur in the United States as a consequence of these decisions.

Because of this void in state law, in those areas where the Federal Criminal Code would apply there are grossly inadequate legal remedies to protect the life, health and welfare of pregnant women and unborn human life. You can proscribe the performing of abortions on federal property or the use of federal facilities for such purposes and attach criminal penalties. You can require that sworn consents to the procedure be obtained. You can regulate the procedures that are employed and insure the highest standards of care. You can proscribe the actions of federal employees in performing or assisting in abortions and deny the use of federal funds to pay others. At the very least, you can require that abortions be performed by licensed physicians using accepted medical procedures. You can protect medical personnel from being required to assist in abortion procedures by imposing criminal penalties against those who would require them to act against their conscience. You can proscribe by similar means, the use of live or viable aborted children for any form of experimentation. And you can provide for a reporting system so that the taxpayer may be aware of the extent to which his government is involved in this senseless slaughter.

I am very much encouraged by recent actions of the Congress in this area. In the last few weeks the Legal Services Corporation Act (H.R. 7824) was amended to prohibit legal assistance regarding abortion, also the National Science Foundation Act (H.R. 8510) and the National Bio-Medical Research Fellowship, Traineeship, and Training Act of 1973 (H.R. 7724) were amended to prohibit funds for research on live fetuses.

It is the tradition of America to value human life. In the Judeo-Christian tradition (a tradition that America has relied upon frequently) a man is thought to be created in the image and likeness of God and that makes his existence a very special thing. While some find it difficult to say when human life begins or when human life should end, the presumption upon which our common bond depends is that any doubt has always been resolved in favor of life. The resolution of doubt in favor of life is what makes it possible for us as a people to maintain our respect for others and ourselves. It is part of the trust a people place in those who govern when they consent to be governed. A respect for life, independent of any assessment of its quality, is essential if we are to survive as a free people.

Mr. GREENE. If you have time, there are some brief portions of it I would like to read at this time.

Senator HRUSKA. If it will not take more than 3 minutes.

I do not like to do this, but could you give us a summary of it, and then also include those notes for a supplemental statement?

Mr. BLAKEY. And I wonder if both of you would hold yourselves open to some correspondence. Maybe what cannot be done because of the lateness of the day could be done with an interchange of questions by letter.

Dr. JEFFERSON. Yes.

Mr. GREENE. Yes.

Senator HRUSKA. That would be highly appreciated.

Mr. GREENE. Thank you, Senator.

I think perhaps if we only have 3 minutes, that I might best spend the time attempting to answer the question that you last asked Dr. Jefferson. That is, the appropriateness of this type of testimony before this committee.

One of the key points at issue for both S. 1 and S. 1400 is the definition of "person" and "human being." And you are familiar with those definitions, of course, as they appear in the draft. "Human being" means a person who is born and alive. The other—S. 1400—is the same thing, stated negatively.

Now, I would just like to point out to the Senator that that definition is even more narrow than that which was supplied by the court in *Roe* v. *Wade*, 410 U.S. 113 (1973). As bad as the court's decision is, it did not remove the developing child in utero from the family of human beings, you see. It did not attempt to define the unborn child out of the human race. It merely denied him personhood under the 5th and the 14th amendments, and then in a very narrow respect, as being on balance with the right of the mother for privacy and not for any other purposes.

Senator HRUSKA. Of course that definition to which you refer applies to homocide and it is traditional.

Mr. GREENE. Yes, sir.

I would further point out that, beyond the problems of definition, there is a need for an entire statutory scheme on the subject of abortion and related crimes in the Federal criminal code.

I am no student of the Federal criminal code. As a lawyer in general practice, I have very little opportunity to be involved with it. But it seems to me that through the assimilative crimes section of that act, State abortion laws became a part of the Federal scheme. Since January last, we do not have State abortion laws in many States. Therefore, there is nothing to assimilate. And so the law remains silent.

Mr. Blakey. Should the Federal system not permit the States to move forward and enact their own legislation in that area, rather than moving in with an affirmative Federal position applicable in the assimilative crimes area?

Mr. Greene. That might be preferable in the long run. On the other hand, as we sit here, we continue the destruction of unborn human lives. It goes on day after day after day, and much of it on Federal property with the use of Federal facilities. And these are things that could be proscribed in your code.

You see, because of this void in the State law—there are areas where the Federal criminal code could apply and would apply; it does apply—where there are grossly inadequate legal remedies for the pregnant woman and for the protection of the unborn child.

I do not think that there is any need for the Congress to follow the same trail of error that has been followed before.

Senator Hruska. We shall adjourn the present session of the committee, subject to the call of the Chair.

Thank you both for coming.

Dr. Jefferson. Thank you so much.

Mr. Greene. Thank you, Senator.

[Whereupon, at 3:20 p.m., the subcommittee was adjourned subject to the call of the Chair.]

REFORM OF FEDERAL CRIMINAL LAWS

THURSDAY, SEPTEMBER 27, 1973

U.S. SENATE,
SUBCOMMITTEE ON CRIMINAL LAWS AND PROCEDURES
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:30 a.m., in room 2228, Dirksen Senate Office Building, Senator Roman Hruska, presiding.

Present: Senator Hruska (presiding).

Also present: Paul C. Summitt, chief counsel; Kenneth A. Lazarus, minority counsel; Dennis C. Thelen, assistant counsel; and Mabel A. Downey, clerk.

Senator HRUSKA. The subcommittee will come to order.

As we continue our hearings this morning on the code revision bills, S. 1 and S. 1400, we will hear testimony on the civil rights and elections provisions of these bills. There will be placed in the record at this time the sections from S. 1, S. 1400 and present law relating to civil rights and elections. Our first witness will be Mr. K. William O'Connor, Deputy Assistant Attorney General, Civil Rights Division. Will you please present your associates, Mr. O'Connor.

STATEMENT OF K. WILLIAM O'CONNOR, DEPUTY ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION, ACCOMPANIED BY ROBERT A. MURPHY, CHIEF, CRIMINAL SECTION, CIVIL RIGHTS DIVISION; FRANK D. ALLEN, JR., DEPUTY CHIEF, CRIMINAL SECTION, CIVIL RIGHTS DIVISION; AND EDGAR BROWN, CRIMINAL CODE REVISION UNIT, CRIMINAL DIVISION

Mr. O'CONNOR. Thank you.

My associates with me here are Mr. Bob Murphy, on my right, who is the Chief of the Criminal Section of the Civil Rights Section, and Mr. Frank Allen, who is Bob Murphy's Deputy on my left, and to my far right is Mr. Edgar Brown of the Criminal Code Revision Unit, who is here to offer technical advice and assistance in any way that may be possible.

May I say, Senator, that we are glad to wait on the Senator at any time and at any place and this certainly has been no problem for us to be here attending you.

Senator HRUSKA. Thank you very much.

You have submitted a statement, a prepared statement. You may proceed in your own fashion either to highlight it or read it, whichever you chose.

Mr. O'Connor. Thank you. I think that if the subcommittee will permit I would like to ask to have the statement introduced into the record of the proceedings and I would accept the invitation of the Senator to highlight this statement.

Senator Hruska. That will be fine.

[The documents referred to follow:]

[S. 1, 93d Cong., 1st Sess.]

A BILL To codify, revise and reform title 18 of the United States Code; to make appropriate amendments to the Federal Rules of Criminal Procedure; to make conforming amendments to criminal provisions of other titles of the United States Code; and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Criminal Justice Codification, Revision and Reform Act of 1973."

* * * * * * *

"Subchapter F.—Civil Rights Offenses

"Sec.
"2–7F1. Deprivation of Civil Rights.
"2–7F2. Interference With Government Benefit or Program.
"2–7F3. Discrimination.
"2–7F4. Interference With Civil Rights Activities.
"2–7F5. Unlawful Acts Under Color of Law.
"2–7F6. Interference With Activities of Employees and Employers.

"§ 2–7F1. Deprivation of Civil Rights

"(a) Offense.—A person is guilty of an offense if he intentionally:

"(1) injures, oppresses, threatens, or intimidates any other person in the free exercise or enjoyment of, or because of such persons having exercised. any right or privilege secured to him by the constitution or laws of the United States;

"(2) goes on the property of another person or goes in disguise on the highway to prevent or hinder another person's free exercise or enjoyment of any right or privilege secured to him by the constitution or laws of the United States: or

"(3) subjects, under color of law, any inhabitant of any state:

"(i) to the deprivation of any rights, privileges, or immunities secured or protected by the constitution or laws of the United States; or

"(ii) to different punishments, pains, or penalties on account of such inhabitant being an alien, or by reason of his race, color, sex, religion, or national origin.

"(b) Grading.—The offense is a Class E felony.

"(c) Compound Grading.—The offense is:

"(1) a Class A felony if any of the following additional offenses is committed: murder or aggravated kidnapping: or

"(2) a Class B felony if any of the following additional offenses is committed: maiming, aggravated arson or aggravated malicious mischief.

"(d) Jurisdiction.—Federal jurisdiction exists when the offense is committed.

"§ *2–7F2. Interference With Government Benefit or Program*

"(a) Offense.—A person is guilty of an offense if he intentionally:

"(1) withholds from or deprives another person or threatens to withhold from or deprive another person of the benefit of any government program or government-supported program, or a government contract, to interfere with, restrain, or coerce any person in the exercise of his right to vote for any candidate or issue at any election, or in the exercise of any other political right; or

"(2) injures, intimidates, or interferes with another person, by force or threat of force, because such person is or has been:

"(i) participating in or enjoying the benefits of any program, facility, or activity provided or administered by the government, or receiving government financial assistance, including:

"(A) serving as a grand or petit juror in any court or attending court in connection with such possible service;

"(B) qualifying for or operating in a contractual relationship with the government; or

"(C) qualifying for or enjoying the benefits of a government loan or government guarantee or insurance of loan; or

"(ii) applying for or enjoying employment, or any prerequisite of employment, by a government agency.

"(b) GRADING.—The offense is a Class E felony.

"(c) COMPOUND GRADING.—The offense is:

"(1) a Class A felony if any of the following additional offenses is committed: murder or aggravated kidnapping; or

"(2) a Class B felony if any of the following additional offenses is committed: maiming, aggravated arson, or aggravated malicious mischief.

"(d) JURISDICTION.—Federal jurisdiction exists when the government is Federal.

"§ 2–7F3. *Discrimination*

"(a) OFFENSE.—A person is guilty of an offense if he intentionally injuries, intimidates, or interferes with another person, by force or threat of force, because of his race, color, sex, religion, or national origin and because he is or has been, or to intimidate him or any other person from:

"(1) voting for any candidate or issue or qualifying to vote, qualifying or campaigning as a candidate for elective office, or qualifying or acting as a poll watcher or other election official, in any primary, special, or general election;

"(2) enrolling in or attending any public school or college;

"(3) participating in or enjoying the benefits of any program, facility, or activity provided or administered by any state or local government, including:

"(i) serving as a grand or petit juror in any court or attending court in connection with such possible service;

"(ii) qualifying for or operating in a contractual relationship with the government; or

"(iii) qualifying for or enjoying the benefits of a government loan or government guarantee or insurance of a loan;

"(4) enjoying the goods, services, or accommodations of any establishment which provides lodging to transient guests, or of any facility which serves the public and is engaged in selling food, beverages, or gasoline, or of any place of exhibition or entertainment which serves the public, or of any other establishment which serves the public and:

"(i) which is located within the premises of any such establishment, and

"(ii) which holds itself out as serving patrons of such establishment. This paragraph shall not apply if such establishment is located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor as his residence:

"(5) applying for or enjoying employment, or any prerequisite of employment by any employer, or joining or using the services or advantages of any labor organization, hiring hall, or employment agency;

"(6) selling, purchasing, renting, financing, occupying, or contracting or negotiating for the sale, purchase, rental, financing, or occupation of any dwelling, or applying for or participating in any service, organization or facility relating to the business of such selling or otherwise dealing in dwellings; or

"(7) traveling among the states or in interstate or foreign commerce, or using any facility which affects interstate or foreign travel, or using any vehicle, terminal, or facility of any common carrier by motor, rail, water, or air.

"(b) GRADING.—The offense is a Class E felony.

"(c) COMPOUND GRADING.—The offense is:

"(1) a Class A felony if any of the following additional offenses is committed: murder or aggravated kidnapping; or

"(2) a Class B felony if any of the following additional offenses is committed: maiming, aggravated arson, or aggravated malicious mischief.

"(d) JURISDICTION.—Federal jurisdiction exists when the offense is committed.

"§ *2–7F4. Interference With Civil Rights Activities*

"(a) OFFENSE.—A person is guilty of an offense if he intentionally injures, intimidates, or interferes with another person, by force or threat of force, because such person is or has been, or to intimidate him or any other person from:

"(1) affording, in official or private capacity, another person or class of persons opportunity or protection to participate in any benefit or program, in fact, described in section 2–7F2, or to participate without discrimination on account of race, color, sex, religion, or national origin in any benefit or activity, in fact, described in section 2–7F3;

"(2) aiding or encouraging another person to participate in any benefit or program, in fact, described in section 2–7B2, or to participate without discrimination on account of race, color, sex, religion, or national origin in any benefit or activity, in fact, described in section 2–7B3; or

"(3) in fact lawfully participating in speech or peaceful assembly opposing any denial of opportunity to participate in any benefit or program, in fact, described in section 2–7B2, or to participate without discrimination on account of race, color, sex, religion, or national origin in any benefit or activity, in fact, described in section 2–7B3.

"(8) GRADING.—The offense is a Class E felony.

"(c) COMPOUND GRADING.—The offense is:

"(1) a Class A felony if any of the following additional offenses is committed: murder or aggravated kidnapping; or

"(2) a Class B felony if any of the following additional offenses is committed: maiming, aggravated arson, or aggravated malicious mischief.

"(d) JURISDICTION.—Federal jurisdiction exists when the offense is committed.

"§ *2–7F5. Unlawful Acts Under Color of Law*

"(a) OFFENSE.—A Federal public servant acting under color of law or a state public servant acting under color of law, or a person acting under color of Federal or state law, is guilty of an offense if he intentionally:

"(1) subjects another person to violence or detention which is unlawful;

"(2) exceeds his authority in executing an order or other process for arrest, search and seizure, or the production of evidence;

"(3) extorts a confession or plea of guilty from another person by violence, threats of violence, or intimidation;

"(4) denies another person his right to counsel during the period between detention and appearance in court; or

"(5) fabricates, falsifies, or suppresses evidence to secure a conviction or interfere with the defense of another person.

"(b) GRADING.—The offense is Class E felony.

"(c) COMPOUND GRADING.—The offense is:

"(1) a Class A felony if any of the following additional offenses is committed: murder or aggravated kidnapping;

"(2) a Class B felony if any of the following additional offenses is committed: maiming, aggravated arson, or aggravated malicious mischief.

"(d) JURISPRUDENCE.—Federal jurisdiction exists when the offense is committed.

"§ *2–7F6. Interference With Activities of Employees and Employers*

"(a) OFFENSE.—A person is guilty of an offense if he intentionally injures, intimidates, or interferes with another person, by force or threat of force, and such other person is:

"(1) an employee engaged in peaceful picketing during any labor controversy affecting wages, hours, or conditions of labor;

"(2) an employee engaged in activities relating to self-organization or collective bargaining; or

"(3) an employer engaged in maintaining open access to a plant or other business establishment.

"(b) GRADING.—The offense is a Class E felony.

"(c) COMPOUND GRADING.—The offense is:

"(1) a Class A felony if any of the following additional offenses is committed: murder or aggravated kidnapping; or

"(2) a Class B felony if any of the following additional offenses is committed: maiming, aggravated arson, or aggravated malicious mischief.

"(d) JURISDICTION.—Federal jurisdiction exists when the offense is committed within the jurisdiction defined in section 1–1A4(64) (special jurisdiction) or section 1–1A(3) (affects commerce jurisdiction).

* * * * * * *

"*Subchapter H.—Protection of Political Processes*

"Sec.
"2–6H1. Election Fraud.
"2–6H2. Wrongful Political Contribution.
"2–6H3. Foreign Political Influence.

"*§ 2–6H1. Election Fraud*

"(a) OFFENSE.—A person is guilty of an offense if, in connection with any primary, general, or special election, he knowingly:

"(1) makes a false voting registration;

"(2) confers a pecuniary benefit upon another person for such person's voting or withholding his vote or voting for or against any candidate or issue, or for such conduct by another person;

"(3) accepts a pecuniary benefit for conduct, in fact, prohibited under paragraph (1) or (2); or

"(4) obstructs, interferes, or impedes in any other manner with the conduct of such election or registration for it.

"(b) GRADING.—The offense is a Class D felony.

"(c) COMPOUND GRADING.—The offense is:

"(1) a Class A felony if any of the following additional offenses is committed: murder or aggravated kidnapping; or

"(2) a Class B felony if any of the following additional offenses is committed: maiming, aggravated arson, or aggravated malicious mischief.

"(d) JURISDICTION.—Federal jurisdiction exists when the election involves a candidate for a Federal office.

"*§ 2–6H2. Wrongful Political Contribution*

"(a) OFFENSE.—A person is guilty of an offense if:

"(1) he is a public servant and he solicits a contribution for any political purpose from another public servant or, in response to such solicitation with respect to a public servant for whom he works, he makes such a contribution to another public servant; or

"(2) he solicits or receives a political contribution in a building or facility.

"(b) SOLICITATION PRECLUDED.—Section 1–2A3 (criminal solicitation) is inapplicable under this section.

"(c) GRADING.—The offense is a Class E felony.

"(d) JURISDICTION.—Federal jurisdiction exists when the public servant or the building or facility is Federal.

"*§ 2–6H3. Foreign Political Influence*

"(a) OFFENSE.—A person is guilty of an offense if:

"(1) being an agent of a foreign principal, he, directly or indirectly, knowingly makes a contribution in connection with a primary, special, or general election, or a political convention or caucus held to select candidates for political office; or

"(2) he, directly or indirectly, knowingly accepts a contribution which is, in fact, prohibited by paragraph (1).

"(b) GRADING.—The offense is a Class D Felony.

"(c) DEFINITIONS.—As used in this section:

"(1) 'agent of foreign principal' means a person who:

(i) acts as an agent, representative, employee, or servant, or a person who acts in any other capacity at the order, request, or under the direction or control, of a foreign principal, and

(ii) any substantial portion of whose activities are, directly or indirectly, supervised, directed, or controlled by such foreign principal; and

"(2) 'foreign principal' has the meaning prescribed in section 611(b), title 22, United States Code, but does not include a person who is a citizen of the United States.

93d Congress, 1st Session

S. 1400

IN THE SENATE OF THE UNITED STATES

March 27, 1973.—Mr. Hruska (for himself and Mr. McClellan) introduced the following bill; which was read twice and referred to the Committee on the Judiciary.

A BILL To reform, revise, and codify the substantive criminal laws of the United States; to make conforming amendments to title 18 and other titles of the United States Code; and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Criminal Code Reform Act of 1973".

* * * * * * *

"§ *1501. Interfering with Civil Rights*

"(a) OFFENSE.—A person is guilty of an offense if he knowingly deprives another person of, or injures, oppresses, threatens, or intimidates another person in the free exercise or enjoyment of, or because of his having so exercised, any right, privilege, or immunity secured to him by the Constitution or laws of the United States.

"(b) GRADING.—An offense described in this section is a Class A misdemeanor.

"§ *1502. Interfering with Civil Rights under Color of Law*

"(a) OFFENSE.—A person is guilty of an offense if, while acting under color of law, he knowingly engages in any conduct which, in fact, constitutes an offense under any section in chapter 16 or 17, and thereby, in fact, deprives another of any right, privilege, or immunity secured to such person by the Constitution or laws of the United States.

"(b) PROOF.—Whether the deprivation concerns a right, privilege, or immunity secured by the Constitution or laws of the United States is a question of law.

"(c) GRADING.—An offense described in this section is a Class A misdemeanor.

"§ *1511. Interfering with an Election, Federal Activity, or Federal Employment*

"(a) OFFENSE.—A person is guilty of an offense if, by force or threat of force, he intentionally injures, intimidates, or interferes with another person because such other person is or has been, or in order to intimidate any person from:

"(1) voting or qualifying to vote, qualifying or campaigning as a candidate for elective office, or qualifying or acting as a poll watcher or other election official, in a primary, special, or general election;

"(2) participating in or enjoying the benefits of a program, service, facility, or activity provided by, administered by, or wholly or partly financed by, the United States;

"(3) serving as a grand or petit juror in a court of the United States or attending court in connection with possible service as such a grand or petit juror;

"(4) applying for or enjoying employment, or a perquisite thereof, by an agency of the United States;

"(5) affording another person or class of persons opportunity or protection to participate in any benefit or activity described in this section; or

"(6) aiding or encouraging another person or class of persons to participate in any benefit or activity described in this section.

"(b) GRADING.—An offense described in this section is a Class A misdemeanor.

"§ *1512. Discriminating in Public Education, State Activities, Employment, Public Accommodations, Housing, or Travel*

"(a) OFFENSE.—A person is guilty of an offense if, by force or threat of force, he intentionally injures, intimidates, or interferes with another person:

"(1) because of such other person's race, color, religion, or national origin and because such other person is or has been, or in order to intimidate any person from:

"(A) enrolling in or attending a public school or public college;

"(B) participating in or enjoying a benefit, service, privilege, program, facility, or activity provided or administered by a state or subdivision thereof;

"(C) serving as a grand or petit juror in a court of a state or attending court in connection with possible service as such a grand or petit juror;

"(D) enjoying the goods, services, facilities, privileges, advantages, or accommodations of:

"(i) an inn, hotel, motel, or other establishment which provides lodging to transient guests;

"(ii) a restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility which serves the public and which is principally engaged in selling food or beverages for consumption on the premises;

"(iii) a gasoline station;

"(iv) a motion picture house, theater, concert hall, sports arena, stadium, or any other place of exhibition or entertainment which serves the public; or

"(v) any other establishment which serves the public, which is located within the premises of any of the aforesaid establishments or within the premises of which is physically located any of the aforesaid establishments, and which holds itself out as serving patrons of such establishments;

"(E) applying for or enjoying employment, or a perquisite thereof, by a private employer or by an agency of a state of subdivision thereof, or joining or using the services or advantages of a labor organization, hiring hall, or employment agency;

"(F) selling, purchasing, renting, financing, or occupying a dwelling; or contracting or negotiating for the sale, purchase, rental, financing or occupation of a dwelling; or applying for or participating in a service, organization, or facility relating to the business of selling or renting dwellings; or

"(G) traveling in or using a facility of interstate commerce, or using a vehicle, terminal, or facility of a common carrier by motor, rail, water, or air; or

"(2) because such other person is or has been, or in order to intimidate any person from:

"(A) affording another person or class of persons opportunity or protection to participate without discrimination on account of race, color, religion, or national origin in any benefit or activity described in this section; or

"(B) aiding or encouraging another person or class of persons to participate without discrimination on account of race, color, religion, or national origin in any benefit or activity described in this section.

"(b) DEFENSE.—It is a defense to a prosecution under subsection (a)(1)(D)(i) that:

"(1) the defendant was the proprietor of the establishment involved or an employee acting on behalf of the proprietor;

"(2) the establishment was located within a building containing not more than five rooms for rent or hire; and

"(3) the building was occupied by the proprietor as his residence.

"(c) GRADING.—An offense described in this section is a Class A misdemeanor.

"§ *1513. Interfering With Speech or Assembly Related to Civil Rights Activities*

"(a) OFFENSE.—A person is guilty of an offense if, by force or threat of force, he intentionally injures, intimidates, or interferes with another person because he is or has been, or in order to intimidate him or any other person from, participating in speech or assembly opposing any denial of opportunity to participate:

"(1) in any benefit or activity described in section 1511; or

"(2) in any benefit, activity described in section 1512 without discrimination on account of race, color, religion, or national origin.

"(b) GRADING.—An offense described in this section is a Class A misdemeanor.

"§ *1521. Obstructing an Election*

"(a) OFFENSE.—A person is guilty of an offense if, in connection with a primary, general, or special election to nominate or elect a candidate for federal office, he knowingly:

"(1) obstructs, impairs, or perverts the lawful conduct of such election;

"(2) offers, gives, or agrees to give anything of value to another person for or because of any person's voting, refraining from voting, or voting for or against a candidate; or

"(3) solicits, demands, accepts, or agrees to accept anything of value for or because of any person's voting, refraining from voting, or voting for or against a candidate.

"(b) GRADING.—An offense described in this section is a Class E felony.

"§ *1522. Obstructing Registration*

"(a) OFFENSE.—A person is guilty of an offense if, in connection with registration to vote at a primary, general, or special election to nominate or elect a candidate for federal office, he knowingly:

"(1) obstructs, impairs, or perverts the lawful conduct of such registration;

"(2) offers, gives, or agrees to give anything of value to another person for or because of any person's registering to vote;

"(3) solicits, demands, accepts, or agrees to accept anything of value for or because of any person's registering to vote; or

"(4) gives false information to establish his eligibility to vote.

"(b) GRADING.—An offense described in this section is a Class A misdemeanor.

"§ *1523. Interfering with a Federal Benefit for a Political Purpose*

"(a) OFFENSE.—A person is guilty of an offense if, with intent to interfere with, restrain, or coerce another person in the exercise of his right to vote at a primary, general, or special election to nominate or elect a candidate for federal, state, or local elective office, he withholds or threatens to withhold from any other person, or deprives or threatens to deprive any other person of, the benefit of a federal program or federally-supported program, or a federal government contract.

"(b) GRADING.—An offense described in this section is a Class A misdemeanor.

"§ *1524. Misusing Authority Over Personnel for a Political Purpose*

"(a) OFFENSE.—A person is guilty of an offense if, as a federal public servant, he promotes, fails to promote, demotes, or discharges another federal public servant, or in any manner changes or promises or threatens to change the official position or compensation of another federal public servant, for or because of any person's giving, withholding, or neglecting to make a political contribution.

"(b) GRADING.—An offense described in this section is a Class A misdemeanor.

"§ *1525. Soliciting a Political Contribution by a Federal Public Servant or in a Federal Building*

"(a) OFFENSE.—A person is guilty of an offense if:

"(1) as a federal public servant, he knowingly:

"(A) solicits a political contribution from another federal public servant; or

"(B) makes a political contribution to another federal public servant in response to a solicitation; or

"(2) he knowingly solicits or receives a political contribution in a federal building or facility.

"(b) GRADING.—An offense described in this section is a Class A misdemeanor.

"§ *1526. Political Contribution by an Agent of a Foreign Principal*

"(a) OFFENSE.—A person is guilty of an offense if:

"(1) as an agent of a foreign principal, he knowingly makes or promises to make a political contribution; or

"(2) he knowingly solicits, accepts, or receives a political contribution from an agent of a foreign principal, or from a foreign principal or government.

"(b) GRADING.—An offense described in this section is a Class E felony.

"§ *1527. Definitions for sections 1521 through 1526*

"As used in sections 1521 through 1526:

"(a) 'anything of value' does not include non-partisan physical activities or services to facilitate registration or voting;

"(b) 'federal office' means the office of the President or Vice President of the United States, or Senator or Representative in, or Delegate or Resident Commissioner to, the Congress of the United States;

"(c) 'foreign principal' has the meaning set forth in section 1 of the Foreign Agents Registration Act of 1938, as amended (22 U.S.C. 611), but does not include a citizen of the United States;

"(d) 'political contribution' means anything of pecuniary value used or to be used for the nomination or election of any person to federal, state, or local elective office.

* * * * * * *

STATEMENT OF K. WILLIAM O'CONNOR, DEPUTY ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION, DEPARTMENT OF JUSTICE

Mr. Chairman and members of the Subcommittee, thank you for the opportunity to appear before you today to discuss the civil rights offenses which are proposed to be defined in S. 1400, the Criminal Code prepared by the Department of Justice, and to do so in connection with similar sections of S. 1, the Committee's proposed code.

With me are Robert A. Murphy, Chief of the Criminal Section of the Civil Rights Division, Frank D. Allen, Deputy Chief of that Section, and Edgar Brown of the Criminal Division. My remarks will be brief so that we can answer your questions.

Attorneys in the Department of Justice have spent a great deal of time and thought in discussing and formulating what would be the Civil Rights sections of S. 1400, and we urge your favorable consideration of them. At the outset, let me mention that most of the Civil Rights offenses which are defined in both bills before the Committee are simply a restatement of the law as it exists today. For example, Sections 1511 through 1513 of S. 1400 simply reflect a reorganization and redefinition of the present law now found in Sections 245 of Title 18 and 3631 of Title 42, of the United States Code. No substantive change has been recommended in those sections. It is our observation that these Sections cover the same offenses as those sought to be proscribed by Sections 2–7F2 through 2–7F4 of the Committee's bill.

Section 1501 of the Department's proposal combines present Sections 241 and 242 of Title 18, removing what we think are anachronistic aspects of them. Section 1501, therefore, removes the conspiracy aspect to the crime covered by present § 241, as does Section 2–7F1 of the Committee's bill. The broad language of Section 1501 of the Department's code and of Section 2–7F1 of the Committee's bill also gives recognition to the need for the opportunity to use a case law approach to the development of civil rights law. This approach was endorsed by the Commission on the Reform of the Criminal Laws in their report to the Congress and to the President.

There are, however, differences between the general civil rights proposals of S. 1 and S. 1400. S. 1 has a culpability standard of "intentionally" while S. 1400 requires that the criminal act be done "knowingly." In a broadly worded statute, such as these civil rights statutes, the state of mind with which the offender acts is important to prevent the statute from being held unconstitutionally vague. This test was applied to present Section 242 by the Supreme Court in *Screws* v. *United States* and to present § 241 in *United States* v. *Guest*. The majority of the Court in *Screws* held that the word "willful" in § 242 saved the statute. They interpreted this to mean that the jury must be charged in prosecutions under these statutes that they must find that the defendant acted with the "specific intent to deprive the victim of a right made definite by statute or rule of law." We believe that "knowingly," as defined in Section 302(b) of S. 1400, and as used in Section 1501 meets the Supreme Court's requirement as to definiteness. It is our position that the higher standard—"intentionally"—need not be used to meet this test.

S. 1 retains that part of Section 241 which concerns "going on the highway in disguise." We believe that with the elimination of the conspiracy requirement of § 241, this language simply states one means by which an individual can violate the law and that it is no longer necessary to retain such language in the generally worded provision of § 1501 in S. 1400. Finally, Section 2–7F1 of S. 1 retains the language of present Section 242 of Title 18 relating to deprivation of rights by persons acting under color of law, while that language does not appear in Section 1501 of S. 1400. It is our view that such language, appearing in subparagraph (3) of Section 2–7F1 is really not necessary because of the general proscription against deprivation of rights found in subparagraph (1). Similarly, such language would be repetitious if it appeared in S. 1400 because of proposed Section 1502.

Section 1502 represents the efforts of the Department of Justice to address what we consider to be a very significant area of law enforcement—that of dealing with unlawful acts of public officials which infringe upon individual rights. It is not significant, in the Department's view, because such conduct is extensive or because there are a significant number of law enforcement officers who are criminals. Rather, it is significant because those few law enforcement officers who mistreat citizens do an injury to the legal system which goes far beyond their single acts, and an effective federal sanction should follow such acts.

Before describing the proposed changes in present law in this area, let me give you a brief description of the work of the Civil Rights Division of the Department of Justice.

Each year for the past few years the Criminal Section of the Civil Rights Division has received between 8,000 and 10,000 complaints from citizens alleging that their civil rights have been violated in some way—most complain of some form of mistreatment by law enforcement officers. The complaints are analyzed by personnel in the Criminal Section to determine if they allege a violation of any statute over which the Section has jurisdiction. Based on those complaints, approximately 3,000 preliminary investigations are conducted by the Federal Bureau of Investigation either at the Division's request or at their own initiative in accordance with standing policy. Each investigation, when completed, is analyzed by an attorney or attorneys in the Criminal Section as well as by the appropriate United States Attorneys' offices, to determine whether further investigation is required, whether the matter should be closed or whether a prosecution should be recommended. In the fiscal year 1973 about 110 matters were presented to Grand Juries for their evaluation and possible indictment, something less than 2% of the original complaints, again, most involving alleged physical mistreatment of the complainant by a law enforcement officer. After grand jury investigations, a few of these were either dropped by the Department, or no-billed. Thus, the resulting prosecutions represent careful screening and professional judgments as to the merits of each case.

Our decision to institute a prosecution is based primarily upon evidentiary considerations; not, usually, upon judgments that particular cases do not meet some policy guidelines. That is, in the cases that are not prosecuted, the principal reason is that we do not believe the available evidence will prove the truth of the victim's, or complainant's, allegations. We also close some matters without prosecution because state or local authorities have acted to vindicate the rights involved.

I mention these things to illustrate that if the statutory conceptualizations which we propose are adopted, the decisions about what cases to prosecute will not change, and the number of prosecutions against law enforcement officers would not increase.

During fiscal 1973, cases involving 80 defendants were terminated at the trial level by the Criminal Section of the Civil Rights Division. Of these, 52 defendants were law enforcement officers who were charged under present § 242 with depriving persons of federal constitutional rights through the use of excessive force. These defendants' charges were terminated in the following manner.

Four were dismissed at the government's motion.

Four pleaded guilty.

Forty-four were tried, and nine of the 44 were convicted.

While this gives the Section a slightly better conviction rate for fiscal 1973 in this type case than in the last three fiscal years combined—25% compared to about 12%—it is in striking contrast to the Section's conviction rate of 68% in other types of civil rights cases involving other statutes.

There maye be a number of reasons for the low success rate for police brutality cases, but we believe that the jury instructions which are now required contribute significantly to acquittals—particularly the instructions which require the government to prove that the defendant acted with the specific intent to deprive the victim of a constitutional right; an intent to assault or murder will not suffice.

Presently, except in cases involving the most protracted kind of torture, federal law enforcement in this area is hampered because of a lack of clear legislative standards, particularly in the kind of intent which must be proved. This intent was read into the statute by the Supreme Court in the *Screws* case which I previously mentioned to keep it from being vague in its breadth of wording. This kind of intent would not be necessary under criminal statutes which more precisely define prohibited conduct, such as one where the crime prohibited is murder or assault, with the culpability to be proven commensurate with that crime.

In fact, what is involved in these cases is basically an assault or a murder, an unjustified use of force, acts which are crimes under state laws, and are commonly understood as such. Under these circumstances the appellate courts have made it clear that there is a right protected by the Fourteenth Amendment of the Constitution not to be subjected to unjustified or legally unauthorized force by persons who act while clothed with the authority of the state. Because, however, of the very broad wording of § 242 and in order to avoid an unconstitutionally broad application of this statute, the jury must find in any prosecution brought under this statute that the defendant acted with the specific intent to deprive the victim of a federal right.

In addition to acquittals of defendants by juries, we have had district judges dismiss cases in the absence of clear legislative standards because their conceptualization of the presently vague standards under present § 242 does not comport with a more generally accepted definition of due process of law. Such interpretations lead to erratic application of the law, and diverse results.

For example, a judge refused to let a case go to the jury in which a police officer had knocked two teeth from a juvenile who was arrested for drinking under age. We had charged the officer with depriving the juvenile of his liberty without due process of law by the unjustified beating which he administered. The court ruled that although there was evidence that the officer struck the juvenile and had committed assault and battery, he had not deprived the juvenile of a federal right because the juvenile had received a hearing on the drinking charge, that is, he had received due process of law.

In another case which a judge refused to submit to a jury, a striking with a blackjack by a police officer and a resultant death of an incarcerated drunk had been shown by the evidence. The judge ruled that while there was evidence that the blow had been delivered either in anger or in an effort to quiet the drunk or to subdue him, there was no evidence, in the judge's mind, that the blow had been administered to summarily punish the victim. Therefore there was no federal crime.

These two cases also illustrate the vagueness problem that exists with present Section 242, which would be corrected by the Department's proposal.

We believe that, in keeping with the format of both bills before the Committee and with that of the Brown Commission's proposed code, a statute can be drawn which places the issue at any trials brought under them within the framework of what actually occurred—that is, an assault, a homicide, or a theft. If a law enforcement officer unlawfully assaults or murders a citizen, that is what the jury should be asked to try, not the abstract issues of specific intent to deprive of a constitutional right which in most cases involving violence is no standard of culpability at all.

At this point, it should be noted that the jury should also try any defense of justification which the officer might have, as described in Chapter 5 of S. 1400, in their precise terms and not as a component of specific intent.

The motive for which the crime was committed, whether to extort a confession or to visit retribution, or punishment, on the victim, should not be made an element of the offense.

However, there must be a constitutional basis for trying this kind of crime in federal court. Obviously, an assault or even a murder by a law enforcement officer, if not done under color of law, such as one which is the result of a family dispute or a personal quarrel with a neighbor, is not a violation of a Fourteenth Amendment right, and would not be covered by the proposed statute. Additionally, there is a safeguard in proposed Section 1502 which would require the judge to determine that if the facts are as the government's witnesses say they are, a violation of a federal right necessarily occurred. This question is not submitted to the jury, however, but rather the jury would be instructed in terms of the prohibited conduct—assault, murder, etc. and would assess the defendant's culpability in those terms rather than in constitutional terms.

In considering the various proposals before the Congress, I would hope that serious attention is given to defining in specific terms what kinds of conduct are to be prohibited by police officers and what is not, so that prosecutors, judges and juries as well as potential defendants can have a reasonable certainty as to what the law is. We believe that the Department's proposals accomplish this objective.

Mr. Chairman, that concludes my prepared statement and we will be happy to answer any questions which the Subcommittee members might have.

Mr. O'Connor. Thank you, Senator.

The Department's position on the civil rights provisions of S. 1400 is that they are a significant clarification which is required in order to insure good law enforcement of presently existing statutes, that they are in no sense an amplification or expansion of present Federal jurisdiction but rather are a restatement of the law as it exists today in terms that are meaningful and understandable to those who are charged with administering the law and to those upon whom these statutes may operate.

The bills which are presently before the subcommittee, upon which we have been asked to testify, are S. 1 and S. 1400. S. 1400, of course, is the bill which we support. However, S. 1400 and S. 1 are so similar in most respects that the testimony which I would give here would mostly be applicable to S. 1 as well.

I think the first difference I would allude to between S. 1 and S. 1400 is the culpability standard which is adverted to in the provisions relating to actions under color of law. S. 1 has a culpability standard of intentionally committing a proscribed act while S. 1400 requires that the act be done knowingly.

I think that knowingly is a better statement of what the law requires than intentionally, and I reach that conclusion by analysis of the case law which has flowed under existing section 242 of title 18.

The issue is to establish a specific intent which is sufficient to sustain the constitutionality of the statute, that is, so a person can know what they are charged with, and the standard of knowingly seems to us to meet this test effectively.

Therefore, we support the use of the word knowingly in S. 1400 rather than the word intentionally, which is the S. 1 standard proposed.

Now, one of the differences between S. 1 and S. 1400 is the elimination in S. 1400 of the language regarding going in the highway in disguise, which is presently found in section 241, the conspiracy section of title 18. We do not think that going on the highway in disguise is any longer a seriously useful piece of legislation. That was part of the anti-Klan legislation which was, of course, a reconstruction statute and we think we have gotten beyond the time where that particular language is necessary.

Now, the statutes that are proposed here can be divided really into two categories, Senator. One is the category which is in fact a restatement exactly of existing law. That would be sections 1511 and 1512. Those statutes as proposed in section 1511, 1512 and 1513 of S. 1400 are simply restatements in haec verba of the statutes which are presently found as 18 U.S.C., secs. 245 and 3651. The intention here is simply a draftsman's intent to put in sequential order a statute which relates to the same general subject matter. So these three sections to which I have adverted are not changes from existing law at all.

The other classification in which there are changes in existing law, the one to which I had hoped we might address most of the testimony today, is an attempt to make our position clear and to insure that the subcommittee has the opportunity to ask any questions which it may have.

I think that it may be helpful, Senator, if in our discussion of these I present some limited statistical information that may elucidate the kind of criminal law enforcement that we are engaged in.

I should say most of the work done under the statutes which we are discussing, particularly section 242, is the prosecution of law enforcement officers who have violated the rights of people with whom they have come in contact in the course of their duties.

Now, I should advise the subcommittee that we receive in our ordinary course of business some 10,000 complaints of this sort of conduct annually. It has been higher but for the last 3 years it has been about 10,000 complaints a year.

Mr. Murphy and his staff analyze the complaints that come in and determine which, if any, have any merit that requires further questions to be determined. About 3,000 matters a year are subject to further examination either on the initiative of the Federal Bureau of Investigation, which receives individual complaints from citizens, or persons who feel their rights have been abused, or on the instructions of our criminal section.

Of the 3,000 investigations which are undertaken, and I think it is split about 50–50 between Criminal Section requests and FBI initiation, perhaps 100 matters come out as having sufficient merit and sufficient intricacy to warrant being presented to a Federal grand jury to determine whether or not indictments should be brought.

Senator HRUSKA. That is 100 cases out of how many complaints?

Mr. O'CONNOR. 10,000.

I think that one might draw the very proper conclusion from those statistics that law enforcement officers are among the most law-abiding folk you can find. But to pass from that digression and to go on, out of the 100 presentations to a grand jury, perhaps 50 or so would result in indictments, and of the 50 some are disposed of by pleas, some by trial and some by other means. But the reason that I go through those numbers, Senator, is because it shows how you start with a very, very broad funnel and you come to a very, very narrow aperture at the bottom of the funnel through which these criminal prosecutions may be strained.

Now it is our position that the statute proposed, S. 1400, would not in any sense amplify the volume of prosecutions, it would clarify the presentation in a court of law of evidence for the benefit of the defendants and the judge and the jury, but it would not amplify the Federal jurisdiction or increase the scope of potential prosecutions. It is, therefore, intended to be a means of making the law more intelligible and more precise and more relevant to those who both come before the court as defendants and those who are required to judge or to judge the facts as jurors.

Senator HRUSKA. Now, if section 1502 of S. 1400, were approved and enacted into law, would that increase the number of prosecutions brought against law enforcement officers?

Mr. O'CONNOR. I think it would not at all increase the number of prosecutions against law enforcement officers. As I have indicated, Senator, the situation is that the 242 type prosecution, which is what we are here discussing, 18 U.S.C. 242 being a protective statute that is in force, is usually invoked when there is an allegation of physical abuse of some kind occurring in the course of, the intercourse, if you like, between the law enforcement officer and the person with whom he comes in contact in the course of his duties as a law enforcement officer,

typically a person who is arrested or stopped for speeding or intercepted in some appropriate means by the law enforcement officer for some ostensible violation of the law.

The undertaking of the prosecution under the existing statute or under the proposed would only occur if the use of force, which was indicated here, in this particular instance, was unjustified and was imposed as a punitive sanction by the law enforcement officer who in effect had arrested the person under color of law perhaps for a real violation. The jury issue would be different, however, under the proposed statute. The jury would be required to consider the facts which were presented as they relate to the actual offense which occurs, which is, generally speaking, under 242, an assault and battery kind of issue, and the question reserved for the court would be the legal issue as to whether or not there was a right involved which was being trespassed upon by the actions of the law enforcement officer. That is exactly the same standard of analysis applied in the Criminal Section of the Civil Rights Division and by me ultimately in authorizing or declining to authorize a prosecution today, and it would be in the future. So I think this change would be zero.

Senator HRUSKA. Mr. O'Connor, does this section 1502 reach beyond the power of Congress to enforce the 14th amendment by making every crime by a law enforcement officer a Federal crime?

Mr. O'CONNOR. No, sir, we do not think that it does. The statute proposed does no more really than make an explicit legislative enactment of what the courts in interpreting existing statutes have already said was a deprivation of federally protected rights. The statute does not intend nor does it make every crime by a law enforcement officer a Federal crime but relates only to those acts which are committed while acting under color of law, that is, abusing or misusing a power which is granted to the law enforcement officer by the States, and which he possesses by virtue of such a law and which he has used in such a way as to deprive the individual who is ostensibly the victim of a federally protected right.

I could perhaps digress a moment there and say that it often occurs, because law enforcement officers are human like other people, that there are acts done by them which are in effect transgressions of State laws. The private occasion of a violation of State law by a law enforcement officer which has nothing to do with his action under color of law, would, of course, not be covered in the proposed statute. It is quite possible that a law enforcement officer may lose his temper, have an altercation with someone over a private matter, one unrelated in any sense to his discharge of his duties or to his actions under color of law. Such matters would not be covered by the proposed statute nor are they now.

Senator HRUSKA. It seems that the approach taken by S. 1400 and S. 1 is to eliminate the vagueness of present section 242, but in S. 1 by section 2–7F5, unlawful acts under color of law are prohibited in more traditional civil rights language while S. 1400 simply makes reference to the common crimes found in chapters 16 and 17.

Why is your approach considered preferable to the approach of S. 1?

Mr. O'CONNOR. Senator, the view of the Department is that a criminal statute which is imprecise is both dangerous and misleading to

the rights of the defendants and to the problems attending prosecution. Therefore, the maximum law enforcement efficiency and appropriateness is accomplished by having a precise and concisely worded statute.

Now what we believe we have accomplished here, in the distinctions to which the Senator just adverted, is a step, in fact a broad step, towards a more precise articulation of the kinds of conduct which are prohibited. For example, subpart 1 of 2–7F5 states that a crime is committed if violence or detention is applied which is unlawful. That is a difficult standard. It would require significant amounts of interpretation by courts of appeals, I am sure, before a fair and understandable standard of guilt could be defined under which people who are charged with the crime could defend themselves or under which people who are charged with law enforcement could introduce appropriate proof.

The intent of the statute which we are supporting, S. 1400, is to make a precise articulation by adverting to specific identified crimes as in chapters 16 and 17, and I think that that system makes it much, much easier for the defendant to understand what he is charged with, for the jury to understand what the defendant is charged with, for the defense counsel to know how to defend his matter, and, for that matter, for the judge to know how to instruct the jury.

Senator HRUSKA. What you say would indicate that you believe an attempt to specify those constitutional rights intended to be protected by sections 1501, 1502, would raise problems, is that correct?

Mr. O'CONNOR. The constitutional rights protected are exceedingly broad, of course, and I think that in the system that is proposed in S. 1400 we define a number of circumstances which relate precisely to the kinds of violations which are likely to arise. That makes it a much more precise and understandable standard of conduct to which people must adhere.

Senator HRUSKA. Section 1501 could be described as a sort of a catch-all section, couldn't it?

Mr. O'CONNOR. It is pretty much of a section that catches together some of the general and broad rights. It is a modification of 241, of course, with the elimination of the conspiracy concept, 241 being a previous conspiracy section under title 18. The purpose of 1501 is to allow for an orderly development of law and to insure that the rights which are available in the pronouncements of the constitution are protected by statute.

Senator HRUSKA. Have you completed your comment on your statement?

Mr. O'CONNOR. Yes, sir. I would be happy to answer any further questions or any comments that the Senator might wish to make.

Senator HRUSKA. I will ask Mr. Summitt if he has any questions.

Mr. SUMMITT. No, sir.

Senator HRUSKA. Have you any, Mr. Lazarus?

Mr. LAZARUS. No.

Senator HRUSKA. Very well, this is a very fine statement and we appreciate your testimony. We would like to suggest that if we have any questions that arise as a result of later testimony upon further analysis of this subject, that we could address a letter to you and get some further views on your part.

Mr. O'Connor. We would be delighted to furnish further views on any areas of this matter that would be of interest to the subcommittee and will, of course, await your communication.

Senator Hruska. Thank you all for coming.

Our next witness, John C. Keeney, Deputy Assistant Attorney General, Criminal Division, will testify on the subject of elections. Mr. Keeney, please identify the people who are with you.

STATEMENT OF JOHN C. KEENEY, DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, ACCOMPANIED BY WALTER BARNES, ATTORNEY, FRAUD SECTION, CRIMINAL DIVISION, AND EDGAR BROWN, CRIMINAL CODE REVISION UNIT

Mr. Keeney. Yes: on my left is Walter Barnes who is the head of the election fraud unit in the Fraud Section of the Criminal Division, and on my right is Edgar Brown who is in the Code Revision Unit and who has for a number of years had extended experience in the enforcement of the election laws.

Senator Hruska. You filed a statement with the committee. The statement will be incorporated into our printed record in full. If you choose to read it, that will be fine, if you want to just comment on it that would also be well.

In addition to your statement, you also have an analysis of the several sections upon which you will testify that will be included in the printed material.

[The documents referred to follow:]

Department of Justice Memorandum on Sections 1521–1527 of the Criminal Code Reform Act (Election Offenses)

I. CURRENT LAW

The federal election laws are located in a number of different titles of the United States Code. The principal statutes are contained in Chapter 29 (Elections and Political Activities) and Chapter 13 (Civil Rights) of Title 18; Chapter 14 (Federal Election Campaign) of Title 2; Subchapter III (Political Activities) of Chapter 73 of Title 5 (Government Organization and Employees); and Chapter 20 (Elective Franchise) of Title 42 (Public Health and Welfare). Together these statutes comprehend a number of quite different legislative objectives: (1) to prevent vote fraud; (2) to protect civil rights; (3) to protect federal programs; (4) to protect federal employees from improper influence; and (5) to regulate candidates and political committees.

A. *Election fraud*

Section 241 of Title 18. The principal federal statute for prosecuting election fraud is Secton 241, which was enacted May 31, 1870, to enforce the guarantees of the Fourteenth and Fifteenth Amendments to the Constitution.[1] The penalty is a fine of $10,000 or imprisonment for ten years, or both. Under this section the Government has successfully prosecuted conspiracies to stuff a ballot box with forged ballots,[2] to impersonate qualified voters,[3] to alter legal ballots,[4] to prevent voters from voting,[5] to fail to count votes and to alter the votes counted,[6]

[1] 16 Stat. 141.

[2] *United States* v. *Saylor*, 322 U.S. 385 (1944); *United States* v. *Nathan*, 238 F. 2d 401, *cert. den.*, 353 U.S. 910; *United States* v. *Skurla*, 126 F. Supp. 713 (W.D. Pa. 1954).

[3] *Crolich* v. *United States*, 196 F. 2d 879 (5th Cir., 1952), *cert. den.*, 344 U.S. 830.

[4] *United States* v. *Powell*, 81 F. Supp. 288 (E.D. Mo. 1948).

[5] *United States* v. *Wilson*, 72 F. Supp. 812 (W.D. Mo. 1947).

[6] *United States* v. *Ryan*, 23 F. Supp. 513 (W.D. Mo. 1938); *Walker* v. *United States*, 93 F. 2d 383 (8th Cir., 1937), *cert. den.*, 303 U.S. 644.

to discriminate on account of race,[7] and to cast illegal absentee ballots.[8] Section 241 reaches fraud even when the result does not affect the outcome of the election, or when the number of fraudulent ballots represents an infinitesimal fraction of the number of votes cast.[9] Under the doctrine in *United States* v. *Price*, 383 U.S. 787, at 805, Section 241 protects "rights under the entire Constitution, including the Thirteenth, Fourteenth and Fifteenth Amendments, and not merely under part of it."

Nevertheless, there are important limitations to Section 241. A conspiracy between two candidates for the Pennsylvania State Legislature to obtain a recount of boxes and to stuff them in their favor did not constitute an offense under this statute. Here the offense, if any, was against the State and not against the right to vote protected by the United States Constitution.[10] Because of the reach of the Fifteenth Amendment, Section 241 is interpreted to prohibit racial discrimination in voting at *any* election, but it does not reach fraud in State and local elections.

A second limitation upon Section 241 is that it does not, according to the Supreme Court, cover bribery of voters,[11] an offense that also could not be prosecuted under the general conspiracy statute as a fraud against the Government.[12] Bribery of voters, or vote buying was made a separate offense by the Federal Corrupt Practices Act of 1925 and is now prohibited by Section 597 of Title 18.[13]

B. Bribery

1. Section 597 of Title 18. As indicated above, vote buying is covered by Section 597 of Title 18. Until enactment of the Federal Election Campaign Act of 1971, Section 597 did not cover primary elections, with the anomalous result that it was a crime to buy and sell votes at a general election, but it was not unlawful to do so at a primary election, at least in the absence of a State statute making it an offense. Violations are punishable by a fine of $1,000 or imprisonment for one year or both, and willful violations are punishable by a fine of not more than $10,000 or imprisonment for two years, or both.

2. Section 1973i(c) of Title 42. A second statute dealing with bribery of voters was enacted as part of the Voting Rights Act of 1965.[14] Section 1973i(c) of Title 42 makes it a crime to pay or offer to pay or to accept a payment either for registering to vote or for voting at a federal election. The penalty is a fine of $10,000 or imprisonment for five years, or both. Section 1973i(c) also covers the giving of false information as to one's name, address, or period of residence in the voting district in order to qualify for registration. Except for this provision, Section 1973i(c) duplicates Section 597. At the time the latter was enacted, however, Section 597 did not reach primary elections.

C. Corrupt practices

1. Chapter 29 of Title 18 includes a number of statutes that may be characterized as prohibiting or regulating corrupt practices. Many originated before the Federal Corrupt Practices Act of 1925; others were enacted in the Hatch Act

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[7] *Ex parte Yarbrough*, 110 U.S. 651 (1884); *Guinn* v. *United States*, 238 U.S. 383 (1915); *United States* v. *Classic*, 313 U.S. 299 (1941).

[8] *United States* v. *Chandler*, 157 F. Supp. 753 (S.D.W. Va. 1957); *Fields* v. *United States*, 228 F. 2d 544 (4th Cir., 1955), *cert. den.*, 350 U.S. 982; *United States* v. *Weston*, 417 F. 2d 181 (4th Cir., 1969), *cert. den.*, 396 U.S. 1062.

[9] *Prichard* v. *United States*, 181 F. 2d 326 (6th Cir., 1950). At page 331, the Court points out: "The deposit of forged ballots in the ballot boxes, no matter how small or great their number, dilutes the influence of honest votes in an election, and whether in greater or less degree is immaterial."

[10] *Steedle* v. *United States*, 85 F. 2d 867 (3rd Cir., 1936).

[11] *United States* v. *Bathgate*, 246 U.S. 220 (1918). The Court held that conspiracy to bribe voters at an election for a United States Senator and a Representative to Congress lay beyond Section 241. The Court pointed out that Section 241 was first enacted as Section 6 of the Enforcement Act of 1870 and that Section 19 of the Act punished bribery of voters. In 1894 Congress repealed large portions of the Enforcement Act, including the bribery section, but left what is now Section 241. Accordingly, the Court concluded that repeal of the bribery provision did not have the effect of enlarging the coverage of Section 241 (246 U.S. at 226):

"Bribery expressly denounced in another section of the original act, is not clearly within the words used; and the reasoning relied on to extend them thereto would apply in respect of almost any act reprehensible in itself, or forbidden by state statutes, and supposed injuriously to affect freedom, honesty, or integrity of an election."

[12] *United States* v. *Gradwell*, 243 U.S. 476 (1917).

[13] Conspiracy to bribe voters in violation of the general conspiracy statute is thus cognizable as a conspiracy to commit an offense against the United States, i.e., to violate Section 597. *United States* v. *Blanton*, 77 F. Supp. (D. Mo. 1948). See also, *United States* v. *Foote*, 42 F. Supp. 17 (D. Del. 1942).

[14] 79 Stat. 437.

in 1939, and in the Federal Election Campaign Act of 1971. The following listing of the sections of Chapter 29 of Title 18 illustrates the variety of purposes served by these statutes. They are as follows:

Section 592. Troops at Polls.—This section makes it a felony punishable by imprisonment for five years, or by a fine of $5,000 or both, for a federal employee, civil or military, to order troops or armed men "at any place where a general or special election is held, unless such force be necessary to repel armed enemies of the United States."

There are no cases reported under this section.

Section 593. Interference by Armed Forces.—This section makes it a felony with the same penalty as that provided by Section 592 for an officer or member of the armed forces of the United States to interfere with the conduct of any election in any state.

There are no cases reported under this section.

Section 594. Intimidation of Voters.—Originally Section 1 of the Hatch Act, this section makes it a misdemeanor for anyone to intimidate or threaten another person for the purpose of interfering with the right of such person to vote at a federal election.

There are no cases reported under this section.

Section 595. Interference by Administrative Employees of Federal, State, or Territorial Governments.—This section, enacted in 1940 as an amendment to the Hatch Act, makes it a misdemeanor to use official authority for the purpose of interfering with the nomination or election of a candidate for federal office. It applies to federal employees and persons employed by states "in connection with any activity which is financed in whole or in part by loans or grants made by the United States."

There are no cases reported under this section.

Section 596. Polling Armed Forces.—This section makes it a misdemeanor to poll a member of the armed forces with reference to his vote for any candidate, or to release the results of a poll taken among members of the armed forces.

There are no cases reported under this section.

Section 598. Coercion by Means of Relief Appropriations.—This section makes it a misdemeanor to use money appropriated for federal work relief, relief, or for increasing employment, for the purpose of interfering with a person in the exercise of his right to vote.

There are no cases reported under this section.

Section 599. Promise of Appointment by a Candidate.—This section makes it a misdemeanor for a candidate to use his influence or support for the appointment of a person to public office in order to obtain such person's support for his candidacy. A willful violation carries a two-year sentence or a fine of $10,000, or both.

There are no cases reported under this section.

Section 600. Promise of Employment or Other Benefit for Political Activity.—This section makes it a misdemeanor to promise federal employment or other benefits in consideration for political support for any candidate or political party.

The only reported case under this section held that the statute did not cover primary elections. This limitation was removed by the Federal Election Campaign Act of 1971.

Section 601. Deprivation of Employment or Other Benefit for Political Acitivity.—This section makes it a misdemeanor to deprive another of any position, work or other federal relief benefit on account of race, creed, color, or any political activity.

One case is reported under this section, the same case that was referred to in connection with Section 600.

Section 602. Solicitation of Political Contributions.—This section makes it a three-year felony for a federal employee, including a Senator, Representative, delegate, or resident commissioner to Congress, to solicit or receive a political contribution from any other such person.

A number of cases are reported under this section.

Section 603. Place of Solicitation.—This section make it a three-year felony to solicit or receive political contributions in any room or building occupied by persons covered by Section 602 in the discharge of their official duties.

There are a few cases reported under this section.

Section 604. Solicitation from Persons on Relief.—This section makes it a misdemeanor to solicit or receive political contributions from persons known to be entitled to or receiving federal relief benefits.

There are no cases reported under this section.

Section 605. Disclosure of Names of Persons on Relief.—This section makes it a misdemeanor to furnish to a candidate or political committee any list of names of persons receiving federal relief benefits.

There are no cases reported under this section.

Section 606. Intimidation to Secure Political Contributions.—This section makes it a three-year felony for any person covered by Section 602 to discharge, promote, or degrade or change the rank or compensation of any other officer or employee, or to threaten to do so, on account of his making or failing to make a political contribution.

There are no cases reported under this section.

Section 607. Making Political Contributions.—This section makes it a three-year felony for a federal employee to give or hand over to another federal employee, including a Senator or Representative to Congress, "any money or other valuable thing on account of or to be applied to the promotion of any political object."

There are no cases reported under this section.

Section 608. Limitations on Contributions and Expenditures.—This section makes it a misdemeanor for a candidate for President or Vice President to spend more than $50,000 from his personal funds, including the personal funds of his immediate family, in connection with his campaign for nomination or election; $35,000 in the case of a candidate for the office of Senator; or $25,000 for a candidate for office of Representative to Congress.

There are no cases reported under this section.

Section 610. Contributions or Expenditures by National Banks, Corporations or Labor Organizations.—This section makes it a misdemeanor for a national bank, corporation or labor organization to make a contribution or expenditure in connection with an election for federal office. Officers of such organizations who consent to illegal contributions are expressly made liable under the section, being subject to a two-year felony, a maximum fine of $10,000, or both for willful violations.

There are a number of recent cases under this section.

Section 611. Contributions by Government contractors.—This section carries a five-year sentence or a maximum fine of $5,000, or both for a person holding a government contract to make a political contribution; and for anyone knowingly to solicit a political contribution from a person holding such a contract.

There are no cases reported under this section.

Section 612. Publication or Distribution of Political Statements.—This section makes it a misdemeanor willfully to publish a statement concerning a candidate for federal office without disclosing the names of the persons or concerns responsible for the publication.

There are a number of cases reported under this section.

Section 613. Contributions by Agents of Foreign Principals.—This section prohibits an agent of a foreign principal from making a political contribution in connection with any election, or for anyone knowingly to solicit, accept, or receive such a contribution. This section, a 1966 amendment to the Foreign Agents Registration Act, is a five-year felony, with a maximum fine of $5,000.

There are no cases reported under this section.

This completes the list of election statutes contained in Chapter 29 of Title 18. As indicated, the principal statute relied upon to prosecute federal vote fraud is Section 241 of Title 18, the general civil rights statute.

2. Sections 431–454 of Title 2, United States Code, regulating the disclosure of federal campaign funds, were enacted by the Federal Election Campaign Act of 1971, which extensively revised the disclosure provisions of the Federal Corrupt Practices Act of 1925. Together with the election laws contained in Title 18, the disclosure laws comprise the most significant federal criminal statutes concerning elections.

3. Sections 7323 through 7325 of Title 5 provide administrative sanctions for political activity on the part of federal employees.

4. Chapter 20 of Title 42 contains a large number of sections to protect voters from discrimination in violation of the Fifteenth Amendment. Section 1973i(c) of Title 42 is an exception to the general subject matter of Chapter 20. This section, added by the Voting Rights Act of 1965, makes it a five-year felony, with a possible fine of $10,000, to give false information to establish one's eligibility to vote or to pay for registration or voting.

II. THE PROPOSALS OF THE NATIONAL COMMISSION ON REFORM OF THE FEDERAL CRIMINAL LAWS

A. Election fraud

Section 1531 of the Final Report makes vote fraud a specific offense covering the kinds of fraud typically prosecuted under Section 241. Section 241 is retained as a general civil rights statute by Section 1501 of the Final Report. Section 1531 combines Section 597 of Title 18 with Section 1973i(c) of Title 42. Unlike present law, however, the Final Report extends vote fraud to state and local as well as Federal elections.

Developments after the issuance of the Final Report indicate that coverage of state and local elections is probably unsound. Section 1531 assumes that federal jurisdiction exists to protect the right to vote at all elections, whereas that continues to be true only with respect to protecting against racial discrimination in elections. The right to vote for federal candidates does not empower Congress to enact voter qualifications for state and local elections, for example.[15] The confusion arises because vindication of the right to vote developed as part of the law of civil rights. Section 241 has not only been the principal statute for prosecution into fraud but also for protecting civil rights generally from the Civil War era until the 1960's, when special legislation was enacted to combat discrimination in public accommodations, housing, schools, federally-assisted programs, and employment.[16]

Between 1957 and 1970 the principal legislative and enforcement efforts in the voting field were aimed at preventing racial discrimination in voting. Beginning with the Civil Rights Act of 1957,[17] creating the Civil Rights Division in the Department of Justice and the Commission on Civil Rights to investigate voting complaints and to make recommendations for legislation, Congress enacted a series of civil rights statutes to implement the command of the Fifteenth Amendment that the right of citizens to vote "shall not be denied or abridged . . . on account of race, color, or previous condition of servitude."

The most far-reaching of these enactments was the Voting Rights Act of 1965.[18] Congress here abandoned the case-by-case approach to enforcement of the Fifteenth Amendment and substituted a degree of federal control over elections reminiscent of the Enforcement Act of 1870.[19] The Supreme Court upheld the Act in the *State of South Carolina* v. *Katzenbach*, 383 U.S. 301, pointing out that "the Voting Rights Act of 1965 reflects Congress' firm intention to rid the country of racial discrimination in voting." (*Supra*, at p. 315.)

The Act was a reoccupation of the election field abandoned by Congress in 1894 when it repealed major portions of the Enforcement Act. Among other things, the Voting Rights Act of 1965 suspended literacy tests and similar voter qualifications for a five-year period. The Act subjected all new state voter qualifications to federal administrative review and, when necessary, provided for the appointment of federal examiners to register voters. Congress extended the Act to any political subdivision where the Attorney General determined that a literacy test was employed on November 1, 1964, and where the Director of the Census determined that less than fifty percent of the residents of voting age had been registered to vote on that date or had voted in the 1964 general election.

Like the period between 1870 and 1894, marking enactment and repeal of the Enforcement Act, the period between 1957 and 1970 was preoccupied with eliminating racial discrimination in voting. Sporadic attempts may yet be made to deprive citizens of their right to vote in violation of the Fifteenth Amendment, yet it is unlikely that the Department of Justice will be called upon to employ a full division of attorneys to wage a county-by-county legal battle against state-supported voter discrimination. A sign that this era has closed may be seen in the shift from legislation concerned exclusively with voting rights to legislation aimed at civil rights generally, a change that can be detected in provisions of the Voting Rights Amendments Act of 1970.[20] The Act outlawed durational residence requirements for voting for President and Vice President,

[15] *Oregon* v. *Mitchell*, 400 U.S. 112 (1970).
[16] See particularly § 2000 a–e, Title 42 U.S.C.
[17] Civil Rights Act of 1957, 71 Stat. 634, 42 U.S.C. 1971.
[18] Voting Rights Act of 1965, 79 Stat. 437.
[19] Enforcement Act of 1870, 16 Stat. 140.
[20] Voting Rights Amendments Act of 1970, 84 Stat. 314, 42 U.S.C. 1973 aa–bb.

and reduced the voting age to 18 for federal, state and local elections. Most recently Congress enacted the Federal Election Campaign Act of 1971, the first election reform legislation in forty-seven years.[21]

The confusion between Congress' power to cope with racial discrimination and its power to legislate generally in the election field is highlighted by the case of *Oregon* v. *Mitchell*, 400 U.S. 112 (1970), in which there were challenged various provisions of the Voting Rights Amendments Act of 1970, including the 18-year-old vote qualification. On the issue of applying the 18-year-old vote qualification to state elections, Justice Black believed that Article I, Section 2 of the Constitution authorized the states alone to set voter qualificaions, though he conceded the authority of Congress to do so for federal elections. Justice Douglas concluded on the basis of the Fourteenth Amendment that Congress had the power to prescribe voter qualifications for all elections. Following a lengthy review of the history of the Fourteenth Amendment, Justice Harlan found that Congress could not enact voter qualifications for either federal or state elections. On the other hand Justice Brennan, with Justices White and Marshall, concluded that Congress had the power to set the age qualification for voters at both federal and state elections. This followed another lengthy review of the history of the Fourteenth Amendment. Justice Stewart, the Chief Justice and Justice Blackmun held that Congress had no power to confer the right to vote in federal or state elections.

The Twenty-sixth Amendment to the Constitution, which became effective July 5, 1971, resolved the 18-year-old vote issue, but of course did not affect the reasoning of the justices in the *Oregon* case respecting the power of Congress over elections. The division of opinion exhibited by the Court in this case is ample reason to avoid formulations, such as Section 1531 of the Final Report, extending coverage to State and local elections.

B. Grading for election fraud

An offense under Section 153 of the Final Report is graded a Class A misdemeanor, carrying a penalty of one year imprisonment, whereas Sections 241 and 1973i(c) are ten-year and five-year felonies, respectively. Section 597 is also a felony, carrying two-years imprisonment, provided the violation is willful. The assignment of such a low penalty for election fraud seems unwise, and its problem is not mitigated by the provision for ancillary jurisdiction since such fraud seldom involves even a threat of serious bodily injury or death. Because vote fraud frustrates a fundamental democratic process, it should be graded as a serious crime.

C. Campaign laws

The Final Report recommended that campaign laws, with the exception of Section 613 of Title 18 (Contributions by Agents of Foreign Principals) be transferred to Title 2 and either be graded as misdemeanors or be administered as regulatory offenses. The Final Report would thus eliminate Sections 608, 609 (since repealed), 610, 611, and 612 from Title 18.

The Final Report consolidated Sections 595, 598, 601 and 605 of Title 18 to form Section 1532 (Deprivation of Federal Benefits for Political Purposes). The result is a single statute focusing on the granting, withholding, or using of federal benefits of any kind to interfere or coerce any person in the exercise of his right to vote.

Section 1533 of the Final Report (Misuse of Personnel Authority for Political Purposes) continues Section 606 of Title 18, but reduces the grading from a three-year felony to a Class A misdemeanor.

Section 1534 of the Final Report (Political Contributions of Federal Public Servants) continues Sections 602 and 603 of Title 18. Section 603, which currently prohibits soliciting political contributions "in any room or building occupied in the discharge of official duties" by a federal public servant, is modified as being so broad a concept of place as to be vague and indefinite. Moreover, it is argued that there may be a constitutional right merely to be solicited, as distinct from being coerced. Accordingly, Section 1534(b) of the Final Report merely forbids soliciting or receiving a political contribution in a "Federal building or facility".

Section 1535 of the Final Report (Troops at Polls) continues and modifies Section 592 of Title 18. An exception to the current statute's prohibition against bringing troops or armed men to the polls is made when the force is "necessary to repel armed enemies of the United States." The Final Report would also permit

[21] Federal Election Campaign Act of 1971, 86 Stat. 3, approved February 7, 1972.

armed troops to be brought to repel "violent interference with the election process." The Final Report would repeal Section 593 (Interference by Armed Forces) as unnecessary in view of Section 1501 and Section 1511(a) of the Final Report, protecting civil rights.

Section 1541 of the Final Report (Political Contributions by Agents of Foreign Principals) continues Section 613 of Title 18. In so doing the Commission expressed doubt about the effectiveness of the law and indicated that a law imposing registration and disclosure requirements would be preferable.

III. DEPARTMENT OF JUSTICE PROPOSALS: SECTIONS 1521–1527

The general approach of the Commission, indicated above, is adopted in S. 1400. For the reasons indicated, however, a number of significant changes have been made.

A. Sections 1521 and 1522. Obstructing an election and obstructing registration

Section 1521 and 1522 of S. 1400 attempt to incorporate existing law developed under Sections 241 and 597 of Title 18 and Section 1973i(c) of Title 42. The principal changes are as follows:

1. Coverage is limited to election for "federal office," as defined in the recently-enacted Federal Election Campaign Act of 1971,[22] for the reasons set out above.

2. The offense of vote buying is incorporated.

3. Unlike the Commission's formulation, S. 1400 separates the offense of obstruction of registration. This is primarily to simplify drafting and grading. It also recognizes the argument that the courts may not regard the federal interest in registration and elections to be identical.

Section 1973i(c), the present statute on the subject of registration, covers (1) giving false information in order to establish eligibility to vote; (2) conspiracy with another to encourage the latter's false registration; and (3) paying or receiving payment for registering or voting. It reaches giving false information and buying registration, but it does not reach registration irregularities generally. S. 1400 gives identical coverage to elections and registration, as does the Commission's formulation. The result is more than justified by the fact that illegal registration may be undertaken as part of a scheme to cast illegal votes at the election. The federal interest in registration is analogous to the federal interest in primary elections: after *United States* v. *Classic*, 313 U.S. 299 (1941), it was recognized that to be effective the right to vote derived from the Constitution extended to primary as well as to general elections.

4. Unlike Section 241, which is a conspiracy statute, sections 1521 and 1522 reach individual action. A special conspiracy statute is not really needed to cope with election offenses: the general conspiracy statute, Section 1002 of S. 1400, provides adequate coverage. This follows the Commission's recommendation.

5. The language "obstructs, impairs, or perverts" was adopted as being more inclusive than the Commission's phrase "obstructs or interferes with." Moreover, this language follows the language in Section 1300 (Obstruction of a Government Function by Fraud) and Section 1301 (Obstructing a Government Function).

6. The offense is graded as a Class E (three-year) felony rather than a Class A (one-year) misdemeanor as proposed by the Commission. For the reasons indicated above, election fraud is a major crime and should be graded higher than a misdemeanor. Grading vote fraud as a felony will acknowledge the gravity of election fraud. At the same time a felony carrying more than three years might prove more difficult to enforce. Grading the offense as a Class E felony carrying a maximum authorized term of three years seems adequate. Judging from convictions in recent cases, sentences can be expected to average well under three years.

Grading Section 1532 as a Class A (one-year) misdemeanor is justified on the ground that registration fraud, unless it becomes election fraud, does not affect the election itself. It is only indirectly connected to the election and is therefore less of a threat to the election process.

B. Section 1523. Interfering with Federal benefits for a political purpose

S. 1400 here follows Section 1532 of the Final Report in consolidating related provisions of Title 18 into a single statute. Sections 595, 598, 601 and 605 are combined to provide a general prohibition against granting or withholding federal benefits to coerce or interfere with a person's exercising his right to

[22] Federal Election Campaign Act of 1971, 2 U.S.C. 431(c).

vote. Section 1523 expressly covers state and local elections. Coverage of local elections is justified because it is founded upon Congress' plenary power over federal appropriations rather than upon its limited power to regulate elections. Express language indicating coverage of state and local elections is further required to overcome the holding in *United States* v. *Malphurs*, 41 F.S. 817 (Fla. 1941), vacated on other grounds, 316 U.S. 1, that the Hatch Act does not extend to primary elections. Sections 595, 598, 601 and 605 of Title 18 originated with the Hatch Act, which was enacted before the Supreme Court's holding in *United States* v. *Classic*, 313 U.S. 299 (1941), that the right to vote in federal elections includes the right to vote at primary elections.

C. Section 1524. Misusing authority over personnel for a political purpose

This Section continues Section 606 of Title 18. The purpose of this section is to prohibit the use of control over federal employment to obtain political contributions. Section 1524 adds "fails to promote" to the list of practices recited in the current statute. Grading is reduced from a three-year felony to a Class A misdemeanor.

D. Section 1525. Soliciting a political contribution by a Federal public servant or in a Federal building

This section, with minor changes, consolidates and continues Sections 602, 603 and 607 of Title 18. Section 1525 prohibits a federal public servant from soliciting a political contribution from another federal public servant or making a political contribution in response to such a solicitation; it also prohibits any person from soliciting or receiving political contributions in a federal building or facility. The offense is graded a Class A disdemeanor.

Sections 602, 603 and 607 are presently punishable by fine of $5,000 or imprisonment for three years or both. Reduced grading follows the grading recommended for Section 1524 of the Final Report. Lower grading for this class of offense reflects the view that making political contributions is not inherently evil, but is evil when made unlawful. A further consideration warranting reduced grading is the existence of the administrative sanction of dismissal provided under the Hatch Act. Dismissal may in fact be more effective as a deterrent than the criminal law.

Section 1525, unlike Section 607, permits voluntary, i.e., unsolicited, political contributions by federal public servants. Section 607 makes it a three-year felony for a federal employee directly or indirectly to give or hand over to another federal employee, including a Senator, Representative, or delegate to Congress, "any money or other valuable thing on account of or to be applied to the promotion of any political object." This wording would seem to prohibit a federal employee from making an unsolicited, voluntary, political contribution to an incumbent candidate for the Senate or House of Representatives.

There are no cases reported under Section 607. The Civil Service Commission takes the position that federal employees are permitted to make political contributions. "Each employee retains a right to . . . make a financial contribution to a political party or organization."[23] Thus a federal employee is free to make a political contribution to an incumbent candidate's political committee, or to his political party. Under this regulation, however, a federal employee who makes his contribution directly to the incumbent candidate himself could be dismissed under the Hatch Act.[24] A further difficulty with Section 607 and the regulation referred to is that the same act, i.e., making an unsolicited political contribution, results in different consequences depending upon whether the gift is made to a candidate who is an incumbent or to a candidate who is not an incumbent. Gifts to the latter are not covered at all.

The Civil Service regulation offers the practical compromise of permitting contributions to political committees and parties, without reference to incumbent candidates mentioned in Section 607. A difficulty with this solution is that making a contribution to the incumbent candidate's political committee would seem to be an "indirect" giving, which is expressly prohibited by Section 607. A more serious difficulty is that a federal employee acting upon his right to make a political contribution may not appreciate the subtleties involved and lose his job.

The Commission rightly dropped Section 607 from its formulation of this offense. To retain it not only perpetuates confusion surrounding the political rights of federal employees but may raise constitutional issues concerning the extent of their rights.

[23] 5 C.F.R. 733, 101(a).
[24] Sections 7323–7325, Title 5, U.S.C.

Section 1525 adds a requirement that the defendant act "knowingly." Prohibited contributions are commonly solicited by mail to a large number of persons. Mailing lists are purchased and utilized during election campaigns, often without being reviewed. The inadvertent inclusion of a federal employee's business address is not felt to provide a sound basis for a criminal prosecution.

E. Section 1526. Political contribution by an agent of a foreign principal

Section 1526 makes it a Class E felony for an agent of a foreign principal to make a political contribution, or for any person to solicit a political contribution from an agent of a foreign principal, a foreign principal or a government.

This section carries forward without substantive change Section 613 of Title 18, a 1966 amendment to the Foreign Registration Act of 1938 (22 U.S.C. 611). Section 613, like Sections 610 and 611, is an absolute prohibition against the making of political contributions by certain non-foreign entities. Retaining only Section 613 in the Code is justified by the substantial difference between excluding certain domestic entities from the political arena and excluding foreign governments.

Section 613 of Title 18 is presently a five-year felony. Under the system of grading provided in S. 1400, grading of this section could be a Class D (seven-year) or Class E (three-year) felony. Section 1526 grades this offense as a Class E felony.

F. Disposition of sections 591–613 of title 18

1. Sections repealed

The following sections of Title 18 would be repealed by S. 1400:

a. *Section 592* (Troops at polls). In view of the protection afforded by Section 1501 (Interference with Civil Rights) and Section 1521 (Obstructing an Election), there is no real need to retain Section 592. The Final Report continued this provision in modified form. Section 1535 of the Final Report would authorize the presence of troops not only to repeal an armed invasion but also to repel "violent interference with the election process". No basis was suggested to support the need for such extended coverage. Under present law the states are responsible for the conduct of all elections, and in the event of violent interference with elections beyond the control of state authorities, the law permits the state to call for federal intervention.[25]

b. *Section 593* (Interference by armed forces). The same considerations applicable to Section 592 are also applicable to Section 593. Being protected from any interference by Sections 1501, 1502 and 1621, it is unnecessary to protect elections specifically from military interference.

c. *Section 596* (Polling armed forces). Repeal is recommended. To make it a crime to ask a member of the armed forces how he voted probably violates the First Amendment.[26] If polling the military were intended to interfere in some way with an election, the conduct would be covered by Section 1521.

d. *Section 599* (Promise of appointment by candidate). Repeal is recommended. Section 1355 (Trading in Public Office) is broad enough to cover political activity in consideration of appointment, which is the evil at which Section 599 is aimed. The Commission also recommended repeal of Section 599, though its reasons for so doing were that the statute was too broad and included some political rewards that are conventional.[27] This is the kind of prohibition that the Commission felt would be an appropriate subject for a Civil Service regulation.

e. *Section 600* (Promise of employment or other benefit for political activity). The Commission recommended repeal of Section 600 for the same reasons given for Section 599.

Sections 600 of Title 18 (Promise of employment or other benefit for political activity) and 601 (Deprivation of employment or other benefit for political activity) are companion statutes. They were first enacted as Sections 3 and 4 of the Hatch Act in 1939.[28] The Commission would repeal Section 599 (Promise of employment by candidate) and Section 600.[29] Coverage of the promise of employment and other federal benefits as a reward for political activity is comprehended by Section 1355 of S. 1400 (Trading in Public Office). Coverage of deprivation of employment and other federal benefits is retained, however, as an election statute.

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[25] Sections 331–334, Title 10, U.S.C.
[26] National Commission, Working Papers, p. 817.
[27] *Id.*
[28] 53 Stat. 1147.
[29] See n. 26, *supra.*

Section 600, before amendment, extended to activity in support of or opposition to "any candidate or political party in any election." In *United States* v. *Malphurs*, 41 F. Supp. 817 (Fla. 1941), vacated on other grounds, 316 U.S. 1, the Court sustained a demurrer to an indictment charging violations of Sections 3 and 4 of the Hatch Act because of legislative history indicating that Congress did not intend to include primary elections. Despite its inclusive language, Section 600 was held inapplicable to primary elections, or for that matter to state and local elections. This result was changed by the Federal Election Campaign Act of 1971.

The question arises, whether Section 600, as amended, now extends to activity in support of candidates for state and local offices, and also whether Section 601, the companion statute which was not amended, has the same coverage since the amendment extends the definitional Section 591 to Section 600. Section 591 defines the terms "election," "candidate" and "Federal office" so as to exclude elections for state and local candidates. Section 600, however, now refers to political activity in connection with any election "to select candidates for any political office." The term "candidate" is defined by Section 591 to include only candidates for "federal office" and the term "federal office" to include only candidates for "President or Vice-President of the United States, or Senator or Representative in, or Delegate or Resident Commisisoner to the Congress of the United States." The precise coverage of Section 600 is thus not altogether clear. The legislative history indicates only that the purpose of the amendment was "to include any special consideration in return for political support and to apply it to caucuses, conventions, and primary, special and general elections." [30] It can be argued that Congress simply overruled the *Malphurs* case to make it clear that Section 600 should reach primary elections for federal offices. However, it is also possible to argue that Congress acted pursuant to its power to prohibit the use of federal appropriations in any election, including elections for state and local office.

Whatever the scope of this section, the Final Report recommends repeal of prohibitions against political activity in the form of promised federal employment and other benefits by candidates or anyone else—the thrust of Sections 595 and 600. It was the Commission's view that this kind of activity is better suited to administrative regulation. The Hatch Act presently forbids an executive branch employee "to use his official authority or influence for the purpose of interfering with an election or affecting the result thereof" and requires that anyone violating its provisions "be immediately removed from the position or office held by him." [31] Moreover, as already indicated, there is overlapping coverage between the present Section 600 and Sections 1354 and 1355 of S. 1400.

f. *Section 604* (Solicitation from persons on relief). The prohibition against soliciting political contributions from persons on relief is felt to be overly broad, reaching any person who solicits or receives a contribution from any person known to be entitled to or receiving compensation "or other benefit provided for or made possible by any Act of Congress appropriating funds for work relief or relief purposes." This is much broader than Section 1525 of S. 1400 prohibiting federal public servants from soliciting political contributions from other federal public servants.

The Commission recommended repealing Section 604 of Title 18 on the grounds of possible conflict with the First Amendment. It should also be pointed out that Section 1532 of S. 1400 already protects persons from being deprived of federal benefits in connection with exercising their right to vote at any election.

g. *Section 605* (Disclosure of names of persons on relief). As the Commission pointed out, this statute relates to the bygone era of work relief in the 1930's. No cases are reported under this statute. Moreover if the disclosure of such names were aimed at interfering with an election for federal office, the conduct would be covered by Section 1521.

2. *Sections combined and modified*

The following sections of Title 18 would be continued by S. 1400 in modified form, as indicated:

a. *Section 591* (Definitions). Section 1527 of S. 1400 defines the terms "anything of value", "federal office", "foreign principal" and "political contribution."

Section 591, which is transferred to another title, additionally defines the term "election." This is not required for Sections 1521-1526, which specify the elections covered. Section 591 also defines the term "candidate." While "candidate"

[30] U.S. Code Cong. and Adm. News, Feb. 25, 1972, p. 67.
[31] Sections 7323 and 7325 of title 5, U.S. Code.

needs to be defined for the disclosure provisions of Title 2, it is not required for the code. The same is true of the rest of the terms presently defined by Section 591: "political committee," "contribution," "expenditure," "person," and "State."

b. *Section 594* (Intimidation of voters). Section 1501 of S. 1400 protects civil rights, including the right to vote, from interference by threats and intimidation. Section 1523 would also protect the voter from being threatened with the loss of federal benefits or programs.

c. *Section 595* (Interference by administrative employees of Federal, State or Territorial Governments). This section is continued in Section 1523.

d. *Section 597* (Expenditures to influence voting). This section is continued in Section 1521(a)(2)–(3).

e. *Section 598* (Coercion by means of relief appropriations). This section is continued in Section 1523.

f. *Section 601* (Deprivation of employment or other benefit for political activity). This section is continued in Section 1523.

g. *Section 602* (Solicitation of political contributions). This section is continued in Section 1525.

h. *Section 606* (Intimidation to secure political contributions). This section is continued in Section 1524.

i. *Section 607* (Making political contributions). This section is continued in part by Section 1525. It is repealed to the extent that Section 607 of Title 18 may be read to prohibit a federal public servant from making an unsolicited, i.e. voluntary, political contribution to a candidate who is also an incumbent.

j. *Section 613* (Contributions by agents of foreign principals). This section is continued in Section 1526.

3. *Sections moved to other sections*

The following sections have not been retained in the code, but would be moved to other titles of the United States Code. These are all *malum prohibitum* statutes pertaining to political campaigns:

a. *Section 608* (Limitations on contributions and expenditures).

b. *Section 610* (Contributions or expenditures by national banks, corporations or labor organizations).

c. Section 611 (Contributions by Government contractors).

d. Section 612 (Publication or distribution of political statements).

V. PROVISIONS OF S. 1 AND S. 1400 COMPARED

A. Section 2–6H1 of S. 1

Coverage is comparable to Sections 1521 and 1522 of S. 1400. There are a number of differences:

1. S. 1, following the Final Report, combines vote fraud with registration fraud.

2. Grading of vote fraud under S. 1 is a six-year felony, whereas S. 1400 grades vote fraud as a three-year felony and registration fraud as a Class A (one-year) misdemeanor.

3. S. 1 provides enhanced grading for murder, kidnapping, maiming, arson, and malicious mischief committed in the course of an election offense.

4. S. 1 does not define the terms "election" or "candidate."

With the exception of grading, most of the differences between these formulations are minor. The views reflected by S. 1400 on grading vote fraud and registration fraud are as follows:

1. Vote fraud is a felony-grade offense and should be graded as a serious crime.

2. Vote fraud is seldom if ever accompanied by violence against persons. Accordingly, enhanced grading is unnecessary to protect the right to vote.

3. The enhanced grading of Sections 241 and 242 of Title 18, which is provided if death results, is aimed at civil rights violations having little to do with vote fraud. Vote fraud generally consists of a scheme to distort the vote count by various covert means.

4. For these reasons S. 1400 does not extend federal criminal jurisdiction to other crimes committed in the course of committing vote fraud. S. 1 and S. 1400 punish vote fraud as a six-year and three-year felony, respectively. It is felt that S. 1400 provides a sufficient deterrent to this kind of crime. The difference between the two bills on this point is slight, however. S. 1 also makes registration fraud a six-year felony. This is not felt to be warranted in view of the slight federal interest involved in registration.

B. Section 2–6H2 of S. 1

This section, like Section 1525 of S. 1400, combines Sections 602, 603 and 607 of Title 18 regulating the solicitation and receipt of political contributions by federal employees. The following differences between S. 1 and S. 1400 are noted:

1. Section 2–6H2(a) of S. 1 would permit a public servant to make a political contribution solicited by another public servant who was not a "public servant for whom he works." Section 607 of Title 18, read strictly, prohibits federal employees from making a political contribution to any other federal employee, whether the donor works for the recipient or not. To this extent S. 1 narrows the coverage of current law.

2. Section 2–6H2 of S. 1 permits conviction if the violation was reckless, whereas Section 1525 of S. 1400 requires that the defendant act knowingly.

3. Grading of the offense under S. 1 is a one-year felony, and under S. 1400 a one-year misdemeanor and under present law a three-year felony.

C. Section 2–6H3 of S. 1

This section would continue Section 613 of Title 18 by prohibiting contributions by an agent of a foreign principal. Section 1526 of S. 1400 likewise continues the current law.

D. Miscellaneous provisions of S. 1

S. 1 classifies as civil rights offenses some of the provisions currently contained in Chapter 29 of Title 18.

1. Sections 595, 598, 601, and 605 of Title 18, all of which originated with the Hatch Act, are contained in § 2–7F2 of S. 1 (Interference With Government Benefit or Program). S. 1400 consolidates these in Section 1523 (Interfering With a Federal Benefit for a Political Purpose).

2. Section 606 of Title 18 (Intimidation to Secure Political Contributions) becomes Section 2–6E5 (Misuse of Personal Authority) of S. 1. This carries forward the present law, as does Section 1524 of S. 1400.

E. Repeals, transfers and omissions

1. S. 1 combines a number of provisions currently found under Chapter 29 of Title 18 (Election-Political Activities). Thus, Sections 592 (Troops at Polls), 593 (Interference by Armed Forces), 594 (Intimidation of Voters), 595 (Interference by administrative employees of Federal, State or Territorial Governments), and 597 (Expenditures to influence voting) are combined in Section 2–6H1 of S. 1.

2. S. 1 omits Section 596 of Title 18 (Polling armed forces), also repealed under S. 1400.

3. S. 1 also combines Sections 598 (Coercion by means of relief appropriations), 601 (Deprivation of employment or other benefit for political activity), 604 (Solicitation from persons on relief), 605 (Disclosure of names of persons on relief) of Title 18 to make Section 2–7F2 (Interference with Government Benefits or Program).

A difference between S. 1 and S. 1400 is that S. 1400 would repeal Sections 604 and 605. This follows the recommendation of the National Commission. It should be pointed out that it is questionable whether the disclosure of names of persons on relief, Section 605 of Title 18, or the solicitation from persons on relief, Section 604 of Title 18, can be read into the general language of Section 2–7F2 of S. 1.

4. S. 1 combines Section 599 (Promise of appointment by candidate) and Section 600 (Promise of employment or other benefit for political activity) of Title 18 to obtain Section 2–6E2 (Graft), whereas S. 1400 would repeal both statutes in light of coverage of the same conduct by Section 1355 (Trading in Public Office).

5. Like the Final Report and S. 1400, S. 1 would transfer campaign laws from the Criminal Code to another title. Thus, Sections 608 (Limitations on contributions and expenditures), 610 (Contributions or expenditures by national banks, corporations, or labor organizations), 611 (Contributions by Government contractors), and 612 (Publication or distribution of political statements) of Title 18 would be transferred. Like S. 1400, S. 1 would retain Section 613 (Contributions by agents of foreign principals) as an exception to the exclusion of campaign laws from the criminal code.

Mr. KEENEY. In view of the fact my statement is so brief I would like to read it.

Senator HRUSKA. That would be well, you may proceed.

Mr. KEENEY. Perhaps never before in our history has legislative and public interest in the election laws been so intense. Pending legislative proposals would create a national commission to enforce the reporting and disclosure provisions of the 1971 Federal Election Campaign Act, would provide for some public financing of Federal campaigns, and make other significant changes in the existing laws. In addition, various congressional inquiries into campaign practices, as well as the active interest of non-governmental groups, will probably result in further legislative proposals in the election campaign area. The legislative proposals enacted as a result of this intense interest can, where appropriate, be included in the proposed codification of title 18 with little difficulty. However, my formal remarks will be confined to S. 1400 which while making some modification of penalties, with minor exceptions which I will discuss, makes little change in the substantive law.

Generally speaking election laws are aimed at a number of different legislative objectives:

(1) Preventing vote fraud.
(2) Protecting civil rights generally.
(3) Protecting Federal programs from political influence.
(4) Protecting Federal employees from political influence.
(5) Disclosing finances by candidates.
(6) Disclosing finances by political committees.
(7) Prohibiting anonymous campaign literature.
(8) Prohibiting contributions by corporations, labor organizations, and national banks.
(9) Prohibiting contributions by government contractors.
(10) Prohibiting contributions by foreign principals. These are all part of the current laws respecting elections.

Sections 1521–1526 of S. 1400 are concerned only with some of these categories, that is: (1) Preventing vote fraud; (2) protecting the right to vote; (3) protecting Federal employees and programs from political influence; and (4) prohibiting political contributions by foreign principals.

We currently prosecute vote fraud violations under sections 241 and 242 of title 18. Section 241 was enacted May 31, 1870, to enforce the guarantees of the 14th and 15th amendments to the Constitution. The penalty is a fine of $10,000 or imprisonment for 10 years, or both.

Under 18 U.S.C. 241, the Government has successfully prosecuted conspiracies to stuff a ballot box with forged ballots, to impersonate qualified voters, to alter legal ballots, to prevent voters from voting, to fail to count votes, to alter the votes counted, to discriminate on account of race, and to cast illegal absentee ballots. Section 241 reaches fraud even when the result does not affect the outcome of the election, or when the number of fraudulent ballots represents an infinitesimal fraction of the number of votes cast. As for section 242, prosecutions are brought under this section to cover conduct of individuals, acting under color of law, which denies the right to vote or to have one's vote fairly counted.

A limitation of section 241 is that it is a general civil rights statute and does not specifically cover vote fraud.

A second limitation of section 241 is that it does not cover bribery of voters. Such bribery is presently covered by section 597 of title 18.

Section 1521 of S. 1400 makes helpful changes in the current law. First and foremost, it provides a specific statute to cover election fraud. Also, it reaches individual action, whether or not under color of law. At the same time the right to vote would continue to be included under section 1501 of S. 1400 as one of the protected civil rights.

Section 1521 would consolidate vote bribery with vote fraud. Section 1521, in keeping with the case law developed under section 241, limits coverage to elections for Federal office. As to grading, section 1521 is graded a class E—3-year—felony. The National Commission would have graded vote fraud as a class A misdemeanor.

Registration fraud, which is provided for in section 1522, is graded as a class A misdemeanor. These offenses are graded differently because registration fraud will not necessarily affect the election itself. Further, any scheme to interfere with an honest election, including one using registration as a means, could be prosecuted as vote fraud under section 1521.

Turning to the remaining sections of S. 1400. I would like to highlight some of the changes that are being proposed. Section 1523 follows the final report of the Commission in consolidating related provisions of title 18 into a single statute. Thus, sections 595, 598, 601, and 605 of title 18 are combined to provide a general prohibition against granting or withholding Federal benefits to coerce or interfere with a person's exercising his right to vote.

One of the important clarifying changes affected by section 1523 is the inclusion of express language to indicate the coverage of State and local elections as well as Federal elections, including primaries. Since section 1523 is concerned with withholding or granting Federal benefits to influence the exercise of the right to vote, coverage of non-Federal elections can be based upon Congress' plenary power over Federal appropriations rather than upon its limited power to regulate elections.

Section 1525 consolidates sections 602, 603, and 607 of title 18 with one substantive change in addition to grading. Section 607 may be read as prohibiting a Federal employee from making a political contribution to an incumbent Congressman or Senator. The Civil Service Commission, interpreting the Hatch Act, has taken the position that Federal employees are permitted to make such political contributions so long as the contribution is not made directly to an incumbent Federal legislator. Section 1525 resolves this important conflict by making it clear that a Federal employee may make voluntary, that is, unsolicited, political contributions to any candidate.

As you pointed out, I have filed a detailed memorandum with the committee concerning sections 1521 and 1527 and at this point I would be very happy to answer any questions that you or the staff might have.

Senator HRUSKA. Well, thank you, and we will take advantage of that offer, Mr. Keeney, by way of a letter to you in the event we come to something in the future either through additional testimony or otherwise.

Mr. KEENEY. Thank you.

Senator HRUSKA. And if you would respond to such letter we would be very pleased.

Mr. KEENEY. We would be happy to do so.

Senator HRUSKA. In section 596 of present title 18, there is a current prohibition of members of the Armed Forces interfering with elections. Is this covered in S. 1400 and, if so, how?

Mr. KEENEY. Yes, sir, it is covered in section 1521 which deals with the obstruction or interference with an election by any person.

Senator HRUSKA. Any person? So it is all inclusive?

Mr. KEENEY. Yes, sir, all inclusive.

Senator HRUSKA. Now, section 1521(a) makes it a crime for anyone to offer or give or agree to offer or give any thing of value to another person for voting. Section 1527(a) defines anything of value as not including nonpartisan activities or services to facilitate registration or voting.

What is the reason for this exception?

Mr. KEENEY. The reason is based upon what I believe is the generally accepted public policy of encouraging participation in the election process by registration or voting—that is, encouraging groups on a nonpartisan basis to encourage people to exercise their franchise and to register in order to be in a position to exercise the franchise. We think it is good citizenship for groups of any variety to encourage on a nonpartisan basis the participation of as many as possible of the citizenry in the electoral process.

Senator HRUSKA. Would it be a violation of the nonpartisan characteristic for a team to go out and solicit registrations for people to vote if they confine their efforts only to one major party? Would that destroy the nonpartisanship?

Mr. KEENEY. If they confine their activities to one party or one candidate, it would, in my judgment, destroy the nonpartisan aspect.

Senator HRUSKA. You mean one party?

Mr. KEENEY. Yes, sir; one party. Or for the purpose of assisting a particular candidate of one or the other parties.

Senator HRUSKA. Have there been any such cases coming to your attention?

Mr. KEENEY. I know of none, sir. Edgar, do you know of any cases?

Mr. BROWN. No.

Mr. BARNES. No.

Senator HRUSKA. In the case of vote buying in an election in which there are both Federal and State candidates on the ballot, would there be a violation of section 1521?

Mr. KEENEY. There could be, Senator. Here we have to distinguish as to whether the vote buying was with respect to purely local candidates. If the buying was with respect to purely local candidates, there would not be a violation. If vote buying was with respect to Federal candidates on the ballot, there would be, and if the vote buying would be with respect to a straight ticket solicitation which would include both Federal and local candidates, then there would be a violation.

Senator HRUSKA. Well, now, section 1523 reads State and local as well as Federal elections. Why are local elections covered in that section but not in section 1521 dealing with vote fraud?

Mr. KEENEY. Section 1523 is dealing with Federal appropriations moneys that are given to the States or local municipalities and the Federal jurisdiction with respect to those violations is based upon the Congress' power of appropriation, which is a very broad and general power, rather than upon Congress' limited power in the area of elections, which is what we are concerned with in the other sections.

Mr. HRUSKA. So it is the subject matter of section 1523 that calls for that enlargement?

Mr. KEENEY. Yes; the involvement of the Federal purse.

Senator HRUSKA. That is self-evident from the title, which is interfering with the Federal benefit for a political purpose.

Now referring to section 1525, prohibiting a Federal public servant from soliciting political contributions, who is covered in that section?

Mr. KEENEY. There is broad coverage under this section, Senator. It includes not only the civil servant as we generally define the civil servant but it would include high officials such as the President, the President-elect; it would include the Justices of the Supreme Court; it would include all Federal officials and would specifically exclude officials of the District of Columbia who would be treated in this respect as equivalent of State officials. So to summarize the answer, there is very broad coverage—Federal public servant has a very broad definition in S. 1400 and would encompass all of these people.

Senator HRUSKA. What does the Federal criminal code do about the campaign laws, the statutes that limit or prohibit campaign contributions such as sections 608, 610, and 611 of title 18?

Mr. KEENEY. Basically, Senator, it does two things. One, it transfers these sections out of the criminal code and in some instances it modifies downward in some minor respects the penalties that are applicable to these statutes. The reason for this transfer out of title 18 is that basically these are malum prohibitum statutes. There is nothing inherently wrong with a labor union or a corporation or a bank making a contribution in the Federal election nor is there anything inherently wrong about a member of a family contributing substantial amounts of money for an election, but this is wrong because it has been made wrong by statute and not inherently wrong, so it is being placed with the other statutes which are malum prohibitum.

Senator HRUSKA. How long have you been with the Department, Mr. Keeney?

Mr. KEENEY. Sir, over 21 years.

Senator HRUSKA. How long have you had the present post you hold?

Mr. KEENEY. I have had it for just the last 60 or 70 days. Previous to that time I was chief of the Fraud Section in the criminal division.

Senator HRUSKA. So your efforts in the Department have been in this general field right along?

Mr. KEENEY. Yes, sir, they have been in recent years. Prior to that, I was with the Organized Crime Section for a number of years.

Senator HRUSKA. Well, thank you very much.

Mr. Summitt, have you any questions?

Mr. SUMMITT. No, sir.

Senator HRUSKA. Mr. Lazarus.

Mr. LAZARUS. No, sir.

Senator HRUSKA. Thank you all very much for coming.

Mr. KEENEY. Thank you, sir.

Senator HRUSKA. The subcommittee will stand in adjournment subject to the call of the Chair.

[Whereupon, at 11:10 a.m., the subcommittee adjourned subject to the call of the Chair.]

Testimony of Andrew Von Hirsch, Executive Director, Committee for the Study of Incarceration [1]

Mr. Chairman, I am most grateful for this opportunity to participate in the Subcommittee's hearings on the recodification of the Federal Criminal Code.

Gross as are the abuses within prisons, the most fundamental abuse of the correctional system remains the irrationality and arbitrariness of criminal justice system's method of deciding who shall be incarcerated, for what offenses, and for what periods. So long as the irrationality of the dispositional process is not remedied, efforts to improve correctional facilities themselves will do little to alleviate the injustice of contemporary corrections or the bitterness it engenders in those who are confined.

Mr. Chairman, past prison reform efforts so often have failed not merely because of public indifference, but also because reformers became so obsessed in refurbishing the facade of the institution of imprisonment that they did not trouble to examine the underlying structure and purposes of that institution. In the sad aftermath of Attica, perhaps the most hopeful sign is that some reform groups are beginning to ask more probing questions.

As an expression of the new questioning mood, The Committee for the Study of Incarceration—of which I am Executive Director—was organized in 1971 and funded by $315,000 in grants from the Field Foundation and New World Foundation to undertake a basic conceptual inquiry into involuntary confinement in our society. Composed of distinguished professionals from a wide variety of disciplines,[2] the Committee has devoted itself to a fundamental re-examination of the objectives of punishment (and particularly of imprisonment), for the purpose of aiding the development of a more rational theory and practice of sentencing.

The Incarceration Committee expects to complete its report by early next year.

As the Incarceration Committee has not, as a group, examined specific legislature proposals, and as it is still conducting its deliberations, I do not purport to be expressing the Committee's collective views. Instead, I am expressing my own views, although my approach has been much influenced by the Committee's general discussions.

I. LAWLESSNESS IN CORRECTIONAL DECISIONMAKING

1. The Absence of Sentencing and Parole Standards

The fundamental vice of correctional decisionmaking—that is, of both sentencing and parole—has been what U.S. District Judge Marvin Frankel calls "lawlessness." [3] While in other areas of the law we insist upon rules that interested parties may know in advance, the norm in sentencing is virtually no rules at all. In Judge Frankel's words,

> As to the penalty that may be imposed, our laws characteristically leave to the sentencing judge a range of choice that should be unthinkable in a "government of laws, not of men."
>
> * * * * * * *
>
> [Judges] answerable only to their varieties of consciences may and do send people to prison for terms that may vary in any given case from none at all up to five, ten, thirty or more years. This means in the great majority of . . . criminal cases that a defendant who comes up for sentencing has no way of knowing or reliably predicting whether he will walk out of the courtroom on probation, or be locked up for a term of years that may consume the rest of his life, or something in between.[4]

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[1] Mr. von Hirsch did not present his prepared statement in person because the hearings had to be recessed earlier than expected.

[2] The members of the Committee consist of: Former U.S. Senator Charles E. Goodell (Chairman); Marshall Cohen, Professor of Philosophy, City University of New York; Samuel DuBois Cook, Professor of Political Science, Duke University; Alan Dershowitz, Professor of Law, Harvard University; Willard Gaylin, Professor of Psychiatry and Law, Columbia University; Erving Goffman, Professor of Anthropology and Sociology, University of Pennsylvania; Joseph Goldstein, Professor of Law, Yale University; Harry Kalven, Jr., Professor of Law, University of Chicago; Jorge Lara-Braud, Executive Director, Commission of Faith and Order, National Council of Churches; Victor Marrero, Executive Director, New York City Planning Commission; Eleanor Holmes Norton, Chairman, New York City Human Rights Commission; David J. Rothman, Professor of History, Columbia University; Simon Rottenberg, Professor of Economics, University of Massachusetts; Herman Schwartz, Professor of Law, State University of New York at Buffalo; Stanton Wheeler, Professor of Law and Sociology, Yale University; and Leslie T. Wilkins, Professor of Criminal Justice, State University of New York at Albany.

[3] Frankel, *Lawlessness in Sentencing*, 41 Cincinnati L. Rev. 1 (1972).

[4] M. Frankel, *Criminal Sentencing* (1972), at 5–6.

Perhaps the most basic objection to this decisional lawlessness is that it conflicts with the fundamental notion of the rule of law. To cite Judge Frankel's apt words:

> Reverting to elementary principles for a bit, we ought to recall that individualized justice is prima facie at war with such concepts, at least as fundament, as equality, objectivity, and consistency in the law. It is not self-evident that the flesh-and-blood judge coming (say) from among the white middle classes will inevitably achieve admirable results when he individualizes the narcotics sentences of the suburban college youth and the streetwise young ghetto hustler. More importantly and more generally, is it perfectly clear that we want our judges to have such power? In most matters of the civil law, while our sucess is variable, the quest is steadily for certainty, predictability, objectivity. The businessman wants to know what the tax will be on the deal, what the possible "exposure" may be from one risk or another. His lawyer may predict more or less succesfully. But what no businessman wants (if he is honest) is a system of "individualized" taxes and exposures, depending upon who the judge or other official may turn out to be and how that decision-maker may assess the case and the individual before him.
>
> This does not mean, of course, that everybody pays the same tax or is held to the same standards of liability. It does mean that the variations are made to turn upon objective, and objectively ascertainable, criteria—impersonal in the sense of the maxim that the law "is no respecter of persons"—and, above all, not left for determination in the wide-open, uncharted, standardless discretion of the judge administering "individualized" justice. The law's detachment is thought to be one of our triumphs. There is dignity and security in the assurance that each of us—plain or beautiful, rich or poor, black, white, tall, curly, whatever—is promised treatment as a bland, fungible "equal" before the law.
>
> Is "individualized" sentencing consistent with that promise? Certainly not under the broad grants of subjective discretion we give to our judges under most American criminal codes today. The ideal of individualized justice is by no means an unmitigated evil, but it must be an ideal of justice *according to law*. This means we must reject individual distinctions—discriminations, that is—unless they can be justified by relevant tests capable of formulation and application with sufficient objectivity to ensure that the results will be more than the idiosyncratic ukases of particular officials, judges or others.[5]

In practice, the consequence of lawlessness in sentencing and parole has been gross disparities in the dispositions of offenders having similar backgrounds and offense histories. Long the concern of legal scholars[6] and of those most directly affected—offenders themselves,[7] the problem of disparities has now entered public consciousness with the publication of shocking accounts on unequal sentencing such as those documented earlier this year by a *New York Times* reporter, Lesley Oelsner.

Evidence is beginning to accumulate also, that normlessness has led not merely to random disparities but to the worst kind of unequal treatment: bias against particular cultural, racial or social or ideological groups.[8]

2. Indeterminacy

A particularly pernicious form of lawlessness has been indeterminacy: where the actual term of confinement remains undetermined at the time of sentencing but is to be fixed at some unknown subsequent time by a parole board or comparable agency.

Indeterminacy has been commonly defended as a means to suit the disposition of the offender to his "needs" for treatment. But unless treatments are truly effective, the treatment rationale cannot support indeterminacy; and yet even the most ambitious and carefully designed correctional treatment programs have, as yet, manifested little or no success in reducing offender recidivism, when their performance is carefully matched against control groups for which no treatment was supplied.[9] Even if more effective treatments were to be developed in future,

[5] Id., at 10–11.
[6] S. Kadish and M. Paulsen, *Criminal Law and Its Processes* (1969), at 1287–1291.
[7] J. Irwin, *The Felon* (1970).
[8] See, e.g., Gaylin, *No Exit*, Harper's Magazine, November, 1971.
[9] See, e.g., G. Kassebaum, D. Ward & D. Wilner, *Prison Treatment and Parole Survival* (1971); Robison & Smith, *The Effectiveness of Correctional Programs*, 17 Crime & Delinquency 67 (1971).

moreover, they could be expected to work only for certain limited offender subpopulations—thus scarcely justifying the routine resort to indeterminate sentencing for offenders generally.[10]

To those confined, indeterminacy is a Kafkaism at its worst, leaving inmates in agonizing incertainty for years as to the most important single question in their prison-impoverished lives: *when will they be released?* It is not surprising that the New York State Commission on Attica found the operation of the indeterminate sentencing laws was a major grievance among inmates and had become a "primary source" of the bitterness and tension that led to the Attica uprising.[11]

II. THE SOURCE OF DECISIONAL LAWLESSNESS

One source of the present lawlessness in correctional decisionmaking—both in sentencing and parole—has been our collective uncertainty as to what the rules ought to be. We have yet to reconcile the diverse and possibly conflicting aims of the criminal law—deterrence, deserts, incapacitation, rehabilitation—into a rational and consistent *corpus* of theory that could give us guidance as to who should be punished, for how long, with what severity and for what purposes. Achieving this understanding requires a fundamental re-examination of the aims of the criminal law that is just beginning to get underway. It is that kind of re-examination which the Committee for the Study of Incarceration, on whose staff I serve, is undertaking; and which will require much continued effort on the part of specialists in the field. In the meantime, having little or no confidence of what the rules ought to be or how they might be justified, the system has tended to dispense with rules entirely and make punishment a matter of unregulated, individualized discretion.

But there also is another source of the problem, on which I would like to focus attention. This has been the tendency of the system to adopt ostensible penalties which far exceed in severity those that could practicably and humanely be imposed. In Arthur Rosett's words:

> [Discretion] becomes a pervasive need in contemporary America because our criminal law is so harsh that its full application in all but aggravated cases would not only be cruel, but also expensive and socially destructive. Amelioration of the vigors of the written law is the norm, not the exception, in current practice. . . .
>
> [It] is the unacceptable severity of the formal system that makes demands for discretionary escape mechanisms so urgent. . . .[12]

For a variety of motives—desire to maximize the deterrent effects of penalties, accommodation to public pressures for a "tough" stance on crime, our historical tradition of severe punishments and simple uncertainty as to what penalties should be—the criminal justice system establishes purported penalties of extreme stringency, far exceeding those of any civilized nation of the world.[13] But the punishments actually inflicted cannot possibly be of these draconian levels, because (1) such severity would conflict with decisionmakers' common sense notions of equity, and perhaps more importantly (2) because the correctional system simply does not have the facilities to incarcerate so many offenders for such prolonged periods.

The existence of such drastic ostensible penalties, however, tends to impede the development of explicit dispositional rules. For were any agency explicitly to abondon the high purported sanctions and to formulate standards reflecting the less draconian dispositions made in actual practice, it would take upon itself a heavy onus of apparent leniency—laying itself open to charges of subverting the deterrent effects of the law and releasing dangerous criminals to prey upon the citizenry. But as some way must be found to get around the exaggerated ostensible penalties and achieve realistic levels of severity, the system does so via the path of least resistance: by avoiding explicit sentencing rules entirely and reaching its ultimate determinations through low visibility discretionary determinations of what seems "appropriate" in individual cases. While this helps protect the system against charges of apparent leniency, it leads to decisional lawlessness. In the absence of known standards, disparities multiply, indeter-

[10] See, M. Frankel, *Criminal Sentences* (1972), at 86–93.

[11] New York State Special Commission on Attica, *Attica* (1972), at 90–102. In a letter previously submitted by me to this Subcommittee on October 26, 1972 and reprinted in the Subcommittee's record of hearings, I develop the case against sentencing indeterminacy in greater detail.

[12] Rosett, *Discretion, Severity and Legality in Criminal Justice,* 46 So. Cal. L. Rev. 12, 25, 27 (1972).

[13] See, S. Kadish and M. Paulsen, *Criminal Law and Its Processes* (1969) at 1287–1291.

minacy becomes the rule, offenders see themselves confronted with a corrupt and unfair system and—because everyone is left to guess what the actual penalties will be—the deterrent objectives of the law may ultimately be subverted.

We have seen this process occur in the Federal criminal justice system, as well as in many state jurisdictions. The statutory scheme calls for maximum penalties which, generally speaking, are of extraordinary severity; but leaves to other agencies in the system wide discretion to punish below the maxima. The effect of the statutory scheme is, in the first instance, to shift to the courts the burden of determining what the actual penalties should be.

The courts' own sentencing traditions—especially the unreviewability of sentences and the practice of not stating reasons in imposing sentences—militate, unfortunately, against the development of any common law jurisprudence of sentencing. But the statutory pattern aggravates this tendency. The high statutory maxima have the effect of making it especially hazardous for the courts to adopt explicit sentencing rules reducing the general severity of sentences to more realistic levels, without incurring charges of undue leniency and of flouting the legislative will. Moreover, the system permits judges to shift to the parole board the most difficult questions regarding the duration of sentence. Until 1957, Federal judges, once they decided to invoke imprisonment instead of probation, had at least some explicit responsibility to determine the duration of sentence, since the offender would not be eligible for parole until one-third of his sentence had elapsed: but subsequently, even this responsibility could be avoided as a result of legislation authorizing judges to provide in sentencing for immediate parole eligibility.[14] At the end of the decision-making chain, the parole board stands, perhaps, in the most difficult position. Simply because of the physical limitation of prison facilities, the board has no choice but to direct substantial reductions in the time actually served by most prisoners. But—lacking the independence and the prestige of the legislature or the judiciary—it stands least favorably situated to adopt explicit, public rules embodying its decisions. Faced with this dilemma, parole boards' usual response has been to make the necessary determinations reducing time served; but to avoid the potential criticism which explicit rules might attract, by denying that any rules are operative at all. Thus the United States Parole Board, until quite recently, denied steadfastly that any policies governed its decisions at all.[15] While understandable as bureaucratic protective coloration, this response maximizes the indeterminacy of parole board decisions and has made parole one of the major justified grievances of those imprisoned.

III. TOWARD REMEDIES

At last, we may be witnessing the beginnings of efforts to remedy some of these abuses.

In response to the expressed concern of such thoughtful jurists as Judge Frankel and to recent disclosures of gross sentencing disparities, the Federal judiciary has begun to show some more interest in working towards the standardization of penalties. Of particular note is the recently-announced decision of the Second Circuit to undertake a systematic study of how sentencing disparities might be remedied.

It is gratifying also, that the United States Parole Board has begun to reverse its previous policies of no standards and no explanations, and has begun to develop for the use of its examiners, a set of explicit criteria for deciding cases.[16]

In my view, a major contribution which Congress can make is to encourage this trend toward bringing sentencing and parole under the control of rules.

Although that might eventually be our goal, it still seems premature to try to draft a comprehensive tariff of punishments, prescribing the standard penalties (and the extent of permissible discretionary variation in punishment) for each type of offense. For we still simply do not understand enough about the purposes of punishment nor about how the different penal objectives interrelate. This task of standardization cannot be accomplished this year or in this legislative session, but as I see it, is the fundamental task of corrections law reform of this and coming decades. But there are, I believe, some preliminary steps that can currently be undertaken.

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[14] Act of Aug. 25, 1958, Pub. L. No. 85–752, § 3, 72 Stat. 845–6 (codified at 18 U.S.C. § 4202(a) (1964)).

[15] K. C. Davis, *Discretionary Justice* (1971) at 126–133; Gaylin, *No Exit,* Harper's Magazine, November, 1971.

[16] The new U.S. Parole Board procedures are summarized in: National Council on Crime & Delinquency, NCCD Research Center, *Paroling Policy Guidelines: A Matter of Equity* (Report No. 9, by Peter B. Hoffman and Don M. Gottfredson) (1973).

1. Appellate Sentencing Review

One essential reform which the new Federal Criminal Code should contain is *granting Federal appellate courts the power to review sentences.* Unreviewability of sentence is still the prevailing view in the Federal judiciary. Recommended over thirteen years ago by a member of this Subcommittee, Senator Hruska,[17] appellate sentencing review has now received the support of the American Bar Association's Criminal Justice Standards Project, the National Commission on Reform of the Federal Criminal Laws and a host of scholarly authorities.[18] Reviewability should not relate merely to gross abuses of discretion *but be of sufficiently broad scope to allow the Federal appellate courts to begin to articulate a common law jurisprudence of sentencing principles and standards,* such as those which are beginning to emerge in England under their system of appellate sentencing review.[19]

The Administration bill (S. 1400) contains no provision for sentence review at all.[20] The Subcommittee bill (S. 1) follows the pattern of present law (18 U.S.C. 3576) in limiting review to the extraordinarily high upper range sentences the bill prescribes for "specially dangerous" offenders.[21] Such limited review might occasionally permit the reduction of a grossly exaggerated sentence by an individual judge; but it will not accomplish the primary purpose of sentencing review—*to allow the courts to maintain the systematic oversight of sentencing patterns needed to begin to articulate common-law standards for sentencing.* A sentence review provision should be enacted without such restrictions.

Parole determinations should also be subject to judicial review, to permit a uniform dispositional policy rather than separate and possibly conflicting sentencing and parole policies. The provisions of the Subcommittee Bill (S. 1) which apparently purport to deny judicial review of any parole decisions (even where constitutional issues are involved), are clearly undesirable.[22]

2. Requiring Reasons for Sentencing and Parole Decisions

Another beneficial step would be for the new Code to provide *that the giving of explicit reasons on the record should regularly be required of judges in passing sentence and of the U.S. Parole Board in granting or denying parole.* The essential features of the rule of law—rationality, consistency and reviewability—depend upon decisionmakers giving their reasons for decisions, capable of scrutiny by others. As Judge Frankel notes:

". . . in the federal courts and many states, when a judge tries a civil case without a jury, he is expected to spell out, normally in writing, what he finds as facts and what legal conclusions he rests upon such findings. The requirement applies to all manner of cases—including such matters as who is liable for the bent fender, who breached the contract for a shipment of overalls, or who copies the dress design from whom. I have given examples intended not to sound momentous. But, of course, such disputes are not trivial either, certainly not to the disputants. The point, anyhow, is that the parties (especially the loser) are, on deep principles, not merely entitled to a decision: they are entitled to an explanation. And this serves for more than the satisfaction of aesthetic or purely spiritual needs, though I disclaim any belittling of these. The duty to give an account of the decision is to promote thought by the decider, to compel him to cover the relevant points, to help him eschew irrelevancies—and, finally, to make him show that these necessities have been served. The requirement of reasons expressly stated is not a guarantee of fairness. The judge or other official may give good reasons while he acts upon outrageous ones. However given decision-makers who are both tolerably honest and normally fallible, the requirement of stated reasons is a powerful safeguard against rash and arbitrary decisions.[23]

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[17] S. 3914, 86th Cong., 2d Sess. (1960).

[18] American Bar Association, Project of Minimum Standards for Criminal Justice, *Standards Relating to Appellate Review of Sentences* (1968); National Commission on Reform of Federal Criminal Laws, *Final Report* (1971), at 317; M. Frankel, *Criminal Sentencing* (1972) at 75–85; Weigel, *Appellate Revision of Sentences: To Make the Punishment Fit the Crime*, 20 Stan. L. Rev. 405 (1968).

[19] See Thomas, *Appellate Review of Sentences and the Development of Sentencing Policy: The English Experience*, 20 Alabama L. Rev. 193 (1968).

[20] S. 1400, 93d Cong., 1st Sess. (1973), hereinafter referred to as S. 1400.

[21] Sec. 3–11E3 of S. 1, 93d Cong., 1st Sess. (1973), hereinafter referred to as S. 1.

[22] Sec. 3–12F7 of S. 1.

[23] M. Frankel, *Criminal Sentences* (1972), at 40–41.

Once the worst offenders in this regard, parole boards are beginning to move toward the giving of reasons. In a ground-breaking 1971 decision, the Supreme Court of New Jersey ordered its state parole board to give reasons for the denial of parole.[24] More recently, the U.S. Parole Board has begun to issue written explanations of parole denial. Senator Burdick's parole bill includes a requirement of the giving of reasons.[25] Such a legislative requirement would give sanction to the constructive direction in which the Board is moving, as well as ensuring that the policy will continue beyond the term of office of the incumbent Board members.

Now, it is the Federal judges that are most remiss—in customarily failing to state reasons in sentencing. In my view, *a clear statement of legislative policy is urgently needed to the effect that Federal judges are regularly expected to state their reasons on record in passing sentence.* New York State now has legislation requiring judges to state reasons when they impose a minimum sentence;[26] and the National Commission on Reform of the Federal Criminal Laws has recommended a similar requirement of a statement of reasons when consecutive sentences are imposed.[27] This elementary demand of fairness and rationality—the giving of reasons—should be met not only in these restricted situations, but required as a regular incident of sentencing decisions generally.

3. Statutory Maxima

Perhaps the most useful—although the most difficult—step of all would be that of beginning to scale down statutory maximum penalties to more realistic levels. As long as the legislative maxima remain so high as they are now, that will deter the other agencies in the system—the courts and the parole boards—from adopting explicit sentencing rules which, by comparison with these inflated theoretical levels, will necessarily seem lenient if they are to be capable of actual implementation at all. If Congress begins to reduce the inflated statutory maxima, it will be undertaking some of the public responsibility for prescribing the actual rules, thus facilitating the task of other agencies in explicating these rules further.

In my view, the greatest deficiency of both the Administration bill (S. 1400) and the Subcommittee bill (S. 1) is that they fail to make use of the present opportunity to reduce the statutory maxima to more manageable levels—and in many areas, increase these inflated maxima still further. Under either bill, therefore, the courts and the Parole Board would continue to confront impracticably high statutory maximum sentences, whose effect will chiefly be to discourage the development of sentencing standards and to continue the incentives for unfettered discretionary decisionmaking and its attendant evils.

The Brown Commission (The National Commission on Reform of the Federal Criminal Laws) has also recommended the continuation of high maxima, but this is somewhat mitigated by statutory language indicating that long sentences should be invoked sparingly. Thus the Commission's proposed Federal Criminal Code generally favors probation unless imprisonment "is the more appropriate sentence" for the protection of the public or to reflect the seriousness of the crime[28]; calls for prompt release on parole unless certain enumerated factors indicate the desirability of continued incarceration[29]; and generally bars prolonged confinement except where "there is a *high* likelihood that [the offender] would engage in further criminal conduct."[30] While I disagree with the undue reliance this language places on necessarily inaccurate predictions of dangerousness,[31] it does at least give the courts and the Parole Board some indication that there is a legislative policy against resort to prolonged incarceration except in unusual circumstances. And such a policy statement will accordingly facilitate the courts' and the Parole Board's work in beginning to articulate sentencing standards that, necessarily, will generally call for dispositions far below the inflated statutory maxima.

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[24] *Monks* v. *New Jersey State Parole Board*, 58 N.J. 238, 277 A. 2d 193 (1971).
[25] S. 1463, 93d Cong. 1st Sess. (1973).
[26] N.Y. Penal Law § 70.00.3B.
[27] National Commission on Reform of the Federal Criminal Laws, Final Report (1971), at 292.
[28] National Commission of Reform of Federal Criminal Laws, *Final Report* (1971), § 3101 at 277.
[29] Id. § 3402(1), at 299.
[30] Id. § 3402(2), at 300.
[31] von Hirsch, *Prediction of Criminal Conduct and Preventive Confinement of Convicted Offenders*, 21 Buffalo L. Rev. 717 (1972), reprinted along with my comments in the Subcommittee's earlier hearings record.

The two bills, unfortunately, contain no analogous policy statements. Their draconian maxima stand without any substantial indication to the courts and other agencies in the system that the actual standards used in sentencing should utilize more moderate and practicable penalties. The Subcommittee Bill (S. 1) contains no policy statement as to whether and to what extent lesser dispositions are to be preferred over the maxima. The Administration Bill (S. 1400) does still worse, by utilizing language that reads something like a presumption *against* non-incarcerative dispositions; as Professor Louis B. Schwartz, former staff Director of the Brown Commission, has pointed out:

> S. 1400 makes matters very much worse. It tips the scale against probation by requiring the judge to find, as a prerequisite of probation, that it "will not fail to afford adequate deterrence to criminal conduct," "will not fail to constitute just punishment for the offense committed," and that "imprisonment of the defendant is not needed for the protection of the public from further crimes of the defendant." The "will-not-fail" standard would require a judge to be certain that the defendant does not "deserve" (as "just punishment") a jail sentence and practically to guarantee in advance that defendant would live a law abiding life on probation. If the judge is in doubt—and in such matters, any intelligent and conscientious judge must nearly always be in doubt—S. 1400 says in effect, "When in doubt, imprison." since the case does not meet the "will-not-fail" test.[32]

Such a stated preference for incarcerative dispositions is not only objectionable on its merits, but wholly impracticable. For lack of facilities alone, the criminal justice system cannot start utilizing incarceration as the generally preferred response for most offenders. The only effect of such language can be to widen the gulf between the ostensible penalties of the system and those it actually imposes, thus adding to the incentives for low-visibility decision-making, normlessness and uncontrolled discretion.

If—given the uncertain state of our present understanding of sentencing goals and the limitations of time available for the current recodification—it is not presently feasible to undertake systematic reductions of sentencing maxima, a more modest alternative remains. This is to include in the bill language encouraging the courts, as well as the parole board,[33] to begin articulating explicit sentencing criteria; and stating that incarceration, especially long-term incarceration, should be invoked only in exigent circumstances. Since Attica and similar revelations we know now—if we were not aware before—that incarceration is a severe penalty, especially so in the environment of hopelessness and fear our prisons engender. The statement of legislative policy might therefore provide that *incarceration is a severe penalty which should be reserved for serious offenses; and that long-term incarceration—meaning incarceration of years rather than months—is an especially severe penalty which should be restricted to especially grave criminal behavior.* Such a statement necessarily would be vague. But vagueness might be preferable as long as we are still laboring to develop the necessary theoretical base for a sentencing structure and are examining alternative forms of dispositions to incarceration. What such a policy statement can and should do is to encourage the courts and the Parole Board to begin to articulate express sentencing guidelines, by expressing Congressional support for such an enterprise and reducing the gap which now exists between ostensible penalties as embodied in legislative maxima and the actual dispositions that the system must make.

The current recodification also presents an important opportunity to begin to bring consecutive sentencing under control. With the current practice of multiple-count indictments for a single criminal transaction, discretion to impose consecutive sentences is tantamount to discretion to impose a sentence of virtually unlimited duration. Consecutive sentences generally should be barred for offenses involved in a single criminal transaction, to ensure that limitations on the duration of sentence are operative in multiple-count indictments. By endorsing such a policy restricting the application of consecutive sentencing, the Congress will be aiding the development of judicial sentencing standards that regulate this practice more specifically. The Brown Commission's proposed Code contains provisions which move in the direction of controlling consecutive

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[32] Schwartz, *The Proposed Federal Criminal Code*, 13 Criminal Law Reporter 3265, 3266 (July 4, 1973).

[33] The Committee bill (S. 1) does at least authorize rule-making by the Parole Commission. Sec. 3-12F1.

sentencing discretion.[34] The Subcommittee's bill, unfortunately, contains virtually no limitation on the consecutive sentencing.[35] Hopefully, this will be remedied in the final version of the Code.

Biographical Sketch

Andrew von Hirsch has, since 1971, been Executive Director of the Committee for the Study of Incarceration, Washington, D.C. Funded by grants of $315,000 from the Field Foundation and the New World Foundation, and composed of distinguished professionals from a wide variety of disciplines, the Committee is undertaking a fundamental conceptual re-examination of the purposes of incarceration and the criteria our society should use in deciding whether to confine individuals, who is to be confined, and for what periods. Culminating its 3-year study, the Committee's final report is expected to be completed by the spring of 1974.

During 1968–1970, Mr. von Hirsch served as Legislative Counsel to U.S. Senator Charles E. Goodell. He has also written extensively on urban affairs, state government and banking regulation.

Mr. von Hirsch was graduated from Harvard Law School in 1960 and from Harvard College in 1956.

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[34] National Commission on Reform of the Federal Criminal Laws, *Final Report* (1971), § 3204 at 291–2.

[35] Sec. 1–4A5 of S. 1.

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